



International Tribunal for the  
Prosecution of Persons  
Responsible for Serious Violations of  
International Humanitarian Law  
Committed in the Territory of  
Former Yugoslavia since 1991

Case No. IT-04-74-PT

Date: 3 September 2004

Original: English

**BEFORE THE TRIAL CHAMBER**

**Before:** Judge Liu Daqun, Presiding  
Judge Amin El Mahdi  
Judge Alphons Orié

**Registrar:** Mr. Hans Holthuis

**Order of:** 3 September 2004

**PROSECUTOR**

v.

**JADRANKO PRLIĆ  
BRUNO STOJIĆ  
SLOBODAN PRALJAK  
MILIVOJ PETKOVIĆ  
VALENTIN ČORIĆ  
BERISLAV PUŠIĆ**

**DECISION ON HADŽIHAŠANOVIĆ AND KUBURA'S  
MOTION FOR ACCESS TO CONFIDENTIAL SUPPORTING  
MATERIAL**

**The Office of the Prosecutor:**

Mr. Kenneth Scott

**Counsel for the Accused:**

Mr. Čamil Salahović and Mr. Želimir Par for the accused Mr. Jadranko Prlić  
Mr. Željko Olujić for the accused Mr. Bruno Stojić  
Mr. Bozidar Kovačić and Ms. Nika Pinter for the accused Mr. Slobodan Praljak  
Ms. Vesna Alaburić for the accused Mr. Milivoj Petković  
Mr. Tomislav Jonjić for the accused Mr. Valentin Čorić  
Mr. Marinko Škobić for the accused Mr. Berislav Pušić

**Applicants' Counsel:**

Ms. Edina Rešidović and Mr. Stéphane Bourgon for Mr. Enver Hadžihašanović  
Mr. Fahrudin Ibrišimović and Mr. Rodney Dixon for Mr. Amir Kubura

**TRIAL CHAMBER I** (“Trial Chamber”) of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (“Tribunal”),

**NOTING** the “Joint Motion of Enver Hadžihašanović and Amir Kubura for Access to all the Confidential Material Relating to the Indictment at the Time of the Request for Confirmation” filed on 4 May 2004, whereby the Defence for the accused Hadžihašanović and Kubura (“Applicants”) request the Trial Chamber to issue an order for access to the supporting material in the present case (“Motion”);

**NOTING** the “Response of the Accused Valentin Ćorić to the Joint Motion of Enver Hadžihasanović and Amir Kubura for Access to all Confidential Material Relating to the Indictment at the Time of the Request for Confirmation” filed on 6 May 2004 (“Ćorić Response”), whereby the Defence of the accused Ćorić opposes the Motion on the grounds that 1) the “Motion fails to establish why access to the supporting material in this proceeding would be likely to materially assist the Applicants’ case, and that the Applicants in effect wish to conduct a ‘fishing operation’”<sup>1</sup> and 2) the Motion is premature since the Defence has not yet received the supporting material<sup>2</sup>;

**NOTING** the “Prosecution’s Response to Enver Hadžihašanović and Amir Kubura for Access to all the Confidential Material Relating to the Indictment at the Time of the Request for Confirmation”, filed by the Prosecution on 10 May 2004 (“the Response”), whereby the Prosecution opposes the Motion on the grounds that 1) the Motion should be addressed to the Trial Chamber hearing the case against the accused Hadžihašanović and Kubura, on the basis of Rules 66 and 68 of the Rules of Procedure and Evidence (“Rules”), as there is no Tribunal rule which makes supporting material, as such, discoverable to parties or persons outside the particular case to which that material directly relates,<sup>3</sup> 2) the material sought was not presented before the Trial Chamber and is exclusively in the possession of the Prosecution, the Prosecution team in the case against Hadžihašanović and Kubura having the same access to this material as the Prosecution team in the Prlić & *al.* case,<sup>4</sup> 3) on the merits, the Motion does not show how all of the “supporting material” in the Prlić & *al.* case is relevant to the case against the accused Hadžihašanović and Kubura,<sup>5</sup> and 4) if access is granted,

<sup>1</sup> Ćorić Response, para. 3. In the Defence’s view, the overlap between both cases would only concern two municipalities, namely Gornji Vakuf and Vareš.

<sup>2</sup> Ćorić Response, para. 4.

<sup>3</sup> Motion, para. Para. 6. The Prosecution points out that the supporting material in this case is about 11 000 pages (Response, paras. 9 and 11).

<sup>4</sup> Response, para. 14.

<sup>5</sup> Response, paras 9-11, 17-22. The Prosecution submits that the overlaps asserted by the Motion are too vague and generic to provide a basis for disclosure of all supporting material in the Prlić & *al.* case, in particular in relation to the assertion that both cases are “command responsibility” cases or that the HVO had a “two-track” policy toward Bosnia and Herzegovina. The Prosecution adds that the allegations about Gornji Vakuf (being arguably directly linked to the

the Prosecution requests to be allowed fourteen days within which to apply to the Trial Chamber for any additional protective measures;<sup>6</sup>

**NOTING** that the Applicants request access to the confidential material supporting the indictment in the case the *Prosecutor v. Prlić et al.* on the grounds, *inter alia*, that: any information relating to command and control relations with the Bosnia and Herzegovina Army and the Croatian Defence Counsel will be relevant and of utmost importance in preparing the Applicants' Defence,<sup>7</sup> the facts alleged to have occurred in the third amended indictment against the accused Hadžihašanović and Kubura deal with events and facts closely related to the six accused in the present case,<sup>8</sup> the disclosure of the material sought is justifiable and necessary for the preparation of the defence of the accused Hadžihašanović and Kubura,<sup>9</sup> the principle of equality of arms implies that such access should be granted, in particular to allow those representing an accused to conduct in-depth inquiries as to what evidence is available in that person's defence,<sup>10</sup> the accused Hadžihašanović and Kubura will respect any protective measures which might apply to the material supporting the *Prlić & al.* indictment;<sup>11</sup>

**CONSIDERING** that the Prosecution raises two preliminary arguments, namely that the Motion should be addressed to the Trial Chamber hearing the case against the accused Hadžihašanović and Kubura because the Prosecution is one entity which discloses confidential material in other cases pursuant to Rule 68 and that disclosure ordered by another Trial Chamber would have the effect to circumvent the Prosecution's discretion under Rule 68 in a given case; that, pursuant to Rule 50(A)(c) and *a fortiori*, if an indictment confirmed by a confirming judge is amended with leave granted by the Trial Chamber assigned to the case, any order issued by the said confirming judge in relation to the assigned case may be varied or rescinded by the assigned Trial Chamber; that a range of confidential material in support of an indictment, while not falling under Rule 68 disclosure, may materially assist the defence of accused in cases; that therefore, the Defence for accused in other cases, which seek access to confidential material not falling under Rule 66 nor Rule 68 disclosure obligations, is entitled to seek such access by requesting variation of protective measures imposed on the confidential supporting material in the *Prlić et al.* case from this Trial Chamber;

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situation in the municipality of Bogojno) or Mostar, are not substantiated (Response, paras 17-21) and deems that the overlap between the two cases would merely concern the Vareš-related aspects of the *Prlić & al.* case. The Prosecution notes that the supporting material concerning Vareš in the *Prlić & al.* is substantially similar to the *Rajić* material, already disclosed to the Applicants (Response, para. 22).

<sup>6</sup> Response, para. 23.

<sup>7</sup> Motion, para. 6.

<sup>8</sup> Motion, paras 7-16, 25.

<sup>9</sup> Motion, para. 19.

<sup>10</sup> Motion, paras 20-21.

**CONSIDERING** however that disclosure of confidential supporting material not falling under Rules 66 and 68 is limited by the fact that a party may not engage in a fishing expedition but must establish that 1) the material sought has been identified or described by its general nature as clearly as possible, and (2) a legitimate forensic purpose for such access has been shown;<sup>12</sup>

**CONSIDERING** that the relevance of the material sought by a party may be determined by showing the existence of a nexus between the applicant's case and the case from which such material is sought;<sup>13</sup> that it is sufficient if the material sought is likely to be of assistance to the applicants' case or, at least, that there is a good chance that it may assist the defence of the applicants;<sup>14</sup>

**CONSIDERING** that in its Response the Prosecution concedes that there is a substantive overlap between the *Hadžihašanović and Kubura* case and the *Prlić et al.* case in relation to Vareš-related matters but that such documentation was already disclosed to the accused Hadžihašanović and Kubura; that the Prosecution opposes the Motion in relation to the other arguments contained in the Motion on the grounds that the asserted overlaps are too vague and generic to provide a basis for disclosure of all the supporting material in the *Prlić et al.* case;

**CONSIDERING** that the Defence for the accused Hadžihašanović and Kubura explains that besides the temporal and geographical overlaps between the *Prlić et al.* case and the *Hadžihašanović and Kubura* case,<sup>15</sup> the case of the applicants is concerned, in particular, with command and control relations within the ABiH and the HVO and that any information concerning those relations and contained in the *Prlić et al.* supporting material may materially assist the preparation of the defence of the accused *Hadžihašanović and Kubura*;<sup>16</sup>

**FINDING** that the nature of the material sought has been described by its general nature as clearly as it is possible considering the lack of knowledge of the seeking party about the form and nature of the material sought and that a legitimate forensic purpose for access to material providing information has been shown;

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<sup>11</sup> Motion, para. 22.

<sup>12</sup> *Prosecutor v. Enver Hadžihašanović et al.*, Case No. IT-01-47-AR73, Decision on Appeal from Refusal to Grant Access to Confidential Material in Another Case, 23 April 2002, p. 3.

<sup>13</sup> *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Decision on Appellants Dario Kordić and Mario Čerkez's Request for Assistance of the Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post Appeal Pleadings and Hearing Transcripts Filed in the *Prosecutor v. Blaškić*, 16 May 2002, para. 15.

<sup>14</sup> See *Prosecutor v. Enver Hadžihašanović et al.*, Case No. IT-01-47-AR73, Decision on Appeal from Refusal to Grant Access to Confidential Material in Another Case, 23 April 2002, p. 3.

<sup>15</sup> Motion, paras 7, 8, 13.

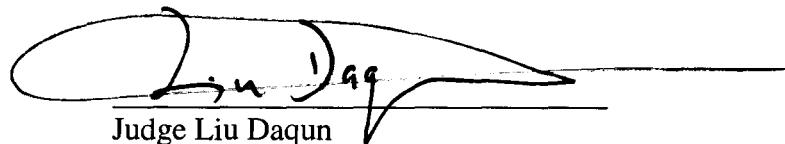
**PURSUANT TO** Articles 20, 21 and 22 of the Statute and Rules 54 and 75 of the Rules;

**HEREBY GRANTS** the Motion and **VARIES** the order for non-disclosure on the supporting material in the present case to the extent that access to that material is granted to the accused Hadžihašanović and Kubura and their defence only,

**ORDERS** the Prosecution to file within fourteen days a written submission identifying the confidentiality measures which it seeks to have imposed on the accused Hadžihašanović and Kubura. The defence for the accused Hadžihašanović and Kubura is to file a response within seven days of the Prosecution's filing, if any.

Done in both English and French, the English text being authoritative.

Dated this Third Day of September 2004,  
At The Hague  
The Netherlands

A handwritten signature in black ink, appearing to read 'Liu Daqun', is written over a horizontal line. The signature is stylized and extends to the right of the line.

Judge Liu Daqun  
Presiding Judge

**[Seal of the Tribunal]**

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<sup>16</sup> Motion, paras 6, 8, 13-16.