

UNITED
NATIONS

IT-95-14/2-A
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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

Case: IT-95-14/2-A

Date: 9 May 2002

Original: English

IN THE APPEALS CHAMBER

Before: Judge David Hunt, Pre-Appeal Judge

Registrar: Mr Hans Holthuis

Decision of: 9 May 2002

PROSECUTOR

v

Dario KORDIĆ & Mario ČERKEZ

**DECISION GRANTING LEAVE TO DARIO KORDIĆ
TO AMEND HIS GROUNDS OF APPEAL**

Office of the Prosecutor:

Mr Norman Farrell

Counsel for the Defence:

**Mr Mitko Naumovski for Dario Kordić
Mr Božidar Kovačić and Mr Goran Mikuličić for Mario Čerkez**

1. The appellant Dario Kordić (“Kordic”) was ordered on 18 February 2002 to file a document which identified clearly and concisely each and every one of his grounds of appeal.¹ He filed such a document on 8 March,² but he included in that document two grounds of appeal which had not previously been raised with any clarity in his Appellant’s Brief. When the prosecution objected to those two grounds,³ Kordić was directed to show cause why he should be granted leave to add them.⁴ He has now sought that leave.⁵

2. In relation to the second of those grounds of appeal, ground 1-D, the prosecution had objected to only part of the ground, namely the allegation that the right of Kordić to a “public trial” had been violated.⁶ Kordić has now withdrawn that part of ground 1-D,⁷ so that the remainder of ground 1-D will be allowed to remain in the Amended Grounds of Appeal. The reference to the alleged violation of his right to a “public trial” is struck out.⁸ The prosecution in its Response has interpreted the withdrawal of that part of ground 1-D as a withdrawal of the whole ground,⁹ but this is obviously an error on its part.

3. The remaining new ground (ground 1-A) is stated in the following terms:

Ground of Appeal 1-A: Lack of Adequate Notice of Charges – Impermissibly Vague Indictment and Amended Indictment

Error: The Trial Chamber committed an error of law invalidating the Judgement by failing to dismiss the original Indictment and the Amended Indictment. For the reasons articulated in the *Kupreškić* Appeal Judgement, neither the original Indictment nor the Amended Indictment set out certain important and material facts of the Prosecution’s case against Kordić with enough detail to inform him clearly of the charges against him so that he could adequately prepare his defence. This violated Articles 20(1) and 20(2) and 21(4)(a) and 21(4)(b), and Rule 47(C).¹⁰

¹ Order to File Amended Grounds of Appeal, 18 Feb 2002 (“Order”), p 3.

² Appellant Dario Kordić’s Response to Order to File Amended Grounds of Appeal, 8 March 2002 (“Amended Grounds of Appeal”), p 1-2.

³ Prosecution’s Consolidated Response to “Appellant Dario Kordić’s Response to Order to File Amended Grounds of Appeal” and “Appellant Mario Čerkez’s Brief Pursuant to 18 February 2002 Order to File Amended Grounds of Appeal”, 22 Mar 2002 (“Consolidated Response”), par 2.

⁴ Decision on Prosecution Application Re Amended Grounds of Appeal, 5 April 2002, par 10(1).

⁵ Appellant Dario Kordić’s Motion for Leave to add Amended Grounds of Appeal 1-A and 1-D as New Grounds of Appeal, 19 April 2002 (“Motion”).

⁶ Consolidated Response, par 12.

⁷ Motion, pars 36-40.

⁸ Consolidated Response, par 12.

⁹ Prosecution’s Response to Appellant Kordić’s Motion for Leave to add new Grounds of Appeal 29 April 2002 (“Response”), par 26.

¹⁰ Amended Grounds of Appeal, p 1.

Kordić seeks to justify his failure to plead such a ground in his Appellant's Brief, and its subsequent addition to his Amended Grounds of Appeal, upon a number of different (and sometimes conflicting) bases, which may be summarised as follows:

- (i) the proceedings were long and complex;¹¹
- (ii) the issues which the amended ground raised had been raised during the trial;¹²
- (iii) he had unsuccessfully sought an extension of time to file his original Appellant's Brief;¹³
- (iv) the prosecution had already directed argument to these issues in its Respondent's Brief;¹⁴
- (v) the judgment of the Appeals Chamber in *Kupreškić*,¹⁵ described as "the seminal decision" in relation to the form of an indictment, was given after the Appellant's Brief had been filed;¹⁶ and
- (vi) the prosecution will not be prejudiced by the addition of such a ground because it has already been informed that it may file a Supplementary Respondent's Brief.¹⁷

4. The prosecution objects to the grant of leave. It points out that the relevant extension of time in which to file an Appellant's Brief which was refused had been sought on the basis that new evidence had to be identified,¹⁸ and that *Kupreškić*, far from being the seminal decision, did no more than articulate "existing law and jurisprudence" and apply it to the facts in that case.¹⁹

5. "Good cause" justifying an amendment to an appellant's grounds of appeal is a protean concept, and whether it is established depends on the circumstances of each case. Its application in the circumstances of this case depends to a large extent upon the importance which the ground could have to the success of any appeal. Inadvertence or negligence by an appellant's counsel to plead a ground of appeal with sufficient clarity should not restrict an appellant's right to raise that ground of appeal where that ground could be of substantial importance to the success of an appeal such as to lead to a miscarriage of justice if it is excluded.

¹¹ Motion, pars 2, 14.

¹² *Ibid*, pars 3, 28.

¹³ *Ibid*, par 13.

¹⁴ *Ibid*, pars 15, 28.

¹⁵ *Prosecutor v Kupreškić et al*, IT-95-16-A, Appeal Judgment, 23 Oct 2001.

¹⁶ Motion, par 34.

¹⁷ *Ibid*, par 35.

¹⁸ Response, pars 7-10.

¹⁹ *Ibid*, par 25.

6. In his original Appellant's Brief, Kordić alleged that the Trial Chamber did not ensure that he had adequate notice of the charges against him:

The Trial Chamber allowed the Prosecution to pursue a constantly changing, rapidly mutating case that deprived Kordić of the timely notice, and, consequently, the adequate "time and facilities" necessary to prepare and present his case.²⁰

Also:

[The Prosecutor] was permitted to pursue a constantly changing "moving target" case that not only deprived Mr Kordić of the timely notice of the real charges against him but also, as a consequence, deprived him of the adequate "time and facilities" necessary to prepare his case, because the Prosecution's claims were in a constant state of flux. This violated his "fair trial" guarantees of Articles 21(2), 21(4)(a) and 21(4)(b).²¹

In its Respondent's Brief, the prosecution dealt with these allegations as raising an issue as to the "vagueness of and lack of specificity" in the indictment.²² Kordić replied to this issue in his Reply Brief.²³

7. Kordić's new ground 1-A has now for the first time identified the defect at the trial as being a defective indictment – no doubt, as the prosecution has asserted, because of the way in which the *Kupreškić* Appeal Judgment approached the problem. The failure on the part of Counsel for Kordić to articulate this previously may demonstrate a lack of appreciation by him of the fundamental principle involved in a "moving target" case, but there can be no doubt that he was at the relevant time attempting to use what are now alleged to have been the consequences of the alleged pleading defect as an argument that the trial miscarried. The inability of Counsel to articulate a ground of appeal properly should not exclude Kordić from raising that ground of appeal. Whether or not this ground is likely to succeed, it is an important issue which Kordić should be permitted to argue because, if successful, it could be of substantial importance to the success of his appeal.

8. The prosecution has not demonstrated any relevant prejudice. Kordić accordingly has leave to add ground 1-A to his amended grounds of appeal.

²⁰ Brief of Appellant Dario Kordić Volume I – Publicly Filed, 9 August 2001 ("Appellant's Brief"), p 5.

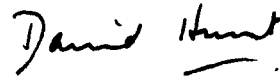
²¹ Appellant's Brief, p 25.

²² Prosecution's Consolidated Brief in Response to the Appeal Briefs of Dario Kordić and Mario Čerkez, 3 Oct 2001, pars 2.11-21.

²³ Reply Brief of Appellant Dario Kordić, 30 Oct 2001, par 2.

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

Dated this 9th day of May 2002,
At The Hague,
The Netherlands.



Judge David Hunt
Pre-Appeal Judge

[Seal of the Tribunal]