



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 No.: IT-95-14-A
Date: 16 May 2002
Original: English

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge David Hunt
Judge Mehmet Güney
Judge Asoka de Zoysa Gunawardana
Judge Theodor Meron

Registrar: Mr. Hans Holthuis

Decision of: 16 May 2002

PROSECUTOR

v.

TIHOMIR BLAŠKIĆ

**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**

Counsel for the Prosecution:

Mr. Norman Farrell

Counsel for the Appellant:

**Mr. Anto Nobile
Mr. Russell Hayman
Mr. Andrew M. Paley**

THE APPEALS 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 (“the International Tribunal”),

BEING SEISED of “Appellant Dario Kordić’s Request for Assistance of Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post-Appeal Pleadings and Hearing Transcripts filed in *The Prosecutor v. Blaškić*” filed on 5 February 2002 (the “Request”);

PURSUANT TO the Statute and the Rules of Procedure and Evidence of the International Tribunal (the “Statute” and the “Rules” respectively);

HEREBY RENDERS its Decision.

I. BACKGROUND

1. The Request filed by Dario Kordić (“Applicant Kordić”) seeks access to non-public post trial hearings’ transcripts, written submissions and appellate briefs, including motions on additional evidence on appeal filed in the *Blaškić* appeal pursuant to Rule 115 of the Rules.

2. Applicant Kordić argues that he is entitled to all of the confidential submissions in the *Blaškić* appeal for the same reasons articulated by Tihomir Blaškić (“Appellant Blaškić”) in his “Appellant’s Motion for Access to Non-Public Transcripts and Exhibits in Response to 11 October 2001 Order” (the “Motion for Access”) filed on 19 October 2001, before Judge Florence Ndepele Mwachande Mumba which are, *inter alia*, the following: (a) the material in the *Blaškić* case is related to and deriving from, the same events which allegedly took place in the same region and at the same time as those in the *Kordić and Čerkez* case, (b) the principle of equality of arms provides that the parties must be granted measures that could assist them in the presentation of their case, and (c) the Defence is not in the same position as the Prosecution when gathering information.¹

3. Applicant Kordić asserts that he is entitled to know which arguments have been put forward by Appellant Blaškić to the extent that those arguments bear materially upon issues that are presented in Dario Kordić’s and Mario Čerkez’s appeals, as well as in the Prosecution’s appeal. In addition, since Appellant Blaškić is trying to shift responsibility to others for crimes committed by military units under his command, Applicant Kordić wants to know which arguments have been raised.² Access is also deemed necessary in order to assess the consistency of the arguments advanced by the Prosecution in both appeals and for the purpose of “framing arguments appropriately during the oral argument.”³

¹ Request at para. 3.

² The Applicant Kordić challenges the following four items contained in Blaškić’s Motion for Access and referred to as examples of “exculpatory evidence” [to Blaškić] introduced at Kordić’s trial: (a) the testimony of Floyd J. Carter who testified in the Kordić case on November 1999 (he was a Political Affairs Officer who testified that Military Police is an instrument of political rather than military leadership however, he expressed no opinion to the effect that Military Police units in Central Bosnia were not under the command of Blaškić); (b) the testimony of witness AO who testified in Kordić on March 2000 (he testified that Ivica Rajić, who commanded troops in Kiseljak reported directly to Kordić, however the testimony of this witness was disregarded by the Trial Chamber in its entirety as a result of significant discrepancies); (c) Exhibit Z2792 tendered in the Kordić trial which according to Blaškić indicates that Ivica Rajić did not report to Blaškić, however the only witness that discussed the exhibit was impeached and the exhibit itself was prepared by the Office of the Prosecutor; and, (d) the Croatian Secret Service Reports form February 1994, which according to Kordić were anonymous documents prepared by people employed as security operatives who had been engaged in illicit activities and posed as covert operatives in an attempt to evade military service. The Trial Chamber in the Kordić case agreed that the vast majority of these documents were unreliable and should be excluded altogether from evidence. *See* Request at paras 13 to 17.

³ The request mentions that one of the issues on appeal in the Kordić and Čerkez appeals, is the credibility of Witness AT regarding the events alleged to have occurred at the military headquarters of the Central Bosnia Operative Zone in the Hotel Vitez on 15 April 1993. According to counsel for Kordić, relying on “uncorroborated hearsay” witness AT claimed that Kordić attended a meeting convened by Blaškić, where the decision to launch offensive activities against

4. With respect to the equality of arms principle, Applicant Kordić asserts that it would be unfair to permit the Prosecution to have access to confidential submissions in the *Blaškić* appeal which may contain material that could be useful in the presentation of oral argument before the Appeals Chamber, yet to deny similar access to him.⁴

5. On 5 February 2002, Mario Čerkez (“Applicant Čerkez”) filed the “Appellant Mario Čerkez Notice of Joinder in Dario Kordić’s Request for Assistance of Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post-Appeal Pleadings and Hearing Transcripts filed in The Prosecutor v. Blaškić”.

6. On 19 February 2002, the Prosecution filed the “Prosecutor’s Response to the Appellants Dario Kordić and Mario Čerkez’s Joint Request for Assistance of Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post Appeal Pleadings and Hearing Transcripts Filed in the Prosecutor v. Blaškić” (“Prosecution’s Response”), where it acknowledges that Applicants Kordić and Čerkez had demonstrated a legitimate forensic purpose. Therefore the Prosecution does not oppose the granting of the relief sought provided appropriate protective measures are imposed.⁵ The Prosecution also submits that the *ex parte* and confidential filings made by the Prosecution in the *Blaškić* appeal should not be disclosed to Applicants Kordić and Čerkez since they are not related to any of the relevant issues.⁶

7. On 26 February 2002, Dario Kordić filed the “Appellant Dario Kordić Response to Prosecution’s Submissions dated 19 February 2002” where he states that all non-public filings made by the Prosecution or by any other party in the *Blaškić* appeal should be disclosed. *Ex parte* submissions would not be subject to this disclosure requirement except when subsequently disclosed to third parties.

8. On 27 February 2002, Mario Čerkez filed the “Appellant Mario Čerkez Notice of Joinder in Appellant Dario Kordić’s Response to Prosecution’s Submissions dated 19 February 2002”.

9. On 28 February 2002, Appellant Blaškić filed the “Appellant Tihomir Blaškić’s Response to Joint Request of Dario Kordić and Mario Čerkez for Assistance of Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post Appeal Pleadings and Hearing Transcripts Filed in

Ahmići on 16 April was made. Kordić submits that he is entitled to be informed of the position that Blaškić has taken regarding this event. The request points out that in the Kupreskić appeal, it is apparent that the Prosecution has taken divergent positions relating to the credibility of Witness AT and the weight to be accorded to his testimony. Request at para 9.

⁴ Request at para 8.

⁵ Prosecution’s Response at para 3.

the Prosecutor v. Blaškić”⁷ where he states that in general he does not oppose Applicants Kordić and Čerkez’s Request, subject to the imposition of appropriate protective measures. However, Appellant Blaškić believes that certain items should not be disclosed, i.e. the references made to private and closed session trial proceedings in his Appellant’s Brief. He contends that certain information submitted into evidence and referred to in Blaškić’s Appellant’s Brief was disclosed to him by third parties under Rule 70 or other agreements by which it was agreed that the information would not be disclosed to any other party, and thus Rule 70 material should not be disclosed without the authorisation of the providers. Appellant Blaškić states that he is prepared to file a confidential submission identifying this material.

10. On 4 March 2002, Applicant Dario Kordić filed the “Appellant Dario Kordić’s Reply to Tihomir Blaškić’s Response to Dario Kordić’s Request for Assistance of Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post-Appeal Pleadings and Transcripts filed in Prosecutor v. Blaškić” (the “Reply”). Applicant Kordić states that since Appellant Blaškić has been granted access to all confidential material submitted during the course of both trial and appellate proceedings in the *Kordić and Čerkez* case, it would be unfair and a fundamental inequality of arms to deny Applicant Kordić access to all appellate briefs and non-public post-appeal pleadings and hearing transcripts including any Rule 115 applications when Appellant Blaškić has been granted the same access in the *Kordić and Čerkez* case.

II. DISCUSSION

Confidential Submissions filed by the parties in the Blaškić Appeal

11. The present decision covers in particular the confidential versions of the following submissions:

- (a) “Prosecution’s Response to Appellant’s Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115” filed on 14 April 2001,
- (b) “Reply Memorandum in Support of Appellant’s Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115” filed on 18 June 2001,
- (c) “Appellant’s Second Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115” filed on 18 October 2001,
- (d) “Prosecution’s Response to Appellant’s Second Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115” filed on 10 December 2001,

⁶ *Ibid*, at para 5.

- (e) “Appellant’s Reply Brief in Support of Second Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115” filed on 7 January 2002,
- (f) “Appellant’s Brief on Appeal” filed on 14 January 2002, and
- (g) “Prosecution’s Respondent’s Brief” filed on 1 May 2002.

12. On 13 September 2001, public versions of the “Prosecution’s Response to Appellant’s Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115” and the “Reply Memorandum in Support of Appellant’s Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115” were filed. The redactions made to the public versions of these documents are related to references to documents and exhibits filed confidentially at trial, submissions made or testimony referred to which was given in closed session, the names of persons in Croatian Ministries who provided documents to the Prosecution after the trial, and names of serving intelligence officers.

13. On 7 March 2002, public redacted versions of the “Appellant’s Second Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115”, the “Prosecution’s Response to Appellant’s Second Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115”, the “Appellant’s Reply Brief in Support of Second Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115”, and the “Appellant’s Brief on Appeal” were filed. The redactions made to the public versions of these documents are related to testimony given at trial by a protected witness who testified in closed session at Appellant Blaškić’s trial as well as at Applicants Kordić and Čerkez trial, and to references to Appellant Blaškić’s testimony given in closed or private session. The redactions made to Blaškić’s Appellant’s Brief are related to testimony given by witnesses who testified in closed or private session during his trial, references to Appellant Blaškić’s testimony given in private session, and a few redactions are related to Defence exhibits tendered under seal.

Conditions for Access

14. Access to confidential material may be granted whenever the Chamber is satisfied that the party seeking access has established that such material may be of material assistance to his case.⁸ A party is always entitled to seek material from *any* source to assist in the preparation of his case if the material sought has been identified or described by its general nature and if a legitimate forensic purpose for such access has been shown.⁹

⁸ *Prosecutor v. Enver Hadžihasanović, et al*, Decision on Motion by Mario Čerkez for Access to Confidential Supporting Material, Case No. IT-01-47-PT, 10 October 2001, at para 10.

⁹ *Ibidem*.

15. 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 cases from which such material is sought, i.e. if the cases stem from events alleged to have occurred in the same geographic area and at the same time.¹⁰ It is sufficient that access to the material sought is likely to assist the applicant's case materially, or that there is at least a good chance that it would.¹¹

16. Not always would mere geographical and temporal overlap between two cases be sufficient in every instance to conclude that there is a legitimate forensic purpose. However, in the case at hand there is more than a mere temporal and geographical overlap. There seems to be substantive overlap between the facts in the *Kordić and Čerkez* case and the *Blaškić* case.¹² Each case involves many of the same alleged events in the Lašva Valley and relates to the structure of the political and military organizations in Central Bosnia between 1992 and 1994.

17. The Appeals Chamber considers that Applicants Kordić and Čerkez have satisfied the relevant conditions for being granted the access sought. Applicants Kordić and Čerkez have: (a) described the material sought by their general nature, and (b) shown a legitimate forensic purpose for such access. They are entitled to be informed about the arguments advanced in the present appeal to the extent that those arguments bear materially upon issues that are presented in their own appeals.

18. Another argument advanced in the Request is that, from an equality of arms perspective, it would be unfair not to grant access to Applicants Kordić and Čerkez to the confidential submissions in the *Blaškić* appeal since the Prosecution has had, at all times, access to all of the material in both appeals.¹³ The Reply argues that, since Appellant Blaškić has been granted access to all confidential material submitted during the course of both trial and appellate proceedings in the *Kordić and Čerkez* case, it would be a fundamental inequality of arms for Appellant Blaškić to be provided with copies of all such materials in the *Kordić and Čerkez* case, and for Applicants Kordić and Čerkez to be denied the same access in the *Blaškić* appeal.¹⁴ The Reply submits that it would be unfair to deny

¹⁰ See *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-PT, Decision on Motion by Momir Talić for Access to Confidential Documents, 31 July 2000, at para 8.

¹¹ See *The Prosecutor v. Blaškić*, Decision on Appellant's Motion Requesting Assistance of the Appeals Chamber in Gaining Access to Non-Public Transcripts and Exhibits From the Aleksovski Case, 8 March 2002, at page 3. Where the Appeals Chamber held that the Appellant had described the documents sought by their general nature as clearly as he possibly could, and had shown that such access was likely to assist his appeal materially.

¹² Indeed, the original indictment jointly charged Kordić, Čerkez, Blaškić and Aleksovski.

¹³ See Request at para 8.

¹⁴ Reply at para 3.

Applicants Kordić and Čerkez the access sought when Appellant Blaškić has been granted the same access in the *Kordić and Čerkez* case.¹⁵

19. The argument raised by Applicants Kordić and Čerkez with respect to the principle of equality of arms is misconceived. Equality of arms is a broad concept that constitutes an inherent element of a fair trial.¹⁶ According to the principle of equality of arms each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his opponent.¹⁷ It is a protection afforded to the accused to ensure that he is given procedural rights equal to those of the Prosecution in the course of criminal proceedings. Those procedural rights include giving the accused effective ways to challenge evidence produced by the Prosecution.¹⁸

20. The principle of "equality of arms" inheres in the requirement that the accused be recognised the right to a fair trial. Basically, this principle embodies the notion that the accused should be afforded procedural equality with respect to the Prosecution. Its purpose is to give each party equal access to the processes of the Tribunal, or an equal opportunity to seek procedural relief where relief is needed.¹⁹ The right to equality of arms does not include a right to equality of relief.²⁰ Accordingly, Applicants Kordić and Čerkez's entitlement to obtain the relief sought in their Request is not dependent upon whether another Appellant in another proceedings before the International Tribunal has been granted the same relief. Applicants Kordić and Čerkez have a prerogative in relation to the Prosecution to have equal access to processes available at the International Tribunal, and an equal opportunity to seek procedural relief where needed. In the case at hand it would be unfair to deny Applicants Kordić and Čerkez access to material that may be of material assistance to their appeals.

¹⁵ *Ibid.*, at para 5.

¹⁶ See *Foucher v. France*, 25 Eur. H.R.Rep. 234 para 34 (1997).

¹⁷ See *Prosecutor v. Aleksovski*, Decision on Prosecutor's Appeal on Admissibility of Evidence, Case No. I-95-14/1-A, 16 February 1999, at paras 23-25. Where the Appeals Chamber refers to a number of judgements of the European Court of Human Rights that discuss the concept of the principle of equality of arms. The Appeals Chamber in *Tadić* held that "under the Statute of the International Tribunal the principle of equality of arms must be given a more liberal interpretation than that normally upheld with regard to proceedings before domestic courts." Additionally, noting that the Chambers are empowered to issue any necessary orders, summonses, subpoenas, warrants, and transfer orders to aid an investigation or effectuate a trial, the Appeals Chamber determined that a Chamber therefore, "shall provide every practicable facility it is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case." *Prosecutor v. Duško Tadić*, Judgement, Case No.: IT-94-1-A, 15 July 1999, at para 52.

¹⁸ *Niderost - Huber v. Switzerland*, 1997 - I Eur. Ct. H.R. 101, 107 (1997).

¹⁹ *Prosecutor v. Duško Tadić*, Judgement, Case No.: IT-94-1-A, 15 July 1999, at paras. 48,50, 51.

²⁰ *Prosecutor v. Kordić*, Decision on Application by Mario Čerkez for Extension of Time to File his Respondent's Brief, 11 September 2001, paras. 7-9.

Ex Parte Submissions

21. While the Prosecution does not oppose the granting of access to confidential material to Applicants Kordić and Čerkez, it submits that there should be an exception to the general disclosure of appellate filings with respect to *ex parte* and *confidential* filings made by the Prosecution.²¹

22. The *ex parte* and confidential motions and decisions which have been filed in the present appeal are related to requests for protective measures made by the Prosecution on the basis of allegations of non-compliance with previous Tribunal orders against one of the co-counsel for Appellant Blaškić. Some of the motions have already been disposed of by public decisions²² and in general the *ex parte* filings are irrelevant to Applicants Kordić and Čerkez's appeals. Therefore they should not be disclosed to them in the interest of fairness towards Appellant Blaškić's co-counsel and in order to ensure the safety of individuals mentioned therein in connection with the said allegations.

Material covered by Rule 70(C)

23. Some of the non-public appellate filings make reference to documents and witness testimony provided by certain governments and other entities pursuant to Rule 70. Appellant Blaškić stated that if necessary he would file a confidential submission identifying the material falling under Rule 70, and that he did not believe that the confidential material covered by the said provision should be disclosed without the permission of the provider.²³

24. Applications for access to non-public material in the Lašva Valley cases were submitted in the past by the defence counsel in the *Kordić and Čerkez* case. The Trial Chamber in the *Kordić and Čerkez* case requested the reasoned opinion of the appropriate Trial Chambers and rejected the motion with respect to the disclosure of material covered by Rule 70.²⁴ The *Aleksovski* Trial Chamber issued an opinion granting the Prosecution permission to disclose closed session transcripts from the *Aleksovski* case to the defendants in *Kordić and Čerkez*, but suggested the

²¹ Prosecution's Response at para 5.

²² *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Decision Granting Access to Non-Public Materials, 20 February 2002; *Prosecutor v. Dario Kordić and Mario Čerkez*, Order on Prosecution Request for Variation of Witness Protective Measures, Case No.: IT-95-14/2-A, 19 March 2002.

²³ The Appellant's Brief specifically discusses closed and private session trial evidence which was provided to the Appellant by third parties pursuant to Rule 70; the Appellant believes that certain information used as evidence at trial and referenced in some of the appellate filings has been provided to the Prosecution pursuant to Rule 70. See Tihomir Blaškić Response at page 1.

adoption of additional protective measures for the witnesses.²⁵ Before issuing a decision, the *Kupreškić* and *Furundžija* Trial Chambers requested the Victims and Witness Unit Section to seek the consent of the protected witnesses to have redacted transcripts of their closed session testimony released to the accused and defence counsel in other pending and *future* cases before the International Tribunal.²⁶ Afterwards the *Kupreškić* and *Furundžija* Trial Chambers requested the Registrar to disclose to the *Kordić and Čerkez* Trial Chamber only the closed session transcripts of witnesses who had expressly consented to such release.²⁷ Finally the Trial Chamber in *Kordić and Čerkez* granted access to non-public materials from the *Kupreškić* and *Furundžija* cases, subject to the express consent of protected witnesses. Concerning materials from the *Blaškić* and *Aleksovski* cases, access was granted provided that the materials related to witnesses who did not object to such access *and* who were either to be called to testify or whose testimony constituted exculpatory evidence.²⁸

25. More recently, before access was granted to Appellant Blaškić to all the non-public materials submitted as evidence in the *Kupreškić*, *Furundžija* and *Kordić* cases, the Prosecution sought and obtained consent from the providers of the Rule 70(C) related information for its disclosure.²⁹

26. The Prosecution and Appellant Blaškić must make submissions on whether any of the non-public material for which access is sought falls under Rule 70; if it does fall under Rule 70, the Prosecution must indicate the precise sub-paragraph of Rule 70 by which it asserts the material is covered. If there is any material covered by Rule 70(C) within the non-public appellate submissions filed in this appeal, the Prosecution should be given time to seek the consent of the providers of the Rule 70(C) related information for its disclosure to Applicants Kordić and Čerkez.

²⁴ *Prosecutor v. Dario Kordić and Mario Čerkez, Decision on the Motion of the Accused for Access to Non-public Materials in the Lašva Valley and Related Cases*, Case No.: IT-95-14/2-PT, 12 November 1998.

²⁵ *Prosecutor v. Aleksovski, Opinion Further to the Decision of the Trial Chamber seized of the case of the Prosecutor v. Dario Kordić and Mario Čerkez dated 12 November 1998*, Case No.: IT-95-14/1, 8 February 1999.

²⁶ *Prosecutor v. Furundžija, Order*, Case No.: IT-95-17/1-T, 10 December 1998; *Prosecutor v. Zoran Kupreškić et al, Order*, Case No.: IT-95-16-T, 10 December 1998.

²⁷ *Prosecutor v. Kupreškić, Request Concerning The Release Of Transcripts Of Closed Session Testimony Of Witnesses*, Case No.: IT-95-16-17, 10 February 1999; *Prosecutor v. Furundžija, Request Concerning The Release Of Transcripts Of Closed Session Testimony Of Witnesses*, Case No.: IT-95-17/1-T, 10 February 1999.

²⁸ *Prosecutor v. Dario Kordić and Mario Čerkez, Further Order on Motion for Access to Non-Public Materials in the Lašva Valley and Related Cases*, Case No.: IT-95-14/2-PT, 16 February 1999.

²⁹ *Prosecutor v. Blaškić, Prosecution's Supplementary Response on Protective Measures and Disclosure of Rule 70(C) Material*, Case no. IT-95-14/2 A, 16 November 2001.

Third Motion pursuant to Rule 115

27. Appellant Blaškić is preparing a third submission pursuant to Rule 115 which will include statements from witnesses who were previously reluctant to provide statements to him because of concerns for their physical safety and the well being of their family members. However, these witnesses have agreed to provide statements to Appellant Blaškić on the explicit condition that the statements would not be disclosed to any third party, including parties to other proceedings before the Tribunal. Consequently, Appellant Blaškić opposes the release of any filing containing any information with respect to these witnesses. Appellant Blaškić stated that he has tried to obtain witness statements from other individuals unwilling to cooperate with the Tribunal for fear of retribution. To the extent that these individuals agree to provide statements to Appellant Blaškić for use in this appeal, he opposes the release of any such filing as well as the release of any *ex parte* pleading filed by him.³⁰ Finally he submits that if an order is issued granting the request made by Applicants Kordić and Čerkez such order should permit the parties in the *Blaškić* case the opportunity to request that any future confidential filing not be released to third parties.

28. Since the third submission pursuant to Rule 115 has not been filed yet and due to the concerns expressed by the Appellant for the physical safety and the well being of the family members of the witnesses whose statements will be proffered, the Appeals Chamber will stay its decision regarding access to this third submission pursuant to Rule 115, subject to a determination on the protective measures to be applied to these individuals.

Protective Measures

29. Having found that the sought material may materially assist the Applicants Kordić and Čerkez in their appeals, the Appeals Chamber has to determine which protective measures should be applied. It is, indeed, within the discretion of the Appeals Chamber to strike a balance between the right of a party to have access to material to prepare his case and guaranteeing the protection of witnesses and the integrity of confidential information. As mentioned in paragraph 6 of this decision, the Prosecution does not oppose the granting of the relief sought provided appropriate protective measures are imposed. In case access is granted, the Prosecution submits that those measures imposed by Trial Chamber II in relation to Mario Čerkez in the *Hadžihasanović* case would be appropriate for the purposes of the present case.³¹ Thus, the Appeals Chamber will rule on

³⁰ Tihomir Blaškić's Response at page 2.

³¹ Prosecution's Response at para 3.

the protective measures to be imposed taking into account the suggestion made by the Prosecution and agreed upon by Applicants Kordić and Čerkez and Appellant Blaškić.

III. DISPOSITION

FOR THE FOREGOING REASONS the Appeals Chamber **GRANTS** Applicants Kordić and Čerkez's Request;

ORDERS

(a) The Prosecution and Appellant Blaškić to make submissions on whether any of the non-public material for which access is sought falls under Rule 70 no later than 3 June 2002. In the event that there is any material covered by Rule 70(C) within the non-public appellate submissions filed in this appeal, the Prosecution should seek the consent of the providers of the Rule 70(C) related information for its disclosure to Applicants Kordić and Čerkez; and

(b) The Registry to grant Applicants Kordić and Čerkez access to the non-public post-trial submissions and appellate briefs, including motions on additional evidence on appeal pursuant to Rule 115, filed in the *Blaškić* appeal until the date of the issuing of this decision with the exception of any submission related to the Third Motion pursuant to Rule 115- only if and when the consent of the providers has been obtained by the Prosecution in accordance with the directions under paragraph (a) - and subject to the following protective measures:

Applicants Kordić and Čerkez, their counsel and any employees at Andreis & Čogurić or the office of Mr. Mitko Naumovski who have been instructed or authorised by counsel to access the confidential appellate submissions in the case at hand, shall:

- (i) Not disclose to any third party, the names of witnesses, their whereabouts, copies of witness statements, the contents of the witness statements, transcripts of witness testimonies, the contents thereof, or any information which would enable them to be identified and would breach the confidentiality of the protective measures already in place unless absolutely necessary for the preparation of Applicants Kordić and Čerkez's appeal, and always with leave of the Appeals Chamber.
- (ii) Not disclose to any third party, any documentary or other evidence, or any written statement of a witness or the contents, in whole or in part, of any non-public evidence, statement or prior testimony.
- (iii) Not contact any witness without first demonstrating to the Appeals Chamber, that the witness may materially assist Applicants Kordić and Čerkez's appeal in some identified way and that such assistance is not otherwise reasonably available to them. If the Appeals

Chamber authorizes such contact, the Prosecution will be given a right to be present during any contact or interview, if the witness requests such presence.

- (iv) Third parties exclude: (i) Applicants Kordić and Čerkez, (ii) persons employed by counsel's law firms, (iii) personnel from the International Tribunal, or (iv) members of the Office of the Prosecutor.
- (v) If for the purposes of preparing Applicants Kordić and Čerkez's appeal, confidential material is disclosed to third parties - provided that the conditions set out in paragraph (i) are met - any person to whom disclosure of the confidential material in this case is made should be informed that he or she is forbidden to copy, reproduce or publicise, in whole or in part, any non-public information or to disclose it to any other person, and further that, if any such person has been provided with such information, he or she must return it to Applicants Kordić and Čerkez or their counsel as soon as it is no longer needed for the preparation of the appeal.

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



Fausto Pocar
Presiding Judge

Done this sixteenth day of May 2002
At The Hague,
The Netherlands.

[Seal of the Tribunal]