



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-95-14/2-A

Date: 23 January 2003

Original: English

IN THE APPEALS CHAMBER

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

Registrar: Mr Hans Holthuis

Decision of: 23 January 2003

PROSECUTOR

v

DARIO KORDIĆ & MARIO ČERKEZ

**DECISION ON MOTION BY HADŽIHASANOVIĆ, ALAGIĆ, AND KUBURA FOR
ACCESS TO CONFIDENTIAL SUPPORTING MATERIAL, TRANSCRIPTS AND
EXHIBITS IN THE *KORDIĆ & ČERKEZ* CASE**

Counsel for the Prosecutor

Mr Norman Farrell

Counsel for the Defence in the *Kordić & Čerkez* case

Mr Božidar Kovačić for Dario Kordić

Mr Mitko Naumovski for Mario Čerkez

Counsel for the Defence in the *Hadžihasanović* et al case

Ms Edina Rešidović and Mr Stéphane Bourgon for Enver Hadžihasanović

Ms Vasvija Vidović and Mr John Jones for Mehmed Alagić

Mr Fahrudin Ibrišimović and Mr Rodney Dixon for Amir Kubura

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,

BEING SEIZED OF the “Joint Motion of Enver Hadžihasanović, Mehmed Alagić and Amir Kubura for Access to All Confidential Material—Transcripts and Exhibits from the Prosecutor v Dario Kordić and Mario Čerkez (Case No IT-95-14/2-T)”, dated 5 September 2001 but filed on 6 September 2001 (the “Motion”);

NOTING the “Ordonnance du Président relative à la Requête conjointe de la Défense dans l’Affaire *Le Procureur c/Hadžihasanović et consorts* aux fins d’autoriser l’accès à des pièces confidentielles de l’affaire *le Procureur c/Kupreskić et consorts*”, issued on 25 September 2001 (“President’s Order”), whereby the President rejected the Motion;

NOTING the “Order of the President on Defence Counsel’s Joint Motion in the case the Prosecutor v Hadžihasanović et al for Access to all Confidential Material in the case the Prosecutor v Kordić and Čerkez”, dated 16 October 2001 but filed on 29 October 2001, whereby the President stayed a decision on the Motion with respect to the confidential material in the *Kordić & Čerkez* case, until the Appeals Chamber had ruled on Hadžihasanović’s Application for Leave to Appeal from the President’s Order dated 25 September 2001;

NOTING the “Decision on Appeal from Refusal to Grant Access to Confidential Material in Another Case”, issued on 23 April 2002, in which the Appeals Chamber found that the President erred in law when he refused to grant access to the material sought and remitted the case to the President for him to grant access to the material sought and to indicate any appropriate protective measures;

NOTING the “Order of the President on the Defence Motion for Access to Confidential Material in the Case *The Prosecutor v Dario Kordić and Mario Čerkez*” filed on 28 May 2002, whereby the President, after concluding that, once an Appeals Chamber has been constituted to hear the appeal in the *Kordić & Čerkez* case, it is authorised to rule on requests to vary protective measures even though the Motion was filed before the amendment to Rule 75(D) of the Rules of 28 December 2001, invited the Registrar to transmit the Motion to the Appeals Chamber in the *Kordić & Čerkez* case;

NOTING the “Prosecution’s Response to the Motion of Enver Hadžihasanović, Mehmed Alagić and Amir Kubura for Access to All Confidential Material—Transcripts and Exhibits from the Prosecutor v Dario Kordić and Mario Čerkez (Case No IT-95-14/2-T) and Request for Extension of Time Limit”, filed confidentially on 12 July 2002 (“Prosecution’s Response”), in which the Prosecution sought to have its filing recognised as validly filed although out of time;

NOTING the “Defence Response to Prosecution Filing of 12 July 2002”, filed confidentially 18 July 2002 (“Defence’s Response”), in which the Defence objected to the Prosecution’s application, but requested that, should it be granted, the Defence be granted leave to reply to that response;¹

NOTING the Decision of the Pre-Appeal Judge in this case granting the Prosecution’s request for extension of time, considering the Prosecution’s Response as validly filed and granting the Defence’s request for leave to file a reply to the Prosecution’s Response;²

NOTING the “Joint Defence Reply to Prosecution’s Response dated 12 July 2002”, filed confidentially on 29 July 2002;

CONSIDERING that 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;³

NOTING that the *Hadžihasanović et al* Indictment covers to a large extent the same geographical area and time period as the *Kordić & Čerkez* Indictment and that, as pointed out by the Prosecution, the *Hadžihasanović et al* proceedings are essentially the “flipside’ of the HVO prosecutions” of which the *Kordić & Čerkez* case is one example;⁴

¹ See *Prosecutor v Kupreškić et al.*, Decision on Appeal from Refusal to Grant Access to Confidential Material in Another Case, 23 April 2002.

² Decision on Request for Extension of Time, 19 July 2002.

³ *Prosecutor v Kordić and Čerkez*, Order on Paško Ljubičić’s Motion for Access to Confidential Supporting Material, Transcripts and Exhibits in the *Kordić and Čerkez* Case, 19 July 2002, p 4; *Prosecutor v Blaškić*, Decision on Appellant’s Dario Kordić and Mario Čerkez Request for Assistance of the Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post Trial Pleadings and Hearing Transcripts filed in the *Prosecutor v Blaškić*, 16 May 2002, par 14; *Prosecutor v Kvočka et al*, Decision on Momčilo Gruban’s Motion for Access to Material, 13 January 2003, par 5.

⁴ *Prosecutor v Hadžihasanović et al*, Prosecution’s Response to Defence Written Submissions on Joint Challenge to Jurisdiction Arising from the Amended Indictment, 24 May 2002, par 5.

NOTING that the Prosecution did not suggest that access should be refused in relation to certain parts of the material for lack of relevance thereof, nor that the material which is disclosed should be redacted;

CONSIDERING that, in view of the geographical, temporal or otherwise material overlap between the present case and the *Kordić & Čerkez* case, the material sought is likely to be of material assistance to the Defence's case or, at least, there is a good chance that it may give the Defence such assistance;

CONSIDERING that the Defence for Enver Hadžihasanović, Mehmed Alagić and Amir Kubura has (a) described the material sought by its general nature, and (b) shown a legitimate forensic purpose for such access;

CONSIDERING that the protective measures which have already been ordered in relation to that material shall remain in place;

CONSIDERING that the Prosecution was not given an opportunity to submit that additional protective measures should be imposed;

CONSIDERING that, if it decides to do so, the Prosecution or the Defence in the *Kordić & Čerkez* case may make fresh submissions as to the need for additional protective measures within 14 days from the date of this decision and that, after that period has elapsed, the material shall be released in un-redacted form to Hadžihasanović, Alagić and Kubura ("Applicants");

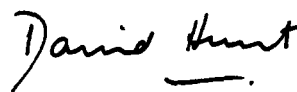
HEREBY GRANTS the Motion and **ORDERS** as follows:

- (a) the Prosecution and the Defence in the *Kordić & Čerkez* case to seek the consent of the providers before disclosing to the Applicants the non-public material which falls under Rule 70(C), and, if the consent of the provider has been given, to provide the material in un-redacted form to the Applicants or to apply for redaction with 14 days.
- (b) subject to any application by either party in the *Kordić & Čerkez* case for additional protective measures within 14 days, the Registry to grant the Applicants access to all public and non-public documents, materials and exhibits from the *Kordić & Čerkez* case including non-public post-trial submissions, appellate briefs, and motions pursuant to Rule 115 filed in the *Kordić & Čerkez* appeal until the date of the issuing of this decision.

- (c) The material to which access is granted shall remain subject to the same protective measures as were imposed by the Trial Chamber.
- (d) The Applicants, their Counsel and any employees who have been instructed or authorised by their Counsel to have access to the confidential material in the present case 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' case, 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; and
 - (iii) not contact any witness from the *Kordić & Čerkez* case whose identity was subject to protective measures without first demonstrating to the Appeals Chamber that the witness may materially assist the Applicants' case 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.
- (e) If, for the purposes of preparing the Applicants' case, 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 shall 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 the Applicants or their Counsel as soon as it is no longer needed for the preparation of the case.
- (f) For the purposes of the above paragraphs, third parties exclude: (i) the Applicants, (ii) persons authorised by the Registrar to assist Counsel for the Applicants, (iii) personnel from the International Tribunal, including members of the Office of the Prosecutor.

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

Dated this 23rd of January 2003,
At The Hague,
The Netherlands.



Judge David Hunt
Presiding

[Seal of the Tribunal]