



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-A  
Date: 24 January 2003  
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:** 24 January 2003

**PROSECUTOR**  
v.  
**TIHOMIR BLAŠKIĆ**

**DECISION ON JOINT MOTION OF ENVER HADŽIHASANOVIĆ, MEHMED ALAGIĆ  
AND AMIR KUBURA FOR ACCESS TO ALL CONFIDENTIAL MATERIAL,  
TRANSCRIPTS AND EXHIBITS IN THE CASE PROSECUTOR V. TIHOMIR BLAŠKIĆ**

*Prosecutor v. Hadžihasanović et al*  
**Counsel for the Prosecutor:**  
Mr. Ekkehard Withopf

**Counsel for the Defence:**  
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

*Prosecutor v. Blaškić*  
**Counsel for the Prosecutor:**  
Mr. Norman Farrell

**Counsel for the Appellant:**  
Mr. Anto Nobile  
Mr. Russell Hayman  
Mr. Andrew 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 ("International Tribunal"),

**BEING SEISED** on the "Joint Motion of Enver Hadžihasanović, Mehmed Alagić and Amir Kubura for Access to All Confidential Material—Transcripts and Exhibits from the Prosecutor v Zoran Kupreškić and Others (Case No IT-95-16A); Prosecutor v Tihomir Blaškić (Case No IT-95-14-T); & Prosecutor v Dario Kordić and Mario Čerkez (Case No IT-95-14/2-T)" filed by Enver Hadžihasanović, Mehmed Alagić and Amir Kubura ("Applicants") on 6 September 2001 ("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/Kupreškić et consorts*" issued on 25 September 2001, where 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. Blaškić", issued on 16 October 2001, where the President decided to stay a decision on the Motion with respect to the confidential material in the *Blaškić* 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" in the case the Prosecutor v. Kupreškić issued on 23 April 2002, where 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 provide for the requested access and to indicate any appropriate protective measures;

**BEING SEISED** of the "Order of the President on the Defence Motion for Access to Confidential Material in the Case The Prosecutor v. Blaškić" issued on 28 May 2002, where it was concluded that, once an Appeals Chamber had been constituted to hear the present case, it was authorised to rule on requests to vary protective measures even though the Motion had been filed before the amendment to Rule 75(D) of the Rules of 28 December 2001, and where the President invited the Registrar to transmit the Motion to the Appeals Chamber in the *Blaškić* case;

**NOTING** the “Appellant’s Response to Joint Motion of Enver Hadžihasanović, Mehmed Alagić and Amir Kubura for Access to all Confidential Material, Transcripts and Exhibits” filed on 14 June 2002, in which the Appellant Blaškić states that access should be conditioned on the imposition of protective measures;

**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 Prosecutor v. Blaškić and Request for an Extension of Time Limit” filed confidentially on 12 July 2002 (“Prosecution’s Response”), in which the Prosecution: (a) sought to have its filing recognised as validly done, (b) opposed a general request for unfettered and unspecified access to “all confidential materials and exhibits” in completed cases and cases pending appeal, and (c) argued that, in the absence of description of the documents by their general nature, the prevailing and overarching interest must be the one underlying the imposition of protective measures and confidentiality<sup>1</sup>;

**NOTING** the “Defence Response to Prosecution Filing of 12 July 2002” filed confidentially on 18 July 2002 (“Defence’s Response”), in which the Defence submitted that should the Prosecution’s Response be admitted, the Defence should be granted leave to file a full Reply on the merits;

**NOTING** that the Defence submitted in its Response that: (a) the Appeals Chamber decision dated 23 April 2002, did not consider that a request for access to all confidential documents was in itself over-broad, vague or otherwise insufficient, (b) the Prosecution had admitted, in particular in its motions seeking the dismissal of co-counsel for Kubura, that the *Kupreškić* case was the *flip-side* of the *Hadžihasanović et al* case, (c) the Prosecution had conceded in other motions that the *Blaškić* case was, in fact, *a fortiori* the *Kupreškić* case in terms of its geographical, temporal and substantive overlap with the *Hadžihasanović et al* case, (d) it was illogical to consider that the Appeals Chamber might rule that the Defence’s request was overly vague with respect to the *Blaškić* case, when the Appeals Chamber had ruled that the very same request was sufficient in *Kupreškić*, a case which involved a lesser degree of overlap<sup>2</sup>;

**NOTING** the “Decision on Request for Extension of Time” issued by the Pre-Appeal Judge in the present case on 22 July 2002, which recognised the Prosecution’s Response as validly filed, and granted the Defence’s request for leave to file a reply by 1 August 2002;

**NOTING** the “Joint Defence Reply to Prosecution’s Response dated 12 July 2002” filed confidentially on 1 August 2002 (“Joint Defence Reply”), which requests that the “Joint Appellants’

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<sup>1</sup> Prosecution’s Response, paras. 37-39.

Reply to the Prosecution's Response to the Joint Appellant's Brief for Enver Hadžihasanović, Mehmed Alagić and Amir Kubura, challenging the Decision of the President rejecting the Motion of the Defence requesting Access to all Confidential Material, Transcripts and Exhibits from The Prosecutor v. Kupreškić et al. Case No. IT-95-16-T" filed on 26 February 2002, ("Kupreškić Reply") be forwarded to the Appeals Chamber and that the arguments raised therein, *mutatis mutandis*, be taken into consideration by the Appeals Chamber in the present case;

**NOTING** that the Kupreškić Reply submitted that: (a) several witnesses whose statements had been disclosed to the Applicants' Defence under Rule 66 of the Rules of Procedure and Evidence had testified in the *Blaškić* case (amongst them Hadžihasanović and Kubura), (b) the *Blaškić* trial judgement was "replete" with references to matters relevant to the *Hadžihasanović* case, *i.e.*, the ABiH 3<sup>rd</sup> corps, the Mujahedin, the situation in Zenica, Travnik and Kakanj, (c) several witnesses in the *Blaškić* case were often referred to in the materials in the *Hadžihasanović* case, and (d) after having conducted an extensive review of the public materials in the *Blaškić* case, the Defence found that there was an overlap, and thus access to *all* materials was needed<sup>3</sup>;

**CONSIDERING** that a party is always entitled to seek material from *any* source to assist in the preparation of its case if the documents sought have been identified or described by their general nature and if a legitimate forensic purpose for such access has been shown;<sup>4</sup>

**NOTING** that the Indictment against *Hadžihasanović et al* covers the same geographical area and time period as the Indictment against Tihomir Blaškić, and that as pointed out by the Prosecution, "...these [*Hadžihasanović*] proceedings are the flipside to the HVO prosecutions"<sup>5</sup>;

**CONSIDERING** that, in view of the geographical, temporal or otherwise material overlap between the *Hadžihasanović* case and the *Blaškić* case, the material sought is likely to be of material assistance to the Applicants' case or, at least, there is a good chance that it may give them such assistance;

**CONSIDERING** that the Applicants have (a) described the material sought by its general nature, and (b) shown a legitimate forensic purpose for access;

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<sup>2</sup> Defence's Response para.3.

<sup>3</sup> Joint Defence Reply, paras. 9,10.

<sup>4</sup> *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. *Prosecutor v. Tihomir 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", Case No. IT-95-14-A, 16 May 2002, para.14, *Prosecutor v. Tihomir Blaškić*, "Decision on Paško Ljubičić's Motion for Access to Confidential Material, Transcripts and Exhibits", Case No. IT-95-14-A, 4 December 2002, para. 13, *Prosecutor v. Kvočka et al*, "Decision on Momčilo Gruban's Motion for Access to Material", Case No. IT-98-30/1-A, 13 January 2003, para.5.

**HEREBY GRANTS the Motion IN PART and ORDERS:**

- (a) the Prosecution to seek the consent of the providers before disclosing to the Applicants the non-public material which falls under Rule 70(C) as identified by the Prosecution and the Appellant Blaškić in their confidential submissions filed before the Appeals Chamber<sup>6</sup>;
- (b) the Registry to grant the Applicants access to all non-public documents, materials and exhibits from the *Blaškić* case including non-public post-trial submissions, appellate briefs, and motions pursuant to Rule 115 of the Rules, filed in the *Blaškić* appeal until the date of the issuing of this decision, only if and when the consent of the providers has been obtained by the Prosecution in accordance with the directions under paragraph (a) above - with the exception of (1) the “Appellant’s Third Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115” filed on 10 June 2002, (2) any submissions related to the said motion, (3) the “Prosecution’s Rebuttal Evidence and Arguments in Response to Additional Evidence Admitted on Appeal” filed on 7 January 2003, and (4) any *ex parte* motions and decisions which have been filed in the present appeal. Access should be granted subject to the following protective measures:

The Applicants, their Counsel and any employees who have been instructed or authorised by Counsel to have access to the confidential material in the present case as described in paragraph (b) 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

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<sup>5</sup> *Prosecutor v. Hadžihasanović et al.*, “Prosecution’s Response to Defence Written Submissions on Joint Challenge to Jurisdiction Arising from the Amended Indictment”, Case No. IT-01-47-PT, 24 May 2002, para. 5.

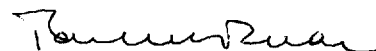
<sup>6</sup> *Prosecution v. Tihomir Blaškić*, “Prosecution’s Submission on Access to Non-Public Material Falling within Rule 70” and the “Appellant’s Submission RE Rule 70 Material in Response to Decision of 16 May 2002 on Request for Access to Non-Public Appellate Pleadings and Transcripts”, Case No. IT-95-14-A, filed confidentially on 3 June 2002.

- (iii) not contact any witness without first demonstrating to the Appeals Chamber, that the witness may materially assist 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.

If, for the purposes of preparing 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 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 or their Counsel as soon as it is no longer needed for the preparation of their case.

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) and personnel from the International Tribunal, including (iv) members of the Office of the Prosecutor.

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



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Fausto Pocar  
Presiding Judge

Done this twenty fourth day of January 2003  
At The Hague,  
The Netherlands.