

UNITED
NATIONS

IT-95-14-A
A18769-A18763
25 FEBRUARY 2003

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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-A
Date: 25 February 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: 25 February 2003

PROSECUTOR
v.
TIHOMIR BLAŠKIĆ

**DECISION ON DARIO KORDIĆ AND MARIO ČERKEZ'S SECOND SUPPLEMENTAL
REQUEST FOR ACCESS TO CONFIDENTIAL MATERIAL**

Counsel for the Prosecutor:
Mr. Norman Farrell

Counsel for Appellant Dario Kordić
Mr. Mitko Naumovski

Counsel for Appellant Mario Čerkez
Mr. Bodžidar Kovačić
Mr. Groan Mikuličić

Counsel for Appellant Tihomir Blaškić
Mr. Anto Nobile
Mr. Russell Hayman

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 of "Dario Kordić Supplemental Request for Assistance of Appeals Chamber in Gaining Access to Non-Public Post-trial Pleadings and Hearing Transcripts Recently filed in the Prosecutor v. Blaškić" filed by Dario Kordić ("Kordić") on 17 January 2003 ("Supplemental Request"), in which he seeks access to the "Prosecution's Rebuttal Evidence and Arguments in Response to Additional Evidence Submitted on Appeal" filed confidentially by the Prosecution in the present appeal on 7 January 2003 ("Prosecution's Rebuttal Submission");

BEING SEISED of the "Notice of Joinder in Dario Kordić's Second Supplemental Request for Assistance of the Appeals Chamber in Gaining Access to Non-Public Post-Trial Pleadings and Hearing Transcripts Recently filed in the Prosecutor v. Blaškić" filed by Mario Čerkez ("Čerkez") on 22 January 2003;

NOTING that the Kordić claims that he is entitled to have access to all of the material contained in the Prosecution's Rebuttal Submission, to the extent that this material bears in any way upon the arguments advanced either by himself or by the Prosecution in the *Kordić* appeal;

NOTING that Kordić submits that it would be in the interests of justice for the Appeals Chamber to order the Registry to disclose all the materials submitted in the Prosecution's Rebuttal Submission, for the reasons set out in paragraphs 14 to 17 of the decision dated 16 May 2002, and paragraph 10 of the decision dated 16 October 2002, issued by the Appeals Chamber in the present case;¹

NOTING the "Prosecutor's Consolidated Response to Dario Kordić's Second Supplemental Request for Assistance of the Appeals Chamber in Gaining Access to Non-Public Post-Trial Pleadings and Hearing Transcripts Recently filed in the Prosecutor v. Blaškić and to Mario Čerkez's Notice of Joinder", filed by the Prosecution on 24 January 2003 (Prosecution's Consolidated Response"), in which the Prosecution informs the Appeals Chamber that it has:

(a) prepared a public redacted version of its Prosecution's Rebuttal Submission;

¹ *Prosecutor v. 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 Pleadings and Hearing Transcripts filed in the Prosecutor v. Blaškić, Case No. IT-95-14-A, 16 May 2002. *Prosecutor v. Blaškić*, Decision on Appellants Dario Kordić and Mario Čerkez's Supplemental Request for Assistance of the Appeals Chamber in Gaining Access to Non-Public Post Trial Submissions, Appellate Briefs and Hearing Transcripts filed in Prosecutor v. Blaškić, Case No. IT-95-14-A, 16 October 2002 (hereinafter "Appeals Chamber's Decision of 16 October 2002").

- (b) determined what confidential material can be disclosed to Kordić and Čerkez; and
- (c) begun examining whether there is any material covered by Rule 70(C) of the Rules of Procedure and Evidence (“Rules”);²

NOTING that the Prosecution does not oppose the Supplemental Request except for the following material:

- (i) Rule 70 material yet to be identified by the Prosecution for which consent is required by the provider;
- (ii) submissions and rebuttal evidence contained within the Prosecution’s Rebuttal Submission that relate to Appellant Blaškić’s Third Additional Evidence Motion (“Third Rule 115 Motion”);³

NOTING that, in the event the Appeals Chamber grants the Supplemental Request subject to the conditions set out in the Prosecution’s Consolidated Response, the Prosecution requests ten days in order to:

- (i) finalize its examination of potential Rule 70 material and inform the Appeals Chamber accordingly;
- (ii) inform the Registry of those parts of the Prosecution’s Rebuttal Submission that should be withheld;
- (iii) apply for the appropriate protective measures;⁴

NOTING the “Appellant’s Response to Dario Kordić’s Second Supplemental Request for Assistance of the Appeals Chamber in gaining Access to Non-Public Post-Trial Pleadings and Hearing Transcripts recently filed in the Prosecutor v. Blaškić and to Mario Čerkez’s Notice of Joinder” filed by Tihomir Blaškić (“Appellant”) on 27 January 2003 (“Appellant’s Response”);

NOTING that while the Appellant does not oppose the Supplemental Request in general, he submits that all references to the material regarding the Third Rule 115 Motion must be first redacted from the Prosecution’s Rebuttal Submission before Kordić and Čerkez can be granted access to it;⁵

² Prosecution’s Consolidated Response, at paras 4, 5. The Prosecution states that, in light of previous Appeals Chamber’s decisions on requests for access to confidential material, it acknowledges that Kordić and Čerkez should have access to any information likely to assist their case materially in the preparation of their appeal. See Appeals Chamber’s Decision of 16 October 2002, and *Prosecutor v. Blaškić, Decision on Paško Ljubičić Motion for Access to Confidential Material, Transcripts and Exhibits*, 4 December 2002, Case No. IT-95-14-A.

³ Prosecution’s Consolidated Response, para. 10.

⁴ *Ibid.* para. 11.

NOTING that the Appellant does not oppose granting Čerkez access to those portions of the Prosecution's Rebuttal Submission which discuss material previously disclosed to Čerkez pursuant to Rule 68 of the Rules, subject to the appropriate protective measures, in accordance with the decision issued by the Appeals Chamber on 27 May 2002;⁶

NOTING "Dario Kordić's Reply to Prosecution's Submissions Concerning his Second Supplemental Request for Assistance of the Appeals Chamber in Gaining Access to Non-Public Post-Trial Pleadings and Hearing Transcripts recently filed in the Prosecutor v. Blaškić" filed by Kordić on 29 January 2003 ("Dario Kordić's Reply"), where he submits that he is not in a position to respond to the arguments advanced in the Prosecution's Consolidated Response because he does not know the nature of the materials in the Prosecution Rebuttal Submission that the Prosecution now seeks to withhold from him;

NOTING that Kordić asserts that the fears of retaliation expressed by the witnesses whose statements were proffered in the Third Rule 115 Motion are unfounded, and submits that they appear to be an attempt by the Appellant to evade liability, by claiming that even though he was the Military Commander, certain military units in the Central Bosnia Operative Zone were not under his command, and further he claims that these allegations are inflammatory and prejudicial;⁷

NOTING that Dario Kordić's Reply refers to a portion of paragraph 11 of the Appeals Chamber's Decision of 16 October 2002, which reads:

...The witnesses whose statements have been proffered as additional evidence on appeal by the Appellant Blaškić have been accorded certain protective measures that cannot be lifted in order to grant Applicants Kordić and Čerkez access to confidential material that is in fact inculpatory to at least one of the applicants;

and with respect to the paragraph stated above, the Kordić points out that the Appellant's "confidential submissions appear to raise troubling questions of fundamental fairness"⁸ because the Appeals Chamber seized of the *Kordić* and *Blaškić* appeals is composed of the same Judges;

NOTING that, pursuant to the Appeals Chamber's Decision of 16 October 2002, the Prosecution does not have to make any "showing" to persuade the Appeals Chamber to deny access to confidential submissions filed on appeal regarding the Third Rule 115 Motion, as suggested in Dario Kordić's Reply;⁹

⁶ Appellant's Response, para. 3. See *Prosecutor v. Blaškić*, Decision on the Appellant's Motion for Protective Measures for New Witnesses on Appeal, *Confidential*, Case No. IT-95-14-A, 27 May 2002 (hereinafter "Appeals Chamber's Decision of 27 May 2002").

⁷ Dario Kordić's Reply, para. 10.

⁸ Dario Kordić Reply, para. 10.

CONSIDERING that, as the “allegations” concerning threats directed at the witnesses whose statements have been tendered by the Appellant in the present appeal have already been the subject of consideration by the Appeals Chamber in this appeal, the Appeals Chamber does not propose to re-visit that issue as suggested in Dario Kordić’s Reply;¹⁰

NOTING that the list contained in Dario Kordić’s Reply,¹¹ setting out the names of the members of the military who testified on “chain of command issues” during the *Kordić and Čerkez* trial, is irrelevant for the purpose of this Supplemental Request, since the issue of the Appellant’s effective control over the Military Police is an issue to be considered in the main appeal;

CONSIDERING that, in granting the protective measures in relation to the Third Rule 115 Motion, the Appeals Chamber exercised its discretion taking into account that: (a) the witnesses had expressed a real fear for their safety, and (b) the witnesses would have refused to testify and submit their statements to the Appeals Chamber for admission under Rule 115 which would have been unfair towards the Appellant and would have prevented him from offering evidence to support his case;

CONSIDERING that, mindful of its obligations under Article 21 of the Statute to ensure that the Appellant has a fair and public hearing, and under Article 22, to protect the witnesses from, *inter alia*, interference or intimidation where it is possible to do so, the Appeals Chamber will not revisit its previous decisions on this matter;

NOTING that the Prosecution is bound by the same protective measures imposed by the Appeals Chamber’s Decision of 27 May 2002, and therefore should the Prosecution need to disclose any of the information contained in the witnesses’ statements proffered in the Third Rule 115 Motion to a party to another proceeding before the International Tribunal pursuant to Rule 68, there is a procedure in place that shall be followed;

NOTING that a public redacted version of the Prosecution’s Rebuttal Submission was filed on 24 January 2003;

NOTING that the redactions made to the Prosecution’s Rebuttal Submission are related to the following references: (a) references to documents filed confidentially at trial, (b) references to

⁹ Dario Kordić’s Reply, para. 5.

¹⁰ Dario Kordić’s Reply, para. 7.

confidential witnesses at trial, (c) references to testimony given in closed session at trial, and (d) references to documents filed confidentially at trial and of which no public redacted version exists;

CONSIDERING that all specific references to Kordić in the Prosecution's Rebuttal Submission are not redacted in the public redacted version, and furthermore that the references to Kordić are related to Exhibit 14 (War Diary) proffered by the Appellant in his Second Rule 115 Motion, to which Kordić and Čerkez should have had access previously since the Prosecution introduced this Exhibit as evidence during *Kordić and Cerkez's* trial;¹²

CONSIDERING that other redactions in the public redacted version of the Prosecution's Rebuttal Submission are references to the testimony of protected witnesses and witnesses who testified in closed session at the Appellant's trial;

CONSIDERING that Kordić and Čerkez have had access to the Appellant's confidential trial material;¹³

CONSIDERING FURTHER that the redacted portions of the Prosecution's Rebuttal Submission in response to the Third Rule 115 Motion refer to the transcripts of the testimony of a protected witness who testified at *Kordić and Cerkez's* trial;

HEREBY DENIES the Supplemental Request with respect to the submissions and rebuttal evidence related to the Third Rule 115 Motion and **GRANTS** the Prosecution ten days from the date of this decision to file an *ex parte* document (i) identifying the Rule 70 material contained within the Prosecution's Rebuttal Submission, and (ii) setting out the time required to contact the providers of such material to obtain their consent for disclosure. Once consent has been obtained the Prosecution shall inform the Registry which portions of the confidential version of the Prosecution's Rebuttal Submission can be disclosed to Kordić and Čerkez.

¹² There are no references to Applicant Mario Čerkez in the Prosecution's Rebuttal Submission.

¹³ 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. *Prosecutor v. Dario Kordić and Mario Čerkez, Further Order on Motion for Access to Non-Public Materials in the Lašva Valley and Related Cases*, IT-97-32-AR-110, DT 16 February 1999.

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



Fausto Pocar
Presiding Judge

Done this twenty-fifth day of February 2003
At The Hague,
The Netherlands.