

UNITED
NATIONS

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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 No. IT-01-47-PT
Date: 12 June 2003
Original: English

IN TRIAL CHAMBER II

Before: Judge Wolfgang Schomburg, Presiding
Judge Florence Ndepele Mwachande Mumba
Judge Carmel Agius

Registrar: Mr. Hans Holthuis

Order of: 12 June 2003

PROSECUTOR

v.

**ENVER HADŽIHASANOVIĆ
AMIR KUBURA**

**DECISION ON "APPLICATION OF DARIO KORDIĆ FOR
ACCESS TO CONFIDENTIAL SUBMISSIONS FILED BY
PROSECUTION AND DEFENCE" IN THE CASE
PROSECUTOR V. HADŽIHASANOVIĆ AND KUBURA**

The Office of the Prosecutor:

Mr. Ekkehard Withopf

Counsel for Dario Kordić:

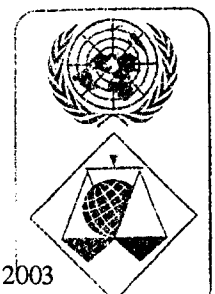
Mr. Mitko Naumovski

Counsel for the Accused:

Ms. Edina Rešidović and Mr. Stéphane Bourgon for Enver Hadžihasanović
Mr. Fahrudin Ibrišimović and Mr. Rodney Dixon for Amir Kubura

Case No.: IT-01-47-PT

12 June 2003



TRIAL CHAMBER II 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 (“Tribunal”),

BEING SEIZED of the “Application of Dario Kordić for Access to Confidential Submissions Filed by Prosecution and Defence” (“Application”), filed under seal by the Defence for Dario Kordić (“Kordić Defence”) on 7 February 2003, whereby Dario Kordić (“Applicant”) requests access to all confidential submissions filed by both the Prosecution and Defence in the *Hadžihasanović and Kubura* case and listed in Exhibit “A” annexed to the Application, to the extent that those submissions pertain in any way to the appeals noted in *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A (“Kordić case”),

NOTING the “Prosecution’s Response to Application of Dario Kordić for Access to Confidential Submissions Filed by Prosecution and Defence” (“Prosecution Response”), filed confidentially by the Office of the Prosecutor (“Prosecution”) on 20 February 2003,

NOTING “Dario Kordić’s Reply to Prosecution Response to his Application for Access to Confidential Submissions Filed by Prosecution and Defence” (“Kordić Reply”), filed by the Kordić Defence on 4 March 2003,

NOTING the “Order Terminating Proceedings Against Mehmed Alagić” issued by the Trial Chamber on 21 March 2003,

NOTING that the Defence in the *Hadžihasanović and Kubura* case did not respond to the Application,

NOTING that the Prosecution, in principle, (i) has no objections to the Applicant having access to the material sought, provided that appropriate protective measures are imposed, and (ii) acknowledges that, in view of the geographical and temporal overlap between the *Hadžihasanović and Kubura* case and the *Kordić* case, the Applicant has sufficiently described the material sought by its general nature and has shown a legitimate forensic purpose for access to such material,

NOTING that the Prosecution Response does not oppose the Application in respect to Pleading Registry No. 480,¹

NOTING, however, that the Prosecution Response submits that (i) the filings with Pleading Registry No. 462, No. 474, and No. 488 have already been received by the Kordić Defence; (ii) the

¹ The numbering of the Registry Pleadings is contained in Exhibit “A”.

filings with Pleading Registry No. 101, No. 103, No. 169, No. 223, No. 290, No. 296, No. 346, No. 362, No. 374, No. 414, No. 486, and No. 3324 appear to have no relevance to the appeal of the Applicant; (iii) the filings with Pleading Registry No. 416, No. 464, No. 472, and No. 494 appear to have no evidentiary value for the appeal of the Applicant; and (iv) the Applicant should not be granted access to the filing with Pleading Registry No. 4, as this document was not disclosed to the Defence in the *Hadžihasanović and Kubura* case,

NOTING that the Kordić Defence did not oppose the Prosecution's submission that the filings with Pleading Registry No. 462, No. 474, and No. 488 have already been received by the Kordić Defence,

NOTING that the Kordić Defence agrees that the filings with Pleading Registry No. 101 and No. 103 need not be disclosed if they have no relevance to the points raised in the appeals of either party in the *Kordić* case,

NOTING that the Kordić Defence submits that the filing with Pleading Registry No. 4 should only be disclosed in case the Prosecution eventually discloses the filing to the Defence in the *Hadžihasanović and Kubura* case,

NOTING that the Kordić Defence agrees that the filings with Pleading Registry No. 223, No. 290, No. 296, No. 346, No. 362, No. 374,² No. 414, and No. 486 need not be disclosed, as the description given of these documents appears to have no relevance to any issue presented in the appeals of either the Applicant or the Prosecution,

NOTING that the Kordić Defence submits that the filings with Pleading Registry No. 416, No. 464, No. 472, No. 494, and No. 3324 could have relevance in the appeals of the Applicant and the Prosecution in the *Kordić* case, as the legal positions advanced by the Prosecution in the *Hadžihasanović and Kubura* case differ materially from submissions made by the Prosecution in the *Kordić* appeals,

NOTING that the Kordić Defence submits that the Prosecution Response does not contain a compelling argument why the filing with Pleading Registry No. 169 should not be disclosed to the Kordić Defence,

NOTING that the Kordić Defence does not oppose the protective measures proposed in the Prosecution Response as a condition to disclosure of such material,

² Obviously misspelled as No. "674" in para. 4 of the Kordić Reply.

NOTING that the Amended Indictment against *Hadžihasanović and Kubura* alleges criminal activities committed by the Army of Bosnia and Herzegovina ("ABiH") in the same geographical area and time period that is to a large extent covered in the *Kordić and Čerkez* Indictment, and that the *Hadžihasanović and Kubura* proceedings are the "flipside" to the proceedings against the Croatian Defence Council ("HVO"), of which the *Kordić and Čerkez* case is one example,³

CONSIDERING that, in view of the geographical, temporal or otherwise material overlap between the *Hadžihasanović and Kubura* case and the *Kordić and Čerkez* case, the material sought is likely to be of material assistance to the appeal of the Applicant or, at least, there is a good chance that it may give the Kordić Defence such assistance,⁴

CONSIDERING that the Kordić Defence, like any other party, is always entitled to seek material from *any* source to assist it in its case, provided that it is able to identify the documents sought or to describe them by their general nature, and that a legitimate forensic purpose for such access can be shown,⁵

CONSIDERING that the Trial Chamber is satisfied that the Kordić Defence has shown a legitimate forensic purpose for seeking access to filings with Pleading Registry No. 169, No. 416, No. 464, No. 472, No. 494, and No. 3324 by showing that there is at least a good chance that such access would assist its case materially,⁶ having in mind that the filings with Pleading Registry No. 416, No. 464, No. 472, No. 494, and No. 3324 could have relevance for the appeals in the *Kordić* case to the extent that the legal positions advanced by the Prosecution in the *Hadžihasanović and Kubura* case differ materially from, or contradict, submissions made by the Prosecution in the course of the appeals in the *Kordić* case,

CONSIDERING that, in the submission of the Prosecution, the filings with Pleading Registry No. 101 and 103 only contain information on the Prosecution's obligation under Rule 68 of the Rules of Procedure and Evidence ("Rules") in the present case,

FOR THE FOREGOING REASONS

PURSUANT TO Rule 54 and Rule 69 of the Rules,

³ *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Decision on Motion by Hadžihasanović, Alagić, and Kubura for Access to Confidential Supporting Material, Transcripts and Exhibits in the *Kordić and Čerkez* Case, 23 January 2003; *Prosecutor v. Hadžihasanović, Alagić and Kubura*, IT-01-47-PT, Prosecution's Response to Defence Written Submissions on Joint Challenge to Jurisdiction Arising From the Amended Indictment, 24 May 2002, para. 5.

⁴ Cf. *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Decision on Motion by Hadžihasanović, Alagić, and Kubura for Access to Confidential Supporting Material, Transcripts and Exhibits in the *Kordić and Čerkez* Case, 23 January 2003.

⁵ *Ibid.*, with further references.

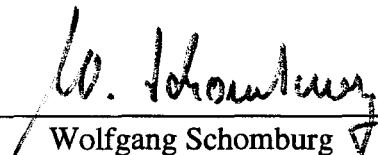
⁶ Cf. *Prosecutor v. Hadžihasanović, Alagić and Kubura*, IT-01-47-PT, Decision on Motion by Mario Čerkez for Access to Confidential Supporting Material, 10 October 2001, para. 11.

1. **DENIES** the Application of the Kordić Defence to have access to the filings with Pleading Registry No. 101, No. 103, No. 223, No. 290, No. 296, No. 346, No. 362, No. 374,⁷ No. 414, No. 462, No. 474, No. 486, and No. 488; and
2. **ORDERS** as follows:
 - (a) the Registry shall grant the Applicant access to the filing with Pleading Registry No. 480;
 - (b) the Registry shall grant the Applicant access to the filing with Pleading Registry No. 4 only if the Prosecution eventually discloses this filing to the Defence in the *Hadžihasanović and Kubura* case;
 - (c) the Prosecution and the Defence in the *Hadžihasanović and Kubura* case, if the filings with Pleading Registry No. 169, No. 416, No. 464, No. 472, No. 494, and No. 3324 contain material which falls under Rule 70 (C) of the Rules, shall seek the consent of the providers of this material – each party with respect to the material used in its own case – and, if the consent of the providers has been given, to apply for any redaction within 14 days;
 - (d) subject to any application by either party in the *Hadžihasanović and Kubura* case for additional protective measures within 14 days, the Registry shall grant the Kordić Defence access to the filings with Pleading Registry No. 169, No. 416, No. 464, No. 472, No. 494, No. 3324, only if and when the consent of the providers has been obtained by the Prosecution and the Defence in the *Hadžihasanović and Kubura* case in accordance with the directions under paragraph (c) above, and subject to the following additional protective measures:
 - (e) the material to which access is granted shall remain subject to the same protective measures as were imposed by the Trial Chamber;
 - (f) the Applicant, his Counsel and any employees who have been instructed or authorized by his 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 appeal of the Applicant, and always with leave of the Trial Chamber;

⁷ Obviously misspelled as No. “674” in para. 4 of the Kordić Reply.

- (ii) not contact any witness from the *Hadžihasanović and Kubura* case whose identity was subject to protective measures without first demonstrating to the Trial Chamber that the witness may materially assist in the appeal of the Applicant in some identified way and that such assistance is not otherwise reasonably available to him. If the Trial 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;
- (iii) 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;
- (iv) inform any member of the Kordić Defence that if he or she withdraws from the case, all material in his or her possession shall be returned to the lead Defence Counsel;
- (g) if, for the purpose of the appeal of the Applicant, confidential material is disclosed to third parties – provided that the conditions set out in paragraph (f)(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 publicize, 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 Applicant or his Counsel as soon as it is not longer needed for the appeal;
- (h) for the purposes of the above paragraphs, third parties exclude (i) the Applicant, (ii) persons authorised by the Registrar to assist Counsel for the Applicant, (iii) and personnel from the International Tribunal, including members of the Prosecution.

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


Wolfgang Schomburg
Presiding

Dated this twelfth day of June 2003,
At The Hague
The Netherlands

[Seal of the Tribunal]

