

IT-95-14/2-A
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26 March 2004

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**UNITED
NATIONS**



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of
Former Yugoslavia since 1991

Case No. IT-95-14/2-A
Date: 26 March 2004
Original: English

IN THE APPEALS CHAMBER

Before: Judge Wolfgang Schomburg, Presiding
Judge Fausto Pocar
Judge Florence Ndepele Mwachande Mumba
Judge Mehmet Güney
Judge Inés Mónica Weinberg de Roca

Registrar: Mr. Hans Holthuis

Decision: 26 March 2004

PROSECUTOR

v.

**DARIO KORDIĆ
&
MARIO ČERKEZ**

**DECISION ON APPELLANT MARIO ČERKEZ'S MOTION
FOR ADDITIONAL EVIDENCE PURSUANT TO RULE 115**

The Office of the Prosecutor:

Mr. Norman Farrell

Counsel for the Accused:

For Dario Kordić
For Mario Čerkez

Mr. Mitko Naumovski
Mr. Božidar Kovačić

Mr. Turner T. Smith Jr
Mr. Goran Mikuličić

Mr. Stephen M. Sayers

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 SEISED OF “Mario Čerkez’s Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115” filed on 7 April 2003 by Mario Čerkez (“Motion”), and a supplemental motion entitled “Mario Čerkez’s Supplemental Application for Admittance of One Document as Additional Evidence on Appeal” filed on 9 April 2003 (“Supplemental Motion”);

NOTING that, on 12 May 2003 the Prosecution filed confidentially “Prosecution’s Response to the Motions to Admit Additional Evidence Filed by Mario Čerkez on 7 April 2003 and 9 April 2003”;

NOTING that “Čerkez’s Reply in Support of his Motions to Admit Additional Evidence Pursuant to Rule 115” was filed confidentially on 6 June 2003;

NOTING that, on 17 April 2003 Kordić filed a brief “Dario Kordić’s Submissions in Relation to Motions Filed by Co-Accused, Mario Čerkez, For Admission of ‘Additional Evidence’ under Rule 115”, and on 18 April 2003 Kordić filed an “Amended Response to Čerkez’s Motions for the Admission of ‘Additional Evidence’ under Rule 115”, whereby Kordić seeks to object to a number of documents attached to the Motion and the Supplemental Motion;

NOTING that on 24 April 2003, Čerkez filed “Mario Čerkez’s Reply to Kordić’s Amended Response to Čerkez’s Motions for the Admission of Additional Evidence under Rule 115”;

NOTING that the part of the Motion filed *ex parte* is dealt with in a separate decision;

CONSIDERING that, in order to have additional evidence admitted on appeal, the party submitting such evidence is required primarily to establish that the evidence itself “was not available at trial” in any form¹ and that it could not have been discovered through the exercise of due diligence,² which means that the party seeking its admission must demonstrate (*inter alia*) that it made use of “all

¹ Rule 115(B). See also *Prosecutor v Krstić*, IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003 (“Subpoenas Decision”), para. 4.

² *Prosecutor v Tadić*, IT-94-1-A, Decision on Appellant’s Motion for the Extension of the Time Limit and Admission of Additional Evidence, 15 October 1998 (“Tadić Rule 115 Decision”), paras 35-45; *Prosecutor v Kupreškić et al*, IT-95-16-A, Appeal Judgement, 23 October 2001 (“Kupreškić Conviction Appeal Judgment”), para. 50; *Prosecutor v Delić*, IT-96-21-R-R119, Decision on Motion for Review, 25 April 2002 (“Delić Review Decision”), para. 10.

mechanisms of protection and compulsion available under the Statute and the Rules of the International Tribunal to bring evidence on behalf of an accused before the Trial Chamber;”³

CONSIDERING that counsel must bring any difficulties in relation to obtaining evidence, including those arising from intimidation or inability to locate witnesses, to the attention of the Trial Chamber;⁴

CONSIDERING that this obligation to report to the Trial Chamber is intended not only as a first step in exercising due diligence but also as a means of self-protection, in that a contemporaneous record then exists that the cooperation of the prospective witness had not been obtained;⁵

CONSIDERING that such a report to the Trial Chamber does not *by itself* satisfy the obligation of due diligence as the party must also seek relief from the Trial Chamber by which the uncooperative prospective witness may be compelled to cooperate;⁶

CONSIDERING that, to be admissible pursuant to Rule 115, evidence which was not available at trial and could not have been discovered through the exercise of due diligence must be relevant to a material issue and credible and such that it *could* have had an impact on the verdict *i.e.*, *could* have demonstrated, in the case of a request by a defendant, that a conviction was unsafe;⁷

CONSIDERING that, if the evidence was available at trial or could have been discovered through the exercise of due diligence, the moving party will be required to undertake the additional burden of establishing that the exclusion of the additional evidence *would* lead to a miscarriage of justice, in that if it had been available at the trial it *would* have affected the verdict;⁸

CONSIDERING that the significance of the additional evidence must be considered in the context of the evidence which was given at the trial and not in isolation;⁹

³ *Tadić* Rule 115 Decision, paras 40, 44-45, 47; *Kupreškić* Conviction Appeal Judgment, para. 50.

⁴ *Prosecutor v Krstić*, Decision on Application for Subpoenas, 1 July 2003 (“*Krstić* Subpoenas Decision”), para. 5; *Tadić* Rule 115 Decision, para. 40; *Kupreškić* Conviction Appeal Judgment, para. 50.

⁵ *Krstić* Subpoenas Decision, para. 14.

⁶ *Krstić* Subpoenas Decision, para. 15.

⁷ *Kupreškić* Conviction Appeal Judgment, para. 68.

⁸ *Krstić* Subpoenas Decision, para. 16; *Delić* Review Decision, para. 15.


⁹ *Prosecutor v Kupreškić et al*, Decision on the Motions of Appellants Vlatko Kupreškić, Drago Josipović, Zoran Kupreškić and Mirjan Kupreškić to Admit Additional Evidence, 26 February 2001, para. 12; *Prosecutor v Kupreškić et al*, Decision on the Admission of Additional Evidence Following Hearing of 30 March 2001, 11 April 2001, para. 8; *Kupreškić* Conviction Appeal Judgment, paras 66, 75.

NOTING that it is important for the parties to be informed as early as possible of the Appeals Chamber's decision in order to prepare their oral arguments;

HEREBY DECIDES that the evidence put forward in the Motion and the Supplemental Motion do not meet the requirements of Rule 115 and therefore will not be admitted as additional evidence on appeal;

NOTES finally that further reasons for the present decision will be given in due course before the hearing.

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


Judge Wolfgang Schomburg
Presiding

Dated this twenty-sixth day of March 2004,
At The Hague,
The Netherlands.

[Seal of the Tribunal]