



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-95-14/2-A
Date: 13 October 2003
Original: English

IN THE APPEALS CHAMBER

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

Registrar: Mr Hans Holthuis

Decision of: 13 October 2003

PROSECUTOR

v

Dario KORDIĆ & Mario ČERKEZ

DECISION ON MOTION FOR CLARIFICATION
AND MOTIONS FOR PROTECTIVE MEASURES

Counsel for the Prosecutor:

Mr Norman Farrell

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

Mr Mitko Naumovski, Mr Turner T Smith Jnr and Mr Stephen M Sayers for Dario Kordić
Mr Božidar Kovačić and Mr Goran Mikuličić for Mario Čerkez

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

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

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Procedural background

1. On 6 September 2001,¹ the Defence for Enver Hadžihasanović, Mehmed Alagić (†) and Amir Kubura (“Applicants”) filed a “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)”. On 25 September 2001, the President issued 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*”, whereby he rejected the Motion. On 29 October 2001,² the President issued 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”, whereby he stayed a decision on the Motion with respect to the confidential material in the *Kordić & Čerkez* case until the Appeals Chamber had ruled on the Application for Leave to Appeal from the President’s Order dated 25 September 2001 filed by Hadžihasanović.

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

3. On 28 May 2002, the President issued an “Order of the President on the Defence Motion for Access to Confidential Material in the Case *The Prosecutor v Dario Kordić and Mario Čerkez*”, whereby he said that, once an Appeals Chamber had been constituted to hear the appeal in the *Kordić & Čerkez* case, it was 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. The President invited the Registrar to transmit the Motion to the Appeals Chamber in the *Kordić & Čerkez* case.

4. On 12 July 2002, the Prosecution filed its “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-

¹ The date appearing on the cover page of the motion is 5 September 2001.

² The date appearing on the cover page of the order is 16 October 2001.

14/2-T) and Request for Extension of Time Limit”,³ in which the Prosecution sought an extension of time. On 18 July, the Defence filed its “Defence Response to Prosecution Filing of 12 July 2002”, in which it objected to the Prosecution’s application for an extension of time on the basis that it had been filed out of time, but requested that, should it be granted, the Defence be granted leave to reply to that response.⁴ On 29 July 2002, the Defence filed its “Joint Defence Reply to Prosecution’s Response dated 12 July 2002”.

5. On 23 January 2003, the Appeals Chamber rendered its “Decision on Motion by Hadžihasanović, Alagić and Kubura for Access to Confidential Supporting Material, Transcripts and Exhibit in the *Kordić & Čerkez* Case” (“Original Decision”), whereby it held that the Applicants had (a) described the material sought by its general nature, and (b) shown a legitimate forensic purpose for such access.⁵ The Appeals Chamber also made the following orders:⁶

- (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.

³ On 19 July 2002 the Pre-Appeal Judge in this case granted 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 (Decision on Request for Extension of Time).

⁴ See *Prosecutor v Kupreškić et al*, Decision on Appeal from Refusal to Grant Access to Confidential Material in Another Case, 23 Apr 2002.

⁵ Original Decision, p 4.

⁶ *Ibid*, pp 4-5.

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- (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.

6. On 28 January 2003, Čerkez filed his "Mario Čerkez's Notice Re. 23 January 2003 Appeals Chamber Decision on Motion by Hadžihasanović, Alagić and Kubura for Access to Confidential Supporting Material, Transcripts and Exhibits in the *Kordić & Čerkez* case", in which he stated that he did not need to seek the consent of any witness or entity pursuant to Rule 70(C) in order to enable the Applicants to gain access to the material in question, and he said that he would not apply for additional protective measure in relation to that material.

7. On 6 February, Kordić sought additional protective measures in relation to some of the material.⁷ On 10 February, a letter from the Senior Legal Officer of the Appeals Chamber was sent to the parties in this case inviting Kordić to make further submissions in relation to the protective measures sought by him. On 14 February, Kordić responded to the letter. On 20 February, the Applicants filed a joint response to the application by Kordić.⁸

8. On 6 February, the Prosecution filed a "Prosecution's Motion for Additional Protective Measures, Clarification and Extension of Time Regarding Access Decision of 23 January 2003" ("Prosecution's Motion"), seeking what it calls "clarification" on a number of issues and additional protective measures. On 17 February, Kordić filed its response to the Prosecution's Motion.⁹ On 20 February, the Applicants filed a joint response to the Prosecution's Motion and to Kordić's Application.¹⁰

Relief sought by the Prosecution

9. The Prosecution requested the following relief:¹¹
- a stay of the Original Decision until further order;
 - clarification as to whether the Original Decision covers pre-trial and trial filings and *ex parte* filings at trial and on appeal;

⁷ Dario Kordić's Application and Notice Pursuant to 23 January 2003 "Decision on Motion by Hadžihasanović, Alagić and Kubura for Access to Confidential Supporting Material, Transcripts and Exhibits in the *Kordić & Čerkez* case" ("Kordić's Application").

⁸ Joint Defence in the Hadžihasanović et al. Response to Dario Kordić's Application and Notice Pursuant to 23 January 2003 "Decision on Motion by Hadžihasanović, Alagić and Kubura for Access to Confidential Supporting Material, Transcripts and Exhibits in the *Kordić & Čerkez* case" ("Applicants' Response to Kordić").

⁹ Dario Kordić's Response to Prosecution's Motion for Additional Protective Measures, Clarification and Extension of Time Regarding Access Decision of 23 January 2003 ("Kordić's Response").

¹⁰ Joint Defence in the Hadžihasanović et al Case Response to Prosecution's Motion of 6 February 2003 for Additional Protective Measures, Clarification and Extension of Time Regarding Access Decision of 23 January 2003 ("Applicants' Response").

¹¹ Motion, par 36.

- an order that it is for the Registry, rather than for the Prosecution, to provide the Applicants with access to Rule 70(C) material;
- an order that the same protective measures as specified in the *Ljubičić* Access Order be ordered in relation to the material being disclosed;¹²
- an order that the Victim and Witness Section, rather than the Prosecution or the Defence, must contact witnesses;
- an order that the Registry, rather than the Prosecution, is responsible for carrying out all necessary redaction of the material disclosed to the Applicants;
- clarification of the procedure to be adopted where confidential witnesses in one case have not consented to disclosure of material in another case;
- the opportunity to make further submissions regarding the time required to comply with the Chamber's Decision.

10. The "clarification" sought by the Prosecution in relation to a number of orders made in the Original Decision do in fact appear to amount to a request for reconsideration. Those instances where reconsideration, and not clarification, is sought will be dealt with as such.¹³

11. The Prosecution also seeks leave in its Motion for an extension of two pages pursuant to the Practice Direction on the Length of Briefs and Motions (IT/184 Rev 1) "in light of the significant issues to be clarified".¹⁴ Neither Kordić nor the Applicants have objected to the extension of pages being granted. The Appeals Chamber accepts that the number of issues which the Prosecution needs to address in its Motion constitutes good cause.

12. In addition, because of its inability to meet the deadline imposed by the Appeals Chamber in this case, the Prosecution seeks leave for an extension of time to comply with the Original Decision. Kordić did not object to the decision being stayed, nor to the extension of time being granted. The Applicants, on the other hand, object that the Prosecution has failed to comply with the Appeals Chamber's Decision and that it has failed to show any basis upon which the Decision should be stayed.¹⁵

13. The Original Decision provided that either party in the *Kordić & Čerkez* case could seek additional protective measures within 14 days. The Prosecution and Kordić have done so within

¹² *Prosecutor v Kordić & Čerkez*, IT-95-14/2-A, Order on Pasko Ljubičić's Motion for Access to Confidential Supporting Material, Transcripts and Exhibits in the case, 19 July 2002, pp 5-6.

¹³ The circumstances under which the Appeals Chamber may reconsider one of its decisions have been laid down in the recent *Mucić et al* Judgment on Sentence Appeal (*Prosecutor v Mucić et al*, IT-96-21-Abis, Judgment on Sentence Appeal, 8 Apr 2003, pars 49 *et seq*).

¹⁴ Motion, par 5.

¹⁵ Applicants' Response, pars 2-4, 21.

that timeframe. Insofar as ordering the Prosecution to comply immediately with the Original Appeals Chamber's Decision or refusing a stay of this Decision would render its present application for protective measures meaningless, leave for an extension of time must be granted until the issue of protective measures has been resolved. That will depend, in turn, on the time which, the Prosecution estimates, it will need to comply with the Decision of the Appeals Chamber as "clarified" by the present Decision. In view of the number of matters with which the Prosecution will have to deal in order to comply with this Decision, and taking into consideration the fact that it must have started to comply with the Original Decision insofar as it did not require any "clarification", the Appeals Chamber will order the Prosecution to comply with the present Decision as well as the Original Decision to the extent that it is being amended or clarified by this Decision within 14 days.

14. The Prosecution next seeks clarification as to the scope of the original order. The Original Decision was limited to the material to which the Applicants had sought access. The prosecution says that, as the applicants made no express mention of pre-trial and trial filings, those filings fall outside of the scope of the original request for "all confidential material" or "non-public documents", and the applicants should not be granted access to that material.¹⁶ It is preferable that a party identify with precision the material to which it seeks access to and the original motion did not specifically request access to either the confidential pre-trial or trial filings. It has now been made clear that it was intended that these materials be included.¹⁷ As the legitimate forensic purpose in these materials is the same, and to avoid a further application being made, the Applicant's request for access to confidential material pursuant to Rule 70 will be interpreted as including a request to access all confidential material including pre-trial and trial filings.¹⁸

15. The original order did not, however, cover *ex parte* filings. Although *ex parte* filings are confidential materials which may fall within the scope of a request for "all confidential material" under Rule 70, they are to be distinguished from other confidential materials due to their specific nature as filings made confidentially between a party and a Trial Chamber. In case for good reason a party was and still is denied access to specific filings, *a fortiori* third parties cannot have access to the requested material.¹⁹

¹⁶ Motion, par 7.

¹⁷ Applicants' Response, par 10.

¹⁸ This was the interpretation placed upon a request of this type in the Appeals Chamber Decision on "Prosecution's Preliminary Response and Motion for Clarification Regarding Decision on Joint Motion of Hadzihasanović, Alagić and Kubuara of 24 January 2003 ("Blaškić Decision").

¹⁹ In his Response, Kordić submitted that it would be "anomalous" for accused persons in other cases to obtain material from his case to which access was denied to him (Kordić's Response, par 2). He added that he would not object to such access being granted to the applicants on the condition that he too be granted such access (Kordić's Response, par 3).

16. The Appeals Chamber accepts the Prosecution's next submission, that, as official custodian of the Court Record, it is for the Registry to provide material to which access has been granted to a party, and not for either party to do so,²⁰ and it notes the Applicants' agreement on that point.²¹

17. The Original Decision provided that either party in the *Kordić & Čerkez* case could seek additional provisional measures in relation to the material to which access is being granted. The Prosecution has now moved to have the same protective measures as those ordered in the *Ljubičić* Access Order being ordered in this case.²² The Prosecution submits that "the protection of these same witnesses remains equally pressing" in the present case as they were in relation to the *Ljubičić* motion for access to this material.²³

18. The necessity to order protective measures and the nature of the measures being ordered depends on the circumstances of each case. Protective measures which may be required in one case may not necessarily be needed in a different, although connected, case. In the present instance, the Prosecution claims that:²⁴ (i) there is no reason to distinguish between the protective measures required in relation to *Ljubičić* as opposed to the Applicants; (ii) it is important to ensure that the protection of the *Kordić & Čerkez* witnesses is consistently recognised in all proceedings; (iii) access should be granted equally to *Ljubičić* and the present Applicants; and (iv) resource considerations should not be permitted to over-ride the priority accorded to the protection of witnesses. Those points – particularly point (ii) – are indeed relevant, and access shall be granted to this material under the same conditions as were granted to *Ljubičić*. Once they have reviewed that material and determined that they need all or part of it in a non-redacted form, the applicants must identify those parts of the material which they claim may assist them in the conduct of their defence and which is not otherwise available to them and file a motion justifying the removal of redactions. Should the need arise, consideration will then be given to additional protective measures.

19. The Appeals Chamber accepts the submissions of the parties that it is preferable for the Registry, as official custodian of the Court Record, as opposed to the parties themselves, to make such redactions. However, the Registry cannot be expected to make the redactions without detailed submissions being made in writing by the parties as to what redactions should be made. Therefore, the parties will be ordered to do so.

²⁰ Motion, pars 13-15.

²¹ Applicants' Response, pars 17-18.

²² This would include: (i) the confidential witnesses and any relevant governments or entities be contacted to ascertain their views concerning the provision of access to the Applicants; (ii) that the material relating to these witnesses be redacted to remove any identifying information; and (iii) after receiving the material in redacted form, it would be for the Applicants to provide cogent reasons as to why they are entitled to access this material in un-redacted form (see, Motion, par 36).

²³ Motion, par 22.

20. The Appeals Chamber will not at this stage deal with the procedure to be adopted where Rule 70(C) providers have not consented to disclosure of material in another case, as this problem has not arisen in the present case.

21. Finally, the Appeals Chamber rejects the Prosecution's submission that the Victims and Witnesses Section, rather than the Prosecution or the Defence, should contact the witnesses whom they called at trial. Those witnesses were called by the parties and they have had, in many cases, no or very limited interaction with the Victims and Witnesses Section. Due to their relationship with these witnesses, each party is in a much better position to contact the witnesses which that party called and to ascertain their security concerns, if they have any.

Motion by Kordić for additional protective measures

22. In his application, Kordić sought additional protective measures in relation to six Defence witnesses whom he called at trial. During the Status Conference of 7 February 2003, the at that time acting Pre-Appeal Judge drew the attention of counsel for Kordić to the fact that the reasons put forward by him in support of further protective measures for these witnesses did not appear on their face to warrant further protective measures. In his letter of 10 February, the Senior Legal Officer of the Appeals Chamber drew the attention of counsel to the fact that any fears expressed by witnesses themselves that they may be in danger or at risk are not in themselves sufficient to establish any real likelihood that they may in fact be in danger or at risk. Kordić was invited to make further submissions upon this matter. In response to this letter, Kordić said that he had nothing to add to his submissions and that the views of the affected witnesses had been accurately recited in his previous submission. The Prosecution informed the Appeals Chamber orally that it would make no further submission upon this matter.

23. The Appeals Chamber is not satisfied that Kordić has shown that additional protective measures for the six Defence witnesses are warranted. As was made clear to Kordić by the at that time acting Pre-Appeal Judge at the Status Conference, and by the letter of the Senior Legal Officer, protective measures will only be granted where the victim or witness "may be in danger or risk". This has always been interpreted as requiring something more than the mere expression of fears by that person; some objective basis is required to demonstrate a real likelihood that such person may be in danger or risk.²⁵ As Kordić has failed to demonstrate that there is an objective basis to the

²⁴ Motion, par 22.

²⁵ *Prosecutor v Galić*, IT-98-29-T, Confidential Decision on the Defence's Request for Protective Measures, 18 Nov 2002 at p 5; *Prosecutor v Brdanin & Talić*, IT-99-36-PT, Decision on Motion by Prosecution for Protective Measures, 3 July 2000, par 26; *Prosecutor v Simić et al*, IT-95-9-T, Order for Protective Measures, 4 Dec 2001, p 2; Confidential Order for Protective Measures, 24 June 2002, p 3; *Prosecutor v Milošević*, IT-02-54-T, First

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fears of the six defence witnesses no additional measures to those ordered by the Trial Chamber are justified and the application has to be refused.

Disposition

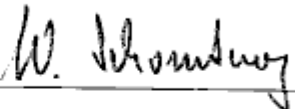
24. The Appeals Chamber makes the following orders:

- (i) **GRANTS** the extension of pages sought by the Prosecution in relation to its Motion and accepts the Motion as having been validly filed.
- (ii) **GRANTS** the extension of time sought by the Prosecution and **STAYS** the Original Decision for 14 days within which time the Prosecution must contact its Rule 70(C) providers. Once the Prosecution has obtained the consent of the providers of Rule 70(C) material, it must file a notice concerning the conditions, if any, under which the providers have agreed to the material being disclosed to the Applicants. The Appeals Chamber regards as premature the prosecution's request for guidance as to the procedure to be followed in case such access is refused by the provider. Further orders shall be made in case the providers oppose such access being granted or if they set conditions thereto.
- (iii) **GRANTS** the protective measures sought by the Prosecution and **ORDERS** the Prosecution to make detailed submissions in writing as to what redactions they consider should be made to the material being disclosed within 14 days of this decision. Once they have reviewed that material and determined that they need all or part of it in a non-redacted form, the applicants must identify those parts of the material which they claim may assist them in the conduct of their defence and which is not otherwise available to them and file a motion by which they seek to justify the removal of the redaction. Should the need arise, consideration will then be given to additional protective measures.
- (iv) Subject to detailed submissions of the prosecution, **ORDERS** the Registry to give access to the Applicants to the material mentioned above under the conditions set out in the present Decision and the Original Order.
- (v) Kordić is to contact his Rule 70(C) providers. Once he has obtained the consent of the providers of Rule 70(C) material, he must file a notice concerning the conditions, if any, under which the providers have agreed to the material being disclosed to the Applicants.
- (vi) The Appeals Chamber **REJECTS** Kordić's application for additional protective measures for the six defence witnesses he called at trial.

(vi) The Appeals Chamber **REJECTS** the Prosecution's requests for "clarification" concerning the responsibility to carry out the redactions in future applications as premature.²⁶

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

Dated this 13th day of October 2003,
At The Hague,
The Netherlands.



Judge Wolfgang Schomburg
Presiding

[Seal of the Tribunal]

²⁶ Decision on Protective Measures for Trial Related Protective Measures (Bosnia), 30 July 2002, par 11. The Appeals Chamber in the *Blaškić* Decision likewise refused "to promulgate a practice to be applicable in all cases", at par 29.

