



**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: 24 June 2003  
Original: English**

**IN THE APPEALS CHAMBER**

**Before: Judge Theodor Meron, Presiding  
Judge Fausto Pocar  
Judge David Hunt  
Judge Mehmet Güney  
Judge Inés Weinberg de Roca**

**Registrar: Mr Hans Holthuis**

**Decision of: 24 June 2003**

**PROSECUTOR**

v

**Dario KORDIĆ & Mario ČERKEZ**

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**DECISION ON APPLICATION BY PROSECUTION FOR LEAVE TO FILE  
FURTHER RESPONSE AND FOR EXTENSIONS OF TIME AND PAGE LIMITS**

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**Counsel for the Prosecutor:**

**Mr Norman Farrell**

**Counsel for the Defence:**

**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**

1. The appellant Mario Čerkez (“Čerkez”) has sought to have admitted, pursuant to Rule 115 of the Rules of Procedure and Evidence (“Rules”), additional evidence in his appeal against conviction.<sup>1</sup> Čerkez, however, failed to make any reference in his Rule 115 Motion to the evidence at the trial or to the relevant passages in the Trial Chamber’s Judgment to which his additional evidence must be directed,<sup>2</sup> leaving it to the prosecution to do so in its Response.<sup>3</sup> This, in turn, led to a successful application by Čerkez for an extension of time and page limits in order to deal with the evidence and with the Trial Chamber’s Judgment in a reply.<sup>4</sup> When granting that relief, the Pre-Appeal Judge stated that, if the reply to be filed by Čerkez raised issues in relation to that material which went beyond the prosecution’s Response, the prosecution would be granted leave to file a further response.<sup>5</sup>

2. Now that Čerkez has filed his Reply,<sup>6</sup> the prosecution asserts that it does indeed go beyond the Response, and it seeks leave to file a further response to the Reply plus extensions of time and page limits in relation to that further response.<sup>7</sup> In its Motion, the prosecution states that it was not possible for it to list, in the space of that Motion or in the time then available, all of the issues to which a further response is necessary, but offered “an indication of the types of issues that arise” for the consideration of the Appeals Chamber.<sup>8</sup> This is not a satisfactory approach. Neither the Rules nor the practice of the Tribunal provide a party with a right to respond to a reply,<sup>9</sup> although leave to do so may be granted.<sup>10</sup> Leave will usually be granted to file a further response where the reply raises a new issue.<sup>11</sup> But the party seeking to file a further

<sup>1</sup> Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115, 7 Apr 2003; Supplemental Motion for the Admittance of One Document as Additional Evidence on Appeal, 9 Apr 2003 (collectively “Rule 115 Motion”).

<sup>2</sup> Rule 115(A) requires that the motion for the admission of additional evidence “clearly identify with precision the specific finding of fact made by the Trial Chamber to which the additional evidence is directed”.

<sup>3</sup> Response to the Motions to Admit Additional Evidence Filed by Mario Čerkez on 7 April 2003 and 9 April 2003, 12 May 2003 (“Response”).

<sup>4</sup> Decision on Application by Čerkez for Leave to Reply and Other Relief, 16 May 2003 (“Decision”), par 9.

<sup>5</sup> Decision, par 8.

<sup>6</sup> Čerkez’s Reply in Support of his Motions to Admit Additional Evidence Pursuant to Rule 115, 6 June 2003 (“Reply”).

<sup>7</sup> Prosecution’s Request for Leave to File a Further Response to Čerkez’s Rule 115 Motions, 13 June 2003 (“Motion”).

<sup>8</sup> Motion, pars 4 *et seq.*

<sup>9</sup> *Prosecutor v Šainović & Ojdanić*, IT-99-37-AR65, Decision on Provisional Release, 30 Oct 2002 (“Šainović Decision”), par 5.

<sup>10</sup> Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal (IT/155 Rev 1), 7 Mar 2002 (“Practice Direction IT/155”), par 16.

<sup>11</sup> Šainović Decision, par 5. See also *Prosecutor v Strugar et al*, IT-01-42-AR72, Decision on “Prosecution’s Application for Leave to File a Reply to the Defence’s Reply to the Prosecution’s Response to the Defence’s Brief on Interlocutory Appeal on Jurisdiction”, 12 Sept 2002, p 2.

response on that basis is required to identify the specific new issues to which it has not already had the opportunity to respond, and that party will not be given leave to file a further response generally. The prosecution has, however, since stated that it will restrict its application to the issues already listed in its Motion.<sup>12</sup> To these issues the Appeals Chamber will return.

3. Even before this latest filing was received, Čerkez objected to leave being granted.<sup>13</sup> Although he concedes in his Objection that he has “arguably” raised some new arguments and that some issues have been argued in a more detailed manner, he says that this was only “to the extent necessary to efficiently argue the issues” raised by the prosecution’s Response, or they were within the scope and reason of his Rule 115 Motion.<sup>14</sup> In the view of the Appeals Chamber, it is unnecessary in this Decision to go into the detail of these arguments put forward by Čerkez. The whole situation arose because of the failure by Čerkez to deal with these matters in his Rule 115 Motion, where it was necessary for him to do so.<sup>15</sup> The extension of time and page limits granted to Čerkez in order to permit him to overcome his own failure was conditioned upon the prosecution being given the opportunity it should have been given in its Response to deal with those matters, by granting leave to file a further response if Čerkez went beyond the original Response. Čerkez has no right to deny the prosecution that opportunity, and that opportunity must be available without having to decide minute and legally insignificant distinctions as to whether the arguments are “arguably” new or merely more detailed than before or already within the scope of his Rule 115 Motion. The prosecution must be placed in as good a position as it would have been had these matters been put forward in the Rule 115 Motion.

4. The Appeals Chamber has considered the submissions made by the prosecution in its Motion, by Čerkez in his Objection and by the prosecution in its Reply to Objection, and, without discussing them, it is satisfied that the prosecution is entitled to respond further to the following new issues raised by Čerkez in his Reply:

(a) the issue of military necessity – pars 49-56 of the Reply;<sup>16</sup>

<sup>12</sup> Prosecution’s Reply Regarding Request for Leave to File a Further Response to Čerkez’s Rule 115 Motions, 23 June 2003 (“Reply to Objection”), par 9.

<sup>13</sup> Mario Čerkez’s Response to Prosecution’s Request for Leave to File a Further Response to Čerkez’s Rule 115 Motions, 17 June 2003 (“Objection”).

<sup>14</sup> Objection, par 3.

<sup>15</sup> *Prosecutor v Kupreškić et al*, IT-95-16-A, Decision on the Admission of Additional Evidence Following Hearing of 30 March 2001, 11 Apr 2001, par 8.

<sup>16</sup> Motion, par 5

- (b) the relevance of the trial record for the purposes of Rule 115 proceedings where the Trial Judgment does not refer to that trial evidence – pars 56-60, 70(o), 70(1)(o) of the Reply;<sup>17</sup>
- (c) the admissibility of the ABiH documents on the basis that the documents are the “best evidence” available – pars 32, 40, 61 and 67 of the Reply;<sup>18</sup>
- (d) the arguments put in relation to the witness Merdan – par 70(qq) of the Reply;<sup>19</sup>
- (e) the arguments put in relation to the meaning, relevance and credibility of the ABiH documents – pars 70(r) and 70(aa) of the Reply;<sup>20</sup>
- (f) the relevance of the probative value of evidence to its admissibility as additional evidence on appeal, and in particular the admission of the undated map – par 70(z) of the Reply;<sup>21</sup>
- (g) the relevance of any discrepancies between the conduct of the prosecution’s case at trial and the arguments made in the prosecution’s Response – pars 5, 25-29, 70(jj), 70(ll) and 73 of the Reply;<sup>22</sup>
- (h) the reasons for the inability of Čerkez to testify at trial about matters arising from the ABiH documents and for his inability to call witnesses from the HVO, such as General Blaškić, to give evidence – pars 70(b) and (c);<sup>23</sup>
- (i) the argument that, if the additional evidence tendered is in conflict with the evidence at the trial, the additional evidence must be admitted on the basis that it may have led to a different factual finding – par 108 of the Reply;<sup>24</sup> and
- (j) whether Rule 115 is an appropriate mechanism for the Appeals Chamber to remedy the prosecution’s alleged violations of Rule 68, even if the appellant fails to meet the burden placed upon him by Rule 115 – par 94 of the Reply.<sup>25</sup>

The Appeals Chamber is *not* satisfied that the issue as to whether the additional evidence must be considered in the light of the evidence at the trial, also raised by the prosecution,<sup>26</sup> is a new issue, and it refuses leave to the prosecution to respond further in relation to that issue.

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<sup>17</sup> *Ibid*, par 6.

<sup>18</sup> *Ibid*, par 7.

<sup>19</sup> *Ibid*, par 8.

<sup>20</sup> *Ibid*, pars 9-10.

<sup>21</sup> *Ibid*, par 11.

<sup>22</sup> *Ibid*, par 12.

<sup>23</sup> *Ibid*, par 13.

<sup>24</sup> *Ibid*, par 15.

<sup>25</sup> *Ibid*, par 16.

<sup>26</sup> *Ibid*, par 14.

5. This leads to the second matter to be decided, the extension of time sought by the prosecution in which to file its further response. It is clear from the description of the new issues raised that some extension of the usual ten days permitted would be appropriate.<sup>27</sup> The prosecution has, however, stated at the forefront of its application for an extension of time which would allow it twenty-eight days from the date of its Motion to file a further response the following:<sup>28</sup>

The Prosecution has calculated this timeframe taking into account the numerous other obligations of this Office in other cases currently on appeal before the Chamber. In particular, within the coming weeks staff working on this appeal will also be working on: appeal briefs in the *Prosecutor v Martinović & Naletilić* case; appeal briefs in the *Prosecutor v Ntakirutimana & Ntakirutimana* case; the Prosecution's response to the fourth additional evidence motion filed in *Prosecutor v Blaškić*; as well as numerous other matters calling for attention in the present appeal and other appeals and ongoing Rule 68 reviews. In addition, the Senior Appeals Counsel responsible for this appeal was absent, only returning from working on ICTR appeals in Arusha, Tanzania on 13 June 2003.

Reliance upon the workload of the Appeals Unit of the Office of the Prosecutor in support of applications for extensions of time is only a recent phenomenon, and usually it has been put as a minor factor. This appears to have been the first time that it has been put at the forefront of the application.

6. The Appeals Chamber acknowledges the difficulties facing those within the Appeals Unit of the Office of the Prosecutor following the very substantial increase in its workload this year (which mirrors the increase in the workload of the Appeals Chamber itself). However, if there has been a failure of that Office to provide greater resources to the Appeals Unit as a result of that increase, it is for that Office to repair the omission. A heavy workload in other cases and inadequate resources to deal with them all is not an appropriate basis for seeking an extension of time. Counsel for the prosecution in an appeal is expected to be provided by the Office of the Prosecutor with the resources necessary to carry the workload in the particular case, and his or her workload in other cases will ordinarily be rejected as the basis for an extension of time, just as it has ordinarily been rejected for counsel for the accused. Where there are special circumstances personal to counsel in relation to the particular case (be it for the prosecution or the accused), the Appeals Chamber will always

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<sup>27</sup> Practice Direction IT/155, par 11.

<sup>28</sup> Motion, par 18.

consider those circumstances in determining whether an extension of time will be granted. However, a systemic failure by the Office of the Prosecutor to provide adequate resources for its counsel to do the work which is necessary in the particular case will not be considered.

7. In the present case, the prosecution has already had eleven days since filing its motion, and the Appeals Chamber is prepared to grant it only ten further days.

8. The final matter raised is the extension in the number of pages to be permitted beyond the ten pages allowed for a response.<sup>29</sup> Rule 115 proceedings almost inevitably require greater than the ten pages permitted for any of the filings related to it.<sup>30</sup> The present Rule 115 proceedings certainly demonstrate that fact. Čerkez was permitted to file his Rule 115 Motion consisting of ninety-three pages (excluding the additional material sought to be admitted).<sup>31</sup> The prosecution obtained leave to file a response of up to 115 pages,<sup>32</sup> although the document filed consisted of only 105 pages. The length of the Response filed was fully appropriate to the issues with which the prosecution was obliged to deal by reason of the failure of Čerkez to deal with them in his Rule 115 Motion. Because of his need to repair these omissions,<sup>33</sup> Čerkez was permitted to file a reply of eighty pages.<sup>34</sup> The prosecution suggests that the reply exceeded that number,<sup>35</sup> but that is not an issue to be determined in this application. The prosecution seeks permission to file a further response of not more than forty pages. The Appeals Chamber is satisfied that the request is not unreasonable in view of the number of new issues raised by Čerkez.

### Disposition

9. The Appeals Chamber grants leave to the prosecution to file a further response, consisting of not more than forty pages, on or before 4 July 2003. Čerkez may file a reply to that further response, if he wishes to do so, within seven days of the filing of that further response.

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<sup>29</sup> Practice Direction on the Length of Briefs and Motions (IT/184 Rev 1), 5 Mar 2002 (“Practice Direction IT/184”), par 5.

<sup>30</sup> Practice Direction IT/184, par 5.

<sup>31</sup> Order on Application by Mario Čerkez to Exceed Page Limit, 4 Apr 2003, p 2.

<sup>32</sup> Order on Extension of Pages, 8 May 2003, p 3.

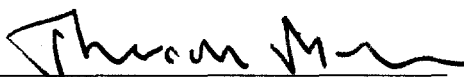
<sup>33</sup> Paragraph 1, *supra*.

<sup>34</sup> Decision on Application by Čerkez for Extensions of Time and Page Limits, 29 May 2003, par 4.

<sup>35</sup> Motion, par 19.

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

Dated this 24<sup>th</sup> day of June 2003,  
At The Hague,  
The Netherlands.



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Judge Theodor Meron  
Presiding Judge

**[Seal of the Tribunal]**