

IT-01-47-AR73
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23 APRIL 2002

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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 the Former Yugoslavia
Since 1991**

Case: IT-01-47-AR73

Date: 23 April 2002

Original: English

IN THE APPEALS CHAMBER

**Before: Judge Mohamed Shahabuddeen, Presiding
Judge Mehmet Güney
Judge Asoka de Zoysa Gunawardana
Judge Fausto Pocar
Judge Theodor Meron**

Registrar: Mr. Hans Holthuis

Decision of: 23 April 2002

PROSECUTOR

v

**ENVER HADŽIHASANOVIĆ
MEHMED ALAGIĆ
AMIR KUBURA**

**DECISION ON APPEAL FROM REFUSAL TO GRANT ACCESS TO CONFIDENTIAL
MATERIAL IN ANOTHER CASE**

**Counsel for the Prosecutor:
Mr. Norman Farrell**

Counsel for the Defence:

**Ms. Edina Rešidović and Mr. Stéphane Bourgon for Enver Hadžihasanović
Ms. Vasvija Vidović and Mr. John Jones for Mehmed Alagić
Mr. Fahrudin Ibrišimović and Mr. Rodney Dixon for Amir Kubura**

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 (“the International Tribunal”),

NOTING 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*” (“the Impugned Decision”) issued on 25 September 2001, which rejected the Defence’s request for access to certain public and non-public material in the *Kupreskić* case;

NOTING the “Joint Application for Leave to Appeal from the Bench of the Tribunal” filed by the Defence on 2 October 2001;

NOTING the “Prosecution Response to the ‘Joint Application for Leave to Appeal from the Bench of the Tribunal’ Filed by Enver Hadžihasanović, Mehmed Alagić and Amir Kubura on 2 October 2001”, filed on 12 October 2001;

NOTING that, in its “Decision on Application for Leave to Appeal” of 1 February 2002, a Bench of the Appeals Chamber found that “the issue in the proposed appeal is of general importance to proceedings before the Tribunal because it concerns the question how to find a balance between the right of a party to have access to material to prepare its case and the need to guarantee the protection of witnesses” and therefore granted leave to the Defence to file an interlocutory appeal against the Impugned Decision;

BEING SEISED OF a “Joint Appellant’s Brief for Enver Hadžihasanović, Mehmed Alagić and Amir Kubura Challenging the Decision of the President rejecting the Motion of the Defence Requesting Access to All Confidential Material, Transcripts and Exhibits from the Prosecutor v. Kupreskić et al”, filed on 11 February 2002, in which the Appellants seek a declaratory order stating the proper test for granting an accused access to confidential material, granting the Appellants access to all confidential material, transcripts and exhibits from the *Prosecutor v. Kupreskić et al*, determining the appropriate measures to be imposed and ordering the Registrar to provide the Appellants with access to all confidential material, transcripts and exhibits from the *Prosecutor v. Kupreskić et al*;

NOTING the “Prosecution’s Response to the ‘Joint Appellant’s Brief for Enver Hadžihanović, Mehmed Alagić and Amir Kubura Challenging the Decision of the President rejecting the Motion of the Defence Requesting Access to All Confidential Material, Transcripts and Exhibits from the *Prosecutor v. Kupreškić et al*”, filed on 20 February 2002;

NOTING the “Joint Appellant’s Reply to the Prosecution’s Response to the ‘Joint Appellant’s Brief for Enver Hadžihanović, Mehmed Alagić and Amir Kubura Challenging the Decision of the President rejecting the Motion of the Defence Requesting Access to All Confidential Material, Transcripts and Exhibits from the *Prosecutor v. Kupreškić et al Case No IT-95-16-T*”, filed on 26 February 2002;

NOTING that, according to the Impugned Decision, it is insufficient to assert the relevance of confidential documents from another case, but that it is also necessary to provide detailed justification as to why disclosure of each document requested is necessary for the preparation of the moving party’s case;

CONSIDERING that a party may not engage in a fishing expedition, but that, provided it does not do so, it may seek access to confidential material in another case if it is able to describe the documents sought by their general nature as clearly as possible even though it cannot describe them in detail, and if it can show that such access is likely to assist his case materially;

CONSIDERING that, in view of the geographical, temporal and substantive overlap between the present case and the *Kupreškić* case, the material sought is likely to be of material assistance to the Defence’s case or, at least, that there is a good chance that it may give the Defence for Enver Hadžihanović, Mehmed Alagić and Amir Kubura such assistance;

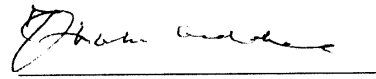
CONSIDERING that the Applicants have been able to describe the documents sought by their general nature and have shown that access to these documents is likely to assist them in their case materially;

FINDING that, in the circumstances of this case, the President erred in law when he refused to grant access to the material sought;

CONSIDERING that the competence of the Appeals Chamber over the present appeal extends both to the ordering of protective measures and to the remission of the case to the President for him to order such measures, and that, in the circumstances of the case, it is better to proceed in the latter manner;

HEREBY GRANTS the motion and remits the case to the President for him to provide for the requested access and to indicate any appropriate protective measures;

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



Mohamed Shahabuddeen
Presiding

Dated this twenty-third day of April 2002,
At The Hague,
The Netherlands.