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SCSL-03-01-T  
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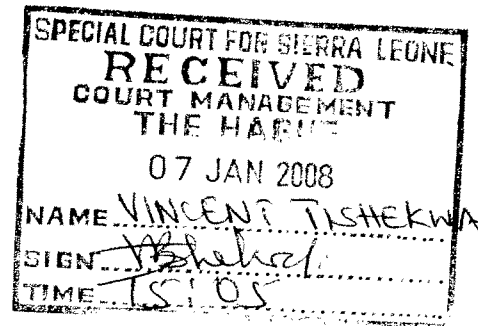
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**SPECIAL COURT FOR SIERRA LEONE**  
OFFICE OF THE PROSECUTOR  
Freetown – Sierra Leone

Before: Justice Julia Sebutinde, Presiding  
Justice Richard Lussick  
Justice Teresa Doherty  
Justice El Hadji Malick Sow, Alternate Judge

Registrar: Mr. Herman von Hebel

Date filed: 7 January 2008



**THE PROSECUTOR**

**Against**

**Charles Ghankay Taylor**

Case No. SCSL-03-01-T

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**PUBLIC WITH *EX PARTE* ANNEX**

**PROSECUTION RESPONSE TO “DEFENCE MOTION PURSUANT TO RULE 75(G) TO MODIFY SESAY DEFENCE PROTECTIVE MEASURES DECISION OF 30 NOVEMBER 2006 FOR ACCESS TO CLOSED SESSION DEFENCE WITNESS TESTIMONY AND LIMITED DISCLOSURE OF DEFENCE WITNESS NAMES AND RELATED EXCULPATORY MATERIAL”**

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Office of the Prosecutor:  
Ms. Brenda J. Hollis  
Ms. Leigh Lawrie

Counsel for the Accused:  
Mr. Courtenay Griffiths Q.C.  
Mr. Terry Munyard  
Mr. Andrew Cayley  
Mr. Morris Anyah

## I. INTRODUCTION

1. Pursuant to Rule 73 of the Rules of Procedure and Evidence (“**Rules**”) the Prosecution files this response to the Defence motion seeking modification of the protective measures orders granted to witnesses for the first accused in the RUF trial in order to obtain access to closed session defence witness testimony and limited disclosure of defence witness names and related potentially exculpatory material.<sup>1</sup>
2. The Motion specifically seeks a modification of the Sesay Protective Measures Decision of 30 November 2006<sup>2</sup> in order to allow the Defence team in the current proceedings to:
  - (i) receive service of copies of the unredacted transcripts from the Sesay Defence case by Court Management on an on-going basis;
  - (ii) disclosure of the names and identifying data of the witnesses subject to the Sesay Protective Measures Decision; and
  - (iii) disclosure of statements taken by the Sesay Defence team during the course of investigations and in preparation for trial.
3. The Prosecution does not oppose a modification of the Sesay Protective Measures Decision in order to permit the Defence to receive redacted copies of the closed session transcripts from the Sesay Defence case if the Defence team are:
  - (i) made subject to the protective measures set out in paragraph 15 below;
  - (ii) only served with those parts of the closed session transcripts from the Sesay Defence case which consist of Sesay Defence witness testimony and which have been redacted to remove:
    - (a) the names and identifying data of the witness testifying in closed session in the Sesay Defence case; and
    - (b) any information covered by protective measures orders imposed by decisions other than the Sesay Protective Measures Decision, including decisions in the current proceedings which

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<sup>1</sup> *Prosecutor v. Taylor*, SCSL-03-01-T-377, “Public Defence Motion Pursuant to Rule 75(G) to Modify Sesay Defence Protective Measures Decision of 30 November 2006 for Access to Closed Session Defence Witness Testimony and Limited Disclosure of Defence Witness Names and Related Exculpatory Material”, 14 December 2007 (“**Motion**”).

<sup>2</sup> *Prosecutor v. Sesay et al.*, SCSL-04-15-T-668, “Decision on Sesay Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure”, 30 November 2006 (“**Sesay Protective Measures Decision**”).

would prevent the disclosure of the names of Prosecution witnesses.

4. The Prosecution does oppose any modification to the Sesay Protective Measures Decision which would permit the Defence to receive: (i) disclosure of the names and identifying data of the witnesses subject to the Sesay Protective Measures Decision save as described in paragraph 15 below; and (ii) disclosure of statements taken by the Sesay Defence team during the course of investigations and in preparation for trial.

## II. SUBMISSIONS

### Acknowledgment of nexus between RUF and Taylor Case

5. The Prosecution notes the jurisprudence of the *Ad Hoc Tribunals* concerning access to non-public material in one set of proceedings by parties to another. This jurisprudence states that in seeking access to such material, “a party may not engage in a fishing expedition but must establish that (1) the material sought has been identified or described by its general nature as clearly as possible; and (2) a legitimate forensic purpose for such access has been shown.”<sup>3</sup> The relevance of the material sought may be determined by showing the existence of a nexus between the applicant’s case and the case from which the material is sought, and it is sufficient if the material sought is “likely” to be of material assistance to the applicant’s case or, at least, there is “a good chance” that it may give them such assistance.<sup>4</sup> A nexus such as the fact that the crimes charged in one set of proceedings are geographically and temporally related to crimes charged in another set of proceedings has been found sufficient to establish relevance.<sup>5</sup>
6. In light of this jurisprudence, the Prosecution notes the Defence position that “the transcripts, exhibits, and pre-trial statements from the Sesay Defence case contain exculpatory material that may be of ‘material assistance to its case’”.<sup>6</sup> The Prosecution also acknowledges the geographical and temporal nexus of

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<sup>3</sup> *Prosecutor v. Prlić et al.*, IT-04-74-PT, “Decision on Defence’s Motion for Access to Confidential Material”, 9 March 2005, page 2 (“**Prlić Decision**”).

<sup>4</sup> *Ibid*, page 2-3.

<sup>5</sup> *Prosecutor v. Milosović et al.*, IT-02-54-T & IT-03-69-PT, “Decision on Motion of Defence of Jovica Stanisic for Variance of Protective Measures Pursuant to Rule 75(G)(i)”, 11 March 2005, page 3.

<sup>6</sup> Motion, para. 2.

the crimes charged in the RUF Indictment<sup>7</sup> with those in the Taylor Indictment<sup>8</sup> and also the fact that the Accused and Issa Sesay are accused of being members of the same common plan, design or purpose, or joint criminal enterprise. Accordingly, it would appear that the criteria have been established for conditional access to the requested closed session transcripts.

Access to be limited to redacted sworn witness testimony

7. As stated above, fishing expeditions are not permitted.<sup>9</sup> Accordingly, parties seeking access to non-public material are required to justify requests for access on the basis of materiality and relevance. If materiality and relevance are established, then:

“[i]t is ... within the discretion of the [...] Chamber to strike a balance between the right of a party to have access to material to prepare his case and guaranteeing the protection of witnesses and the integrity of the confidential information.”<sup>10</sup>

This balance between the rights of the accused and the rights of witnesses is therefore an important consideration in the context of such requests.

8. Requests which stretch to witness names and pre-trial statements in addition to sworn witness testimony are excessive, particularly when it is not clear whether a witness will, in the end, agree to testify; and does not strike the correct balance between the rights of accused and witnesses. The Prosecution notes that Lead Counsel for the Sesay Defence team does not oppose the Motion. However, as stated above and also in Rule 75(A), the right to privacy of witnesses and victims must also be considered. If the Defence are seeking access to material which they consider *may* potentially be exculpatory with a view then to using such material to assist in preparing their defence, then material which is placed on the court record should be sufficient. The Defence is provided with the evidence of witnesses who are willing to testify but are

<sup>7</sup> *Prosecutor v. Sesay et al.*, SCSL-04-15-T-619, “Corrected Amended Consolidated Indictment”, 2 August 2006.

<sup>8</sup> *Prosecutor v. Taylor*, SCSL-03-01-T-263, “Prosecution’s Second Amended Indictment”, 29 May 2007.

<sup>9</sup> See also *Prosecutor v. Brđjanin*, IT-99-36-T, “Decision on Motion by Momcilo Gruban for Access to Confidential Materials in the Brđjanin and Talić Case”, 1 April 2003 in which the ICTY Chamber noted that fishing expeditions are not permitted and held that the defence had not identified the documents sought or described them by their general nature.

<sup>10</sup> *Prosecutor v. Blaskić*, IT-95-14-A, “Decision on Appellants Dario Kordić and Mario Čerkez’s Request for Assistance of the Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post Appeal Pleadings and Hearing Transcripts filed in the Prosecutor v. Blaskić”, 16 May 2002, para. 29 (“**Blaskić Decision**”).

not provided with the evidence of those who are not. Anything more would permit the Sesay Defence investigative materials and sources to be simply opened up to the Taylor Defence without consideration for the privacy of witnesses.<sup>11</sup> Such an unrestricted approach places the rights of the accused above those of the witness.

9. In relation to the disclosure of pre-trial statements, the Prosecution notes the decision made in the *Karemera* case where the defence was granted access to prosecution witnesses' pre-trial statements. In this case it was found that the prosecutor had "not refuted the possibility that the requested materials contain[ed] exculpatory evidence or affect[ed] the credibility of prosecution witnesses" and, therefore, had "not discharged his burden to justify non-disclosure."<sup>12</sup> This decision can be distinguished as, in the instant case, the Defence is not seeking access to prosecution pre-trial statements which may require to be disclosed by the Prosecution to fulfil its disclosure obligations.
10. Access should accordingly be restricted to the first category of material requested by the Defence, namely copies of closed session transcripts. However such material should also be redacted to remove the names or other identifying data of the protected Sesay Defence witness and any other protected witness referred to therein. Further, and as noted below, restricting access to such transcripts will mitigate against any risk of compromising existing protective measures orders issued in this and other cases before the Special Court for Sierra Leone ("SCSL").<sup>13</sup>
11. The Prosecution also refers to its short three paragraphs in its *ex parte* submission set out in Annex A in support of its argument that disclosure should be limited to redacted sworn witness testimony.
12. Notwithstanding the foregoing, should the Chamber decide to grant the Defence access to statements taken by the Sesay Defence team, the Prosecution requests that such statements should be disclosed in redacted

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<sup>11</sup> Indeed, the Taylor Defence could proceed to contact any Sesay Defence witness who provided contact details but who had not yet testified in order to establish whether that witness had material of assistance to the Taylor Defence team.

<sup>12</sup> *Prosecutor v. Karemera et al.*, ICTR-98-44-PT, "Decision on Juvenal Kajelijeli's Motion for Disclosure of Open and Closed Session Testimony, Exhibits and Pre-Trial Statements of Prosecution Witnesses GBU and GFA", 24 November 2004.

<sup>13</sup> Due to the operation of Rule 75(F)(i) witnesses in the RUF trial may be subject to protective measures ordered in other SCSL proceedings.

form. The Defence at this stage do not need to know the identifying details of the specified witnesses in order to determine whether the material sought will assist them in the preparation of their defence.<sup>14</sup> Access to witnesses' details should only be given with the leave of the Court and in accordance with the procedure set out in paragraph 15 below. Further, no disclosure should be made of additional material in the possession of the Sesay Defence team which is the subject of protective measures orders imposed in the RUF trial at the request of the Prosecution, in the AFRC trial, or in the current proceedings. This would include names of suspected or purported Prosecution witnesses in the RUF case and this case. Such information and/or material contained in statements taken by the Sesay Defence team should be redacted before disclosure.

Conditions of Access to Non-Public Material

13. In addition, any access permitted by the Trial Chamber to the requested non-public material in the Sesay Defence case should only be granted subject to conditions which give effect to and do not compromise existing protective measures orders. Such conditions are a normal feature of the *Ad Hoc Tribunal* decisions<sup>15</sup>. In addition to preserving the effect of the protective measures orders, the Defence at this stage do not require the details of witnesses in order to determine whether the material sought will in fact assist them in the preparation of their defence.<sup>16</sup>
14. In its Motion, the Defence incorrectly suggest that, should it be granted access to the requested non-public material, such access will not be subject to conditions, stating rather that the Defence "agrees to voluntarily comply" with one of the protective orders "whenever possible".<sup>17</sup> Defence compliance with protective measures orders in order to gain conditional access to certain non-

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<sup>14</sup> See *Prosecutor v. Rajić*, IT-95-12-PT, "Decision on Joint Defence Motion for Access to Confidential Supporting Material, Filings, Transcripts and Exhibits in the Rajić Case", 15 September 2003 ("**Rajić Case**") in which it was held that the prosecution only provide witness details to the defence if it was found to be justified following a consideration of the material by the defence.

<sup>15</sup> See for example *Blaskić* Decision, *Prosecutor v. Milošević et al.*, IT-02-54-T, "Decision on Defence Motion filed by the Defence of Franko Simatović (IT-03-69-PT) for Access to Transcripts and Documents", 20 October 2003 and *Prosecutor v. Bagosora*, ICTR-98-41-T, "Decision on Zigiranyirazo Motion for Disclosure of Closed Session Testimony of DM-190", 16 May 2006.

<sup>16</sup> *Rajić* Case, page 2.

<sup>17</sup> Motion, para. 16.

public material should not be voluntary but mandatory. To accept otherwise would compromise the very purpose of the Sesay Protective Measures Decision as well as of the relevant protective measures orders issued in this case and other SCSL cases. For example, the Defence position would give it the discretion, in the case of access to pre-trial statements, to discover the identity of a witness well before the 42 day period imposed on the Prosecution and the other accused in the RUF case. It would also give the Defence the discretion to directly contact individuals whose names it was given without going through the Prosecution or WVS to seek prior approval for, and conditions on, such contact. Therefore, any access to non-public material must be in conformity with all relevant protective measures except those which prohibit such access. Of course, limiting access to redacted closed session testimony only would avoid the dichotomy of the Defence being in possession of information in advance of the RUF Prosecution and the Kallon and Gbao defence teams, and would strike the correct balance between two competing and important interests.

15. Accordingly, and in conformity with conditions generally imposed at the ICTY and ICTR,<sup>18</sup> any access granted to the Defence to non-public Sesay Defence material should be subject to all existing protective measures, except those preventing access to the information, including the following:
- (i) Absent the express leave of this Chamber, based on a sufficient showing that disclosure and/or contact with the witness may materially assist the Accused's case and that such assistance is not otherwise reasonably available to it, the Defence shall not:
    - (a) be entitled to disclosure of the name or identifying data of the witness subject to any protective measures order issued by the SCSL including the Sesay Protective Measures Decision;
    - (b) disclose to any third party including the public in general or to the media any non-public information or documentary material including without limitation testimony and/or exhibits received

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<sup>18</sup> See for example *Prosecutor v. Nahimana et al.*, ICTR-99-52-A, "Decision on 'Joseph Nzirorera's Motion for Access to Appeal Briefs'", 9 September 2005; page 6; *Blaskić* Decision, page 12, Order (b)(iii); *Prosecutor v. Bagosora*, ICTR-98-41-T, "Decision on Nzirorera Request for Access to Protected Material", 19 May 2006, page 3; and *Prlić* Decision, page 4, Order 6.

- from the Sesay Defence team, except as permitted under the terms of any existing protective measures orders;
- (c) disclose to any third party, the name of any protected witness;
  - (d) contact any witness whose identity is subject to protective measures save as provided below;
  - (e) shall not disclose the whereabouts or other contact information of any Sesay Defence witness to any third party; and
- (ii) where leave is granted pursuant to sub-clause (i) above to contact any witness whose identity is subject to protective measures, such contact be in accordance with the procedure laid out in paragraph 25(j) of the Sesay Protective Measures Decision; and.
  - (iii) any permitted disclosure of non-public material or information should be made by the Sesay Defence team to the Defence and, where leave is granted as above, by the Defence to a third party subject always to notice of the nature of the above applicable protective measures.<sup>19</sup>

Service of Closed Session Testimony

16. The Defence request service of copies of the unredacted transcripts from the Sesay Defence case by Court Management on an ongoing basis.<sup>20</sup> This request is overly broad as such daily trial transcripts may contain sensitive information relating to case administration and conduct.<sup>21</sup> This material is not relevant to the Taylor Defence case. Instead, service should be restricted to those parts of the transcripts from the Sesay Defence case which consist of Sesay Defence witness testimony. Further, in the course of closed session testimony, it has been noted that the names of protected Prosecution witnesses, previously referred to by their pseudonym, are sometimes referred to. As some Prosecution witnesses in the RUF trial will also be Prosecution witnesses in the current proceedings, these names are still protected in the context of the current proceedings until such time as disclosure of identity must be provided

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<sup>19</sup> Such notification would be similar to that required to be given by the Prosecution under Rule 75(F)(ii).

<sup>20</sup> Motion, para. 20(A).

<sup>21</sup> Sensitive issues which might be addressed during trial are complaints regarding the conduct of counsel or complaints concerning witness protection.



the Defence. Accordingly, this protected material should also be redacted from any transcript to be provided to the Defence.

### III. CONCLUSION

17. As stated above, the Prosecution does not oppose a modification to the Sesay Protective Measures Decision, provided that:
- (i) such modification only permits the Defence access to redacted copies of closed session transcripts from the Sesay Defence case;
  - (ii) the Defence are only served with those parts of such closed session transcripts which consist of Sesay Defence witness testimony;
  - (iii) the transcripts of testimony are redacted to remove:
    - (a) the names and identifying data of the witness testifying in closed session in the Sesay Defence case; and
    - (b) any information covered by protective measures orders imposed by decisions other than the Sesay Protective Measures Decision (including decisions in the current proceedings) such as the names of Prosecution witnesses; and
  - (iv) the Defence are made subject to the protective measures set out in paragraph 15 above.
18. The Prosecution requests that the Trial Chamber deny the Defence's request for access to statements taken by the Sesay Defence team and for disclosure of the names and identifying data of witnesses subject to the Sesay Protective Measures Decision. However, should the Trial Chamber grant the Defence access to such witness statements, then the Prosecution requests that the Trial Chamber order:
- (i) the redaction of the witness' name and identifying data and any material and/or information in the possession of the Sesay Defence team which are covered by protective measures orders imposed in other SCSL proceedings (including the current proceedings) and which might be contained in Sesay Defence team statements prior to disclosure to the Defence; and

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- (ii) that the Defence be made subject to the protective measures set out in paragraph 15 above.

Filed in The Hague,

7 January 2008,

For the Prosecution,



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Brenda J. Hollis  
Senior Trial Attorney

**LIST OF AUTHORITIES****SCSL Cases*****Prosecutor v. Taylor, SCSL-03-01-T***

*Prosecutor v. Taylor*, SCSL-03-01-T-263, “Prosecution’s Second Amended Indictment”, 29 May 2007

*Prosecutor v. Taylor*, SCSL-03-01-T-377, “Public Defence Motion Pursuant to Rule 75(G) to Modify Sesay Defence Protective Measures Decision of 30 November 2006 for Access to Closed Session Defence Witness Testimony and Limited Disclosure of Defence Witness Names and Related Exculpatory Material”, 14 December 2007

***Prosecutor v. Sesay et al., SCSL-04-15-T***

*Prosecutor v. Sesay et al.*, SCSL-04-15-T-619, “Corrected Amended Consolidated Indictment”, 2 August 2006

*Prosecutor v. Sesay et al.*, SCSL-04-15-T-668, “Decision on Sesay Defence Motion for Immediate Protective Measures for Witnesses and Victims and for Non-Public Disclosure”, 30 November 2006

**ICTY Cases**

*Prosecutor v. Blaskić*, IT-95-14-A, “Decision on Appellants Dario Kordić and Mario Čerkez’s Request for Assistance of the Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post Appeal Pleadings and Hearing Transcripts filed in the *Prosecutor v. Blaskić*”, 16 May 2002  
(Copy provided)

*Prosecutor v. Brđjanin*, IT-99-36-T, “Decision on Motion by Momcilo Gruban for Access to Confidential Materials in the *Brđjanin* and *Talić* Case”, 1 April 2003  
<http://www.un.org/icty/brdjanin/trialc/decision-e/030401.htm>

*Prosecutor v. Rajić*, IT-95-12-PT, “Decision on Joint Defence Motion for Access to Confidential Supporting Material, Filings, Transcripts and Exhibits in the *Rajić* Case”, 15 September 2003  
<http://www.un.org/icty/rajic/trialc/decision-e/030915.htm>

*Prosecutor v. Milosović et al.*, IT-02-54-T, “Decision on Defence Motion filed by the Defence of Franko Simatović (IT-03-69-PT) for Access to Transcripts and Documents”, 20 October 2003  
<http://www.un.org/icty/milosevic/trialc/decision-e/031020.htm>

*Prosecutor v. Prlić et al.*, IT-04-74-PT, “Decision on Defence’s Motion for Access to Confidential Material”, 9 March 2005  
<http://www.un.org/icty/prlic/trialc/decision-e/050309.htm>

*Prosecutor v. Milosović et al.*, IT-02-54-T & IT-03-69-PT, “Decision on Motion of Defence of Jovica Stanišić for Variance of Protective Measures Pursuant to Rule 75(G)(i)”, 11 March 2005

<http://www.un.org/icty/milosevic/trialc/decision-e/050311.htm>

### **ICTR Cases**

*Prosecutor v. Karemera et al.*, ICTR-98-44-PT, “Decision on Juvenal Kajelijeli’s Motion for Disclosure of Open and Closed Session Testimony, Exhibits and Pre-Trial Statements of Prosecution Witnesses GBU and GFA”, 24 November 2004

(Copy provided)

*Prosecutor v. Nahimana et al.*, ICTR-99-52-A, “Decision on “Joseph Nzirorera’s Motion for Access to Appeal Briefs”, 9 September 2005

<http://69.94.11.53/ENGLISH/cases/Nahimana/decisions/090905.htm>

*Prosecutor v. Bagosora*, ICTR-98-41-T, “Decision on Zigiranyirazo Motion for Disclosure of Closed Session Testimony of DM-190”, 16 May 2006

<http://69.94.11.53/ENGLISH/cases/Bagosora/decisions/160506.htm>

*Prosecutor v. Bagosora*, ICTR-98-41-T, “Decision on Nzirorera Request for Access to Protected Material”, 19 May 2006

<http://69.94.11.53/ENGLISH/cases/Bagosora/decisions/190506.htm>

**AUTHORITIES PROVIDED**

***Prosecutor v. Blaskić*, IT-95-14-A, “Decision on Appellants Dario Kordić and Mario Čerkez’s Request for Assistance of the Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post Appeal Pleadings and Hearing Transcripts filed in the Prosecutor v. Blaskić”, 16 May 2002**

UNITED  
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IT-95-14-A  
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16 MAY 2002 .

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AT



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-95-14-A

Date: 16 May 2002

Original: English

**IN THE APPEALS CHAMBER**

**Before:**

**Judge Fausto Pocar, Presiding  
Judge David Hunt  
Judge Mehmet Güney  
Judge Asoka de Zoysa Gunawardana  
Judge Theodor Meron**

**Registrar:**

**Mr. Hans Holthuis**

**Decision of:**

**16 May 2002**

**PROSECUTOR**

**v.**

**TIHOMIR BLAŠKIĆ**

**DECISION ON APPELLANTS DARIO KORDIĆ AND MARIO ČERKEZ'S REQUEST  
FOR ASSISTANCE OF THE APPEALS CHAMBER IN GAINING ACCESS TO  
APPELLATE BRIEFS AND NON-PUBLIC POST APPEAL PLEADINGS AND HEARING  
TRANSCRIPTS FILED IN THE PROSECUTOR V. BLAŠKIĆ**

**Counsel for the Prosecution:**

**Mr. Norman Farrell**

**Counsel for the Appellant:**

**Mr. Anto Nobile  
Mr. Russell Hayman  
Mr. Andrew M. Paley**

Case No.: IT-95-14-A

16 May 2002

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**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”),

**BEING SEISED** of “Appellant Dario Kordić’s Request for Assistance of Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post-Appeal Pleadings and Hearing Transcripts filed in The Prosecutor v. Blaškić” filed on 5 February 2002 (the “Request”);

**PURSUANT TO** the Statute and the Rules of Procedure and Evidence of the International Tribunal (the “Statute” and the “Rules” respectively);

**HEREBY RENDERS** its Decision.

## I. BACKGROUND

1. The Request filed by Dario Kordić (“Applicant Kordić”) seeks access to non-public post trial hearings’ transcripts, written submissions and appellate briefs, including motions on additional evidence on appeal filed in the *Blaškić* appeal pursuant to Rule 115 of the Rules.
2. Applicant Kordić argues that he is entitled to all of the confidential submissions in the *Blaškić* appeal for the same reasons articulated by Tihomir Blaškić (“Appellant Blaškić”) in his “Appellant’s Motion for Access to Non-Public Transcripts and Exhibits in Response to 11 October 2001 Order” (the “Motion for Access”) filed on 19 October 2001, before Judge Florence Ndepele Mwachande Mumba which are, *inter alia*, the following: (a) the material in the *Blaškić* case is related to and deriving from, the same events which allegedly took place in the same region and at the same time as those in the *Kordić and Čerkez* case, (b) the principle of equality of arms provides that the parties must be granted measures that could assist them in the presentation of their case, and (c) the Defence is not in the same position as the Prosecution when gathering information.<sup>1</sup>
3. Applicant Kordić asserts that he is entitled to know which arguments have been put forward by Appellant Blaškić to the extent that those arguments bear materially upon issues that are presented in Dario Kordić’s and Mario Čerkez’s appeals, as well as in the Prosecution’s appeal. In addition, since Appellant Blaškić is trying to shift responsibility to others for crimes committed by military units under his command, Applicant Kordić wants to know which arguments have been raised.<sup>2</sup> Access is also deemed necessary in order to assess the consistency of the arguments advanced by the Prosecution in both appeals and for the purpose of “framing arguments appropriately during the oral argument.”<sup>3</sup>

<sup>1</sup> Request at para. 3.

<sup>2</sup> The Applicant Kordić challenges the following four items contained in Blaškić’s Motion for Access and referred to as examples of “exculpatory evidence” [to Blaškić] introduced at Kordić’s trial: (a) the testimony of Floyd J. Carter who testified in the Kordić case on November 1999 (he was a Political Affairs Officer who testified that Military Police is an instrument of political rather than military leadership however, he expressed no opinion to the effect that Military Police units in Central Bosnia were not under the command of Blaškić); (b) the testimony of witness AO who testified in Kordić on March 2000 ( he testified that Ivica Rajić, who commanded troops in Kiseljak reported directly to Kordić, however the testimony of this witness was disregarded by the Trial Chamber in its entirety as a result of significant discrepancies); (c) Exhibit Z2792 tendered in the Kordić trial which according to Blaškić indicates that Ivica Rajić did not report to Blaškić, however the only witness that discussed the exhibit was impeached and the exhibit itself was prepared by the Office of the Prosecutor; and, (d) the Croatian Secret Service Reports form February 1994, which according to Kordić were anonymous documents prepared by people employed as security operatives who had been engaged in illicit activities and posed as covert operatives in an attempt to evade military service. The Trial Chamber in the Kordić case agreed that the vast majority of these documents were unreliable and should be excluded altogether from evidence. See Request at paras 13 to 17.

<sup>3</sup> The request mentions that one of the issues on appeal in the Kordić and Čerkez appeals, is the credibility of Witness AT regarding the events alleged to have occurred at the military headquarters of the Central Bosnia Operative Zone in the Hotel Vitez on 15 April 1993. According to counsel for Kordić, relying on “uncorroborated hearsay” witness AT claimed that Kordić attended a meeting convened by Blaškić, where the decision to launch offensive activities against



4. With respect to the equality of arms principle, Applicant Kordić asserts that it would be unfair to permit the Prosecution to have access to confidential submissions in the *Blaškić* appeal which may contain material that could be useful in the presentation of oral argument before the Appeals Chamber, yet to deny similar access to him.<sup>4</sup>

5. On 5 February 2002, Mario Čerkez (“Applicant Čerkez”) filed the “Appellant Mario Čerkez Notice of Joinder in Dario Kordić’s Request for Assistance of Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post-Appeal Pleadings and Hearing Transcripts filed in The Prosecutor v. Blaškić”.

6. On 19 February 2002, the Prosecution filed the “Prosecutor’s Response to the Appellants Dario Kordić and Mario Čerkez’s Joint Request for Assistance of Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post Appeal Pleadings and Hearing Transcripts Filed in the Prosecutor v. Blaškić” (“Prosecution’s Response”), where it acknowledges that Applicants Kordić and Čerkez had demonstrated a legitimate forensic purpose. Therefore the Prosecution does not oppose the granting of the relief sought provided appropriate protective measures are imposed.<sup>5</sup> The Prosecution also submits that the *ex parte* and confidential filings made by the Prosecution in the *Blaškić* appeal should not be disclosed to Applicants Kordić and Čerkez since they are not related to any of the relevant issues.<sup>6</sup>

7. On 26 February 2002, Dario Kordić filed the “Appellant Dario Kordić Response to Prosecution’s Submissions dated 19 February 2002” where he states that all non-public filings made by the Prosecution or by any other party in the *Blaškić* appeal should be disclosed. *Ex parte* submissions would not be subject to this disclosure requirement except when subsequently disclosed to third parties.

8. On 27 February 2002, Mario Čerkez filed the “Appellant Mario Čerkez Notice of Joinder in Appellant Dario Kordić’s Response to Prosecution’s Submissions dated 19 February 2002”.

9. On 28 February 2002, Appellant Blaškić filed the “Appellant Tihomir Blaškić’s Response to Joint Request of Dario Kordić and Mario Čerkez for Assistance of Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post Appeal Pleadings and Hearing Transcripts Filed in

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Ahmići on 16 April was made. Kordić submits that he is entitled to be informed of the position that Blaškić has taken regarding this event. The request points out that in the Kupreskić appeal, it is apparent that the Prosecution has taken divergent positions relating to the credibility of Witness AT and the weight to be accorded to his testimony. Request at para 9.

<sup>4</sup> Request at para 8.

<sup>5</sup> Prosecution’s Response at para 3.

the Prosecutor v. Blaškić”<sup>7</sup> where he states that in general he does not oppose Applicants Kordić and Čerkez’s Request, subject to the imposition of appropriate protective measures. However, Appellant Blaškić believes that certain items should not be disclosed, i.e. the references made to private and closed session trial proceedings in his Appellant’s Brief. He contends that certain information submitted into evidence and referred to in Blaškić’s Appellant’s Brief was disclosed to him by third parties under Rule 70 or other agreements by which it was agreed that the information would not be disclosed to any other party, and thus Rule 70 material should not be disclosed without the authorisation of the providers. Appellant Blaškić states that he is prepared to file a confidential submission identifying this material.

10. On 4 March 2002, Applicant Dario Kordić filed the “Appellant Dario Kordić’s Reply to Tihomir Blaškić’s Response to Dario Kordić’s Request for Assistance of Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post-Appeal Pleadings and Transcripts filed in Prosecutor v. Blaškić” (the “Reply”). Applicant Kordić states that since Appellant Blaškić has been granted access to all confidential material submitted during the course of both trial and appellate proceedings in the *Kordić and Čerkez* case, it would be unfair and a fundamental inequality of arms to deny Applicant Kordić access to all appellate briefs and non-public post-appeal pleadings and hearing transcripts including any Rule 115 applications when Appellant Blaškić has been granted the same access in the *Kordić and Čerkez* case.

## II. DISCUSSION

### Confidential Submissions filed by the parties in the Blaškić Appeal

11. The present decision covers in particular the confidential versions of the following submissions:
- (a) “Prosecution’s Response to Appellant’s Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115” filed on 14 April 2001,
  - (b) “Reply Memorandum in Support of Appellant’s Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115” filed on 18 June 2001,
  - (c) “Appellant’s Second Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115” filed on 18 October 2001,
  - (d) “Prosecution’s Response to Appellant’s Second Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115” filed on 10 December 2001,

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<sup>6</sup> *Ibid.*, at para 5.

- (e) "Appellant's Reply Brief in Support of Second Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115" filed on 7 January 2002,
- (f) "Appellant's Brief on Appeal" filed on 14 January 2002, and
- (g) "Prosecution's Respondent's Brief" filed on 1 May 2002.

12. On 13 September 2001, public versions of the "Prosecution's Response to Appellant's Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115" and the "Reply Memorandum in Support of Appellant's Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115" were filed. The redactions made to the public versions of these documents are related to references to documents and exhibits filed confidentially at trial, submissions made or testimony referred to which was given in closed session, the names of persons in Croatian Ministries who provided documents to the Prosecution after the trial, and names of serving intelligence officers.

13. On 7 March 2002, public redacted versions of the "Appellant's Second Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115", the "Prosecution's Response to Appellant's Second Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115", the "Appellant's Reply Brief in Support of Second Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115", and the "Appellant's Brief on Appeal" were filed. The redactions made to the public versions of these documents are related to testimony given at trial by a protected witness who testified in closed session at Appellant Blaškić's trial as well as at Applicants Kordić and Čerkez trial, and to references to Appellant Blaškić's testimony given in closed or private session. The redactions made to Blaškić's Appellant's Brief are related to testimony given by witnesses who testified in closed or private session during his trial, references to Appellant Blaškić's testimony given in private session, and a few redactions are related to Defence exhibits tendered under seal.

#### Conditions for Access

14. Access to confidential material may be granted whenever the Chamber is satisfied that the party seeking access has established that such material may be of material assistance to his case.<sup>8</sup> A party is always entitled to seek material from *any* source to assist in the preparation of his case if the material sought has been identified or described by its general nature and if a legitimate forensic purpose for such access has been shown.<sup>9</sup>

<sup>8</sup> *Prosecutor v. Enver Hadžihanović, et al*, Decision on Motion by Mario Čerkez for Access to Confidential Supporting Material, Case No. IT-01-47-PT, 10 October 2001, at para 10.

<sup>9</sup> *Ibidem*.

15. The relevance of the material sought by a party may be determined by showing the existence of a nexus between the applicant's case and the cases from which such material is sought, i.e. if the cases stem from events alleged to have occurred in the same geographic area and at the same time.<sup>10</sup> It is sufficient that access to the material sought is likely to assist the applicant's case materially, or that there is at least a good chance that it would.<sup>11</sup>

16. Not always would mere geographical and temporal overlap between two cases be sufficient in every instance to conclude that there is a legitimate forensic purpose. However, in the case at hand there is more than a mere temporal and geographical overlap. There seems to be substantive overlap between the facts in the *Kordić and Čerkez* case and the *Blaškić* case.<sup>12</sup> Each case involves many of the same alleged events in the Lašva Valley and relates to the structure of the political and military organizations in Central Bosnia between 1992 and 1994.

17. The Appeals Chamber considers that Applicants Kordić and Čerkez have satisfied the relevant conditions for being granted the access sought. Applicants Kordić and Čerkez have: (a) described the material sought by their general nature, and (b) shown a legitimate forensic purpose for such access. They are entitled to be informed about the arguments advanced in the present appeal to the extent that those arguments bear materially upon issues that are presented in their own appeals.

18. Another argument advanced in the Request is that, from an equality of arms perspective, it would be unfair not to grant access to Applicants Kordić and Čerkez to the confidential submissions in the *Blaškić* appeal since the Prosecution has had, at all times, access to all of the material in both appeals.<sup>13</sup> The Reply argues that, since Appellant Blaškić has been granted access to all confidential material submitted during the course of both trial and appellate proceedings in the *Kordić and Čerkez* case, it would be a fundamental inequality of arms for Appellant Blaškić to be provided with copies of all such materials in the *Kordić and Čerkez* case, and for Applicants Kordić and Čerkez to be denied the same access in the *Blaškić* appeal.<sup>14</sup> The Reply submits that it would be unfair to deny

<sup>10</sup> See *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-PT, Decision on Motion by Momir Talić for Access to Confidential Documents, 31 July 2000, at para 8.

<sup>11</sup> See *The Prosecutor v. Blaškić*, Decision on Appellant's Motion Requesting Assistance of the Appeals Chamber in Gaining Access to Non-Public Transcripts and Exhibits From the Aleksovski Case, 8 March 2002, at page 3. Where the Appeals Chamber held that the Appellant had described the documents sought by their general nature as clearly as he possibly could, and had shown that such access was likely to assist his appeal materially.

<sup>12</sup> Indeed, the original indictment jointly charged Kordić, Čerkez, Blaškić and Aleksovski.

<sup>13</sup> See Request at para 8.

<sup>14</sup> Reply at para 3.

Applicants Kordić and Čerkez the access sought when Appellant Blaškić has been granted the same access in the *Kordić and Čerkez* case.<sup>15</sup>

19. The argument raised by Applicants Kordić and Čerkez with respect to the principle of equality of arms is misconceived. Equality of arms is a broad concept that constitutes an inherent element of a fair trial.<sup>16</sup> According to the principle of equality of arms each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his opponent.<sup>17</sup> It is a protection afforded to the accused to ensure that he is given procedural rights equal to those of the Prosecution in the course of criminal proceedings. Those procedural rights include giving the accused effective ways to challenge evidence produced by the Prosecution.<sup>18</sup>

20. The principle of "equality of arms" inheres in the requirement that the accused be recognised the right to a fair trial. Basically, this principle embodies the notion that the accused should be afforded procedural equality with respect to the Prosecution. Its purpose is to give each party equal access to the processes of the Tribunal, or an equal opportunity to seek procedural relief where relief is needed.<sup>19</sup> The right to equality of arms does not include a right to equality of relief.<sup>20</sup> Accordingly, Applicants Kordić and Čerkez's entitlement to obtain the relief sought in their Request is not dependent upon whether another Appellant in another proceedings before the International Tribunal has been granted the same relief. Applicants Kordić and Čerkez have a prerogative in relation to the Prosecution to have equal access to processes available at the International Tribunal, and an equal opportunity to seek procedural relief where needed. In the case at hand it would be unfair to deny Applicants Kordić and Čerkez access to material that may be of material assistance to their appeals.

<sup>15</sup> *Ibid*, at para 5.

<sup>16</sup> See *Foucher v. France*, 25 Eur. H.R.Rep. 234 para 34 (1997).

<sup>17</sup> See *Prosecutor v. Aleksovski*, Decision on Prosecutor's Appeal on Admissibility of Evidence, Case No. I-95-14/1-A, 16 February 1999, at paras 23-25. Where the Appeals Chamber refers to a number of judgements of the European Court of Human Rights that discuss the concept of the principle of equality of arms. The Appeals Chamber in *Tadić* held that "under the Statute of the International Tribunal the principle of equality of arms must be given a more liberal interpretation than that normally upheld with regard to proceedings before domestic courts." Additionally, noting that the Chambers are empowered to issue any necessary orders, summonses, subpoenas, warrants, and transfer orders to aid an investigation or effectuate a trial, the Appeals Chamber determined that a Chamber therefore, "shall provide every practicable facility it is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case." *Prosecutor v. Duško Tadić*, Judgement, Case No.: IT-94-1-A, 15 July 1999, at para 52.

<sup>18</sup> *Niderost - Huber v. Switzerland*, 1997 - I Eur. Ct. H.R. 101, 107 (1997).

<sup>19</sup> *Prosecutor v. Duško Tadić*, Judgement, Case No.: IT-94-1-A, 15 July 1999, at paras. 48,50, 51.

<sup>20</sup> *Prosecutor v. Kordić*, Decision on Application by Mario Čerkez for Extension of Time to File his Respondent's Brief, 11 September 2001, paras. 7-9.

**Ex Parte Submissions**

21. While the Prosecution does not oppose the granting of access to confidential material to Applicants Kordić and Čerkez, it submits that there should be an exception to the general disclosure of appellate filings with respect to *ex parte* and *confidential* filings made by the Prosecution.<sup>21</sup>

22. The *ex parte* and confidential motions and decisions which have been filed in the present appeal are related to requests for protective measures made by the Prosecution on the basis of allegations of non-compliance with previous Tribunal orders against one of the co-counsel for Appellant Blaškić. Some of the motions have already been disposed of by public decisions<sup>22</sup> and in general the *ex parte* filings are irrelevant to Applicants Kordić and Čerkez's appeals. Therefore they should not be disclosed to them in the interest of fairness towards Appellant Blaškić's co-counsel and in order to ensure the safety of individuals mentioned therein in connection with the said allegations.

**Material covered by Rule 70(C)**

23. Some of the non-public appellate filings make reference to documents and witness testimony provided by certain governments and other entities pursuant to Rule 70. Appellant Blaškić stated that if necessary he would file a confidential submission identifying the material falling under Rule 70, and that he did not believe that the confidential material covered by the said provision should be disclosed without the permission of the provider.<sup>23</sup>

24. Applications for access to non-public material in the Lašva Valley cases were submitted in the past by the defence counsel in the *Kordić and Čerkez* case. The Trial Chamber in the *Kordić and Čerkez* case requested the reasoned opinion of the appropriate Trial Chambers and rejected the motion with respect to the disclosure of material covered by Rule 70.<sup>24</sup> The *Aleksovski* Trial Chamber issued an opinion granting the Prosecution permission to disclose closed session transcripts from the *Aleksovski* case to the defendants in *Kordić and Čerkez*, but suggested the

<sup>21</sup> Prosecution's Response at para 5.

<sup>22</sup> *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Decision Granting Access to Non-Public Materials, 20 February 2002; *Prosecutor v. Dario Kordić and Mario Čerkez*, Order on Prosecution Request for Variation of Witness Protective Measures, Case No.: IT-95-14/2-A, 19 March 2002.

<sup>23</sup> The Appellant's Brief specifically discusses closed and private session trial evidence which was provided to the Appellant by third parties pursuant to Rule 70; the Appellant believes that certain information used as evidence at trial and referenced in some of the appellate filings has been provided to the Prosecution pursuant to Rule 70. *See* Tihomir Blaškić Response at page 1.

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adoption of additional protective measures for the witnesses.<sup>25</sup> Before issuing a decision, the *Kupreskić* and *Furundžija* Trial Chambers requested the Victims and Witness Unit Section to seek the consent of the protected witnesses to have redacted transcripts of their closed session testimony released to the accused and defence counsel in other pending and *future* cases before the International Tribunal.<sup>26</sup> Afterwards the *Kupreskić* and *Furundžija* Trial Chambers requested the Registrar to disclose to the *Kordić and Čerkez* Trial Chamber only the closed session transcripts of witnesses who had expressly consented to such release.<sup>27</sup> Finally the Trial Chamber in *Kordić and Čerkez* granted access to non-public materials from the *Kupreskić* and *Furundžija* cases, subject to the express consent of protected witnesses. Concerning materials from the *Blaškić* and *Aleksovski* cases, access was granted provided that the materials related to witnesses who did not object to such access *and* who were either to be called to testify or whose testimony constituted exculpatory evidence.<sup>28</sup>

25. More recently, before access was granted to Appellant Blaškić to all the non-public materials submitted as evidence in the *Kupreskić*, *Furundžija* and *Kordić* cases, the Prosecution sought and obtained consent from the providers of the Rule 70(C) related information for its disclosure.<sup>29</sup>

26. The Prosecution and Appellant Blaškić must make submissions on whether any of the non-public material for which access is sought falls under Rule 70; if it does fall under Rule 70, the Prosecution must indicate the precise sub-paragraph of Rule 70 by which it asserts the material is covered. If there is any material covered by Rule 70(C) within the non-public appellate submissions filed in this appeal, the Prosecution should be given time to seek the consent of the providers of the Rule 70(C) related information for its disclosure to Applicants Kordić and Čerkez.

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<sup>24</sup> *Prosecutor v. Dario Kordić and Mario Čerkez, Decision on the Motion of the Accused for Access to Non-public Materials in the Lašva Valley and Related Cases*, Case No.: IT-95-14/2-PT, 12 November 1998.

<sup>25</sup> *Prosecutor v. Aleksovski, Opinion Further to the Decision of the Trial Chamber seized of the case of the Prosecutor v. Dario Kordić and Mario Čerkez dated 12 November 1998*, Case No.: IT-95-14/1, 8 February 1999.

<sup>26</sup> *Prosecutor v. Furundžija, Order*, Case No.: IT-95-17/1-T, 10 December 1998; *Prosecutor v. Zoran Kupreskić et al, Order*, Case No.: IT-95-16-T, 10 December 1998.

<sup>27</sup> *Prosecutor v. Kupreskić, Request Concerning The Release Of Transcripts Of Closed Session Testimony Of Witnesses*, Case No.: IT-95-16-17, 10 February 1999; *Prosecutor v. Furundžija, Request Concerning The Release Of Transcripts Of Closed Session Testimony Of Witnesses*, Case No.: IT-95-17/1-T, 10 February 1999.

<sup>28</sup> *Prosecutor v. Dario Kordić and Mario Čerkez, Further Order on Motion for Access to Non-Public Materials in the Lašva Valley and Related Cases*, Case No.: IT-95-14/2-PT, 16 February 1999.

<sup>29</sup> *Prosecutor v. Blaškić, Prosecution's Supplementary Response on Protective Measures and Disclosure of Rule 70(C) Material*, Case no. IT-95-14/2 A, 16 November 2001.

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### Third Motion pursuant to Rule 115

27. Appellant Blaškić is preparing a third submission pursuant to Rule 115 which will include statements from witnesses who were previously reluctant to provide statements to him because of concerns for their physical safety and the well being of their family members. However, these witnesses have agreed to provide statements to Appellant Blaškić on the explicit condition that the statements would not be disclosed to any third party, including parties to other proceedings before the Tribunal. Consequently, Appellant Blaškić opposes the release of any filing containing any information with respect to these witnesses. Appellant Blaškić stated that he has tried to obtain witness statements from other individuals unwilling to cooperate with the Tribunal for fear of retribution. To the extent that these individuals agree to provide statements to Appellant Blaškić for use in this appeal, he opposes the release of any such filing as well as the release of any *ex parte* pleading filed by him.<sup>30</sup> Finally he submits that if an order is issued granting the request made by Applicants Kordić and Čerkez such order should permit the parties in the *Blaškić* case the opportunity to request that any future confidential filing not be released to third parties.

28. Since the third submission pursuant to Rule 115 has not been filed yet and due to the concerns expressed by the Appellant for the physical safety and the well being of the family members of the witnesses whose statements will be proffered, the Appeals Chamber will stay its decision regarding access to this third submission pursuant to Rule 115, subject to a determination on the protective measures to be applied to these individuals.

### Protective Measures

29. Having found that the sought material may materially assist the Applicants Kordić and Čerkez in their appeals, the Appeals Chamber has to determine which protective measures should be applied. It is, indeed, within the discretion of the Appeals Chamber to strike a balance between the right of a party to have access to material to prepare his case and guaranteeing the protection of witnesses and the integrity of confidential information. As mentioned in paragraph 6 of this decision, the Prosecution does not oppose the granting of the relief sought provided appropriate protective measures are imposed. In case access is granted, the Prosecution submits that those measures imposed by Trial Chamber II in relation to Mario Čerkez in the *Hadžihasanović* case would be appropriate for the purposes of the present case.<sup>31</sup> Thus, the Appeals Chamber will rule on

<sup>30</sup> Tihomir Blaškić's Response at page 2.

<sup>31</sup> Prosecution's Response at para 3.



the protective measures to be imposed taking into account the suggestion made by the Prosecution and agreed upon by Applicants Kordić and Čerkez and Appellant Blaškić.

### III. DISPOSITION

**FOR THE FOREGOING REASONS** the Appeals Chamber **GRANTS** Applicants Kordić and Čerkez's Request;

#### ORDERS

(a) The Prosecution and Appellant Blaškić to make submissions on whether any of the non-public material for which access is sought falls under Rule 70 no later than 3 June 2002. In the event that there is any material covered by Rule 70(C) within the non-public appellate submissions filed in this appeal, the Prosecution should seek the consent of the providers of the Rule 70(C) related information for its disclosure to Applicants Kordić and Čerkez; and

(b) The Registry to grant Applicants Kordić and Čerkez access to the non-public post-trial submissions and appellate briefs, including motions on additional evidence on appeal pursuant to Rule 115, filed in the *Blaškić* appeal until the date of the issuing of this decision with the exception of any submission related to the Third Motion pursuant to Rule 115- only if and when the consent of the providers has been obtained by the Prosecution in accordance with the directions under paragraph (a) - and subject to the following protective measures:

Applicants Kordić and Čerkez, their counsel and any employees at Andreis & Čogurić or the office of Mr. Mitko Naumovski who have been instructed or authorised by counsel to access the confidential appellate submissions in the case at hand, shall:

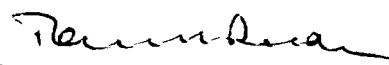
- (i) Not disclose to any third party, the names of witnesses, their whereabouts, copies of witness statements, the contents of the witness statements, transcripts of witness testimonies, the contents thereof, or any information which would enable them to be identified and would breach the confidentiality of the protective measures already in place unless absolutely necessary for the preparation of Applicants Kordić and Čerkez's appeal, 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.
- (iii) Not contact any witness without first demonstrating to the Appeals Chamber, that the witness may materially assist Applicants Kordić and Čerkez's appeal in some identified way and that such assistance is not otherwise reasonably available to them. If the Appeals

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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.

- (iv) Third parties exclude: (i) Applicants Kordić and Čerkez, (ii) persons employed by counsel's law firms, (iii) personnel from the International Tribunal, or (iv) members of the Office of the Prosecutor.
- (v) If for the purposes of preparing Applicants Kordić and Čerkez's appeal, 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 should 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 Applicants Kordić and Čerkez or their counsel as soon as it is no longer needed for the preparation of the appeal.

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



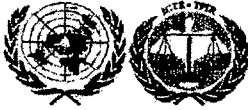
Fausto Pocar  
Presiding Judge

Done this sixteenth day of May 2002  
At The Hague,  
The Netherlands.

[Seal of the Tribunal]

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***Prosecutor v. Karemera et al.*, ICTR-98-44-PT, “Decision on Juvenal Kajelijeli’s Motion for Disclosure of Open and Closed Session Testimony, Exhibits and Pre-Trial Statements of Prosecution Witnesses GBU and GFA”, 24 November 2004**



UNITED NATIONS  
NATIONS UNIES

International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

1572-98-44-T  
24-11-2004  
(15601-15598)

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OR: ENG

**Before Judge:** Dennis C. M. Byron, Presiding Judge  
**Registrar:** Adama Dieng  
**Date:** 24 November 2004

**THE PROSECUTOR**

v.

Édouard KAREMERA  
Mathieu NGIRUMPATSE  
Joseph NZIRORERA  
André RWAMAKUBA

*Case No. ICTR-98-44-PT*

JUDICIAL RECORDS/ARCHIVES  
ICTR  
2004 NOV 24 A 11: 36  
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**DECISION ON JUVENAL KAJELJELI'S MOTION FOR DISCLOSURE OF OPEN  
AND CLOSED SESSION TESTIMONY, EXHIBITS AND PRE-TRIAL  
STATEMENTS OF PROSECUTION WITNESSES GBU AND GFA**

*Rule 60(A), Rule 75(A), (F)(ii) and (G) of the Rules of Procedure and Evidence*

**Counsel for Juvenal Kajelijeli**  
Lennox S. Hinds

**Office of the Prosecutor:**  
James Stewart

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**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA** (“Tribunal”),

**SITTING** as Trial Chamber III, composed of Judge Dennis C. M. Byron, presiding Judge, sitting pursuant to Rule 54 of the Rules of Procedure and Evidence (“Rules”);

**BEING SEIZED** of “Juvenal Kajelijeli’s Urgent Motion for Disclosure of Open and Closed Session Testimony, Exhibits and Pre-trial Statements of Prosecution Witnesses GBU and GFA, filed on 13 September 2004 (“Motion”), and the Prosecutor’s Response to the Motion, filed on 23 September 2004;

**NOW DECIDES** the Motion pursuant to Rule 73(A) on the basis of the written briefs filed by the parties.

**Parties’ Submissions**

*Defence*

1. The Defence for Juvenal Kajelijeli (“Defence”) requests the Chamber to order the Registrar to make available to Counsel for the Defence the transcripts, pre-trial statements and exhibits regarding prosecution witnesses GBU and GFA, pursuant to Rule 81(B). The Defence submits that the Judgement of Trial Chamber II in the trial of *The Prosecutor v. Juvenal Kajelijeli* was based on GBU’s testimony, and that the statements and testimony of GBU in the trial of *The Prosecutor v. Édouard Karemera et al.* would be relevant to assess GBU’s credibility. With respect to GFA, the Defence argues that his testimony might contradict the incriminating evidence that other witnesses gave against Juvenal Kajelijeli.

*Prosecutor*

2. The Prosecutor requests that the Motion be denied. He submits that Rule 81 of the Rules is not applicable, and that the Motion should be examined under Rule 75(F) and (G) of the Rules. With respect to GBU, he indicates that he will disclose the requested transcripts by the end of September 2004, so that the Motion will become moot. With respect to GFA, he submits that this witness has not testified in the trial of *The Prosecutor v. Juvenal Kajelijeli*. According to him, the Defence has not shown that the requested materials assist its case and is merely conducting a “fishing expedition”. He submits that the Defence has not demonstrated the inconsistencies between GFA’s testimony and the testimony of other witnesses in the trial of *The Prosecutor v. Juvenal Kajelijeli*. He concludes that he is not under a disclosure obligation pursuant to Rule 68(A) of the Rules.

**Deliberations**

3. The Chamber observes that the Prosecutor’s response and his request for an extension of time within which to file his response were submitted after the expiration of the time limit stipulated by Rule 73(E) of the Rules. However, the slight delay had no impact on the progress of the proceedings. Therefore and in the interest of justice, the Chamber takes note of the content of the Prosecutor’s response.

4. The Chamber notes that the Prosecutor has disclosed to the Defence the transcripts of GBU’s testimony on 30 September 2004. Therefore the only issue which remains contentious between the parties with respect to GBU is the disclosure of his pre-trial witness statements.

5. The Defence seeks to base its requests on Rule 81(B) of the Rules. The Chamber recalls that this Rule applies “when the reasons for ordering the non disclosure no longer exist”. In the present case, the reasons for the non-disclosure, i.e. the protective measures for the prosecution witnesses in the case of *The Prosecutor v. Édouard Karemera et al.*, have never been rescinded. Therefore Rule 81(B) of the Rules does not apply.

6. The Prosecutor’s disclosure of materials referring to protected witnesses who testified in another trial, and the continuance of protective measures in favour of these witnesses are the subject of Sub-Rules 75(F) and (G) of the Rules which read:

(F) Once protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal (the “first proceedings”), such protective measures:

(i) shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal (the “second proceedings”) unless and until they are rescinded, varied or augmented in accordance with the procedure set out in this Rule; but

(ii) shall not prevent the Prosecutor from discharging any disclosure obligation under the Rules in the second proceedings, provided that the Prosecutor notifies the Defence to whom the disclosure is being made of the nature of the protective measures ordered in the first proceedings.

(G) A party to the second proceedings seeking to rescind, vary or augment protective measures ordered in the first proceedings must apply:

(i) to any Chamber, however constituted, remaining seised of the first proceedings; or

(ii) if no Chamber remains seised of the first proceedings, to the Chamber seised of the second proceedings.

7. The Chamber observes that Sub-Rules 75(F) and (G) of the Rules are no foundation for an additional disclosure obligation of the Prosecutor but rather require a pre-existing obligation. In the present case, the Chamber has to examine whether such a pre-existing obligation can be derived from Rule 68(A) of the Rules. Pursuant to this Rule, the Chamber needs to assess whether the requested materials “[may] in the actual knowledge of the Prosecutor [...] suggest the innocence or mitigate the guilt of the accused or affect the credibility of the prosecution evidence.”

8. The Chamber recalls the assertion of the Defence that the requested materials contain exculpatory elements or affect the credibility of prosecution witnesses who have incriminated Juvenal Kajelijeli. In his response, the Prosecutor does not explicitly address this point but takes the position that his obligations under Rule 68(A) of the Rules “have not been triggered”. The Chamber observes that, in relation to witnesses who gave evidence in other trials which the Prosecutor is required to disclose pursuant to Rule 68(A) of the Rules, the burden lies upon the Prosecutor to justify non-disclosure, not upon the Accused to justify disclosure<sup>1</sup>. The Chamber notes that the Prosecutor has not refuted the possibility that the requested materials contain exculpatory evidence or affect the credibility of prosecution witnesses who have incriminated Juvenal Kajelijeli. Thus, he has not discharged his burden to justify non-disclosure.

9. The Chamber finds that the Defence request is highly specific and refers to clearly indicated materials which contain, according to the Defence, exculpatory information. The

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<sup>1</sup> *The Prosecutor v. Radoslav Brdanin and Momir Talic*, Case No. IT-99-36, Second Decision on Motions by Radoslav Brdanin and Momir Talic for Access to Confidential documents (TC), 15 November 2000, para. 11.

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Chamber holds that this request is sufficiently precise and focused not to be a fishing expedition<sup>2</sup>.

10. The Chamber observes that the protective measures granted by Trial Chamber II on 6 July 2000 in favour of the prosecution witnesses in the trial of *The Prosecutor v. Édouard Karemera et al.*<sup>3</sup> are still in force.

11. In the light of its power to order *proprio motu* appropriate measures to safeguard the privacy and security of victims and witnesses pursuant to Rule 75(A) of the Rules, the Chamber reaffirms the obligation of Counsel for the Defence and any member of his team to comply with all protective measures that have previously ordered in favour of prosecution witnesses GBU and GFA.

**FOR THE ABOVE REASONS,**

**THE CHAMBER**

**REMINDS** the parties that the protective measures for prosecution witnesses GFA and GBU shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal.

**DISMISSES** the Defence request with respect to open and closed session transcripts of the testimony of prosecution witnesses GBU as moot.

**GRANTS** the remainder of the Defence request.

**ORDERS** the Prosecutor to disclose to the Defence:

- (i) all of prosecution witnesses GFA's and GBU's pre-trial witness statements;
- (ii) all public or confidential exhibits tendered during prosecution witnesses GFA's and GBU's testimony; and
- (iii) all open and closed session transcripts of prosecution witness GFA's testimony.

Arusha, 24 November 2004

  
Dennis C. Byron  
Presiding Judge  
  
[Seal of the Tribunal]

<sup>2</sup> Cf. *The Prosecutor v. Ivica Rajic*, Case No. IT-95-12-PT, Decision on Joint Defence Motion for Access to Confidential Supporting Material, Filings, Transcripts and Exhibits in the *Rajic* Case (TC), 15 September 2003, page 2, and *The Prosecutor v. Radoslav Brdjanin*, Case No. IT-99-36-T, Decision on Motion by Momcilo Gruban for Access to Confidential Materials in the Brdjanin and Talic Case (TC), 1 April 2003, page 2.

<sup>3</sup> See Decision on the Prosecutor's Motion for Protective Measures for Witnesses. Cf. also *The Prosecutor v. Nzirorera*, Decision on Prosecutor's Motion for Protective Measures for Witnesses, 12 July 2000 and *The Prosecutor v. Rwamakuba*, Decision on Prosecutor's Motion for Protective Measures for Witnesses, 22 September 2000.



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Court Management Section – Court Records

**CONFIDENTIAL DOCUMENT CERTIFICATE**

This certificate replaces the following confidential document which has been filed in the *Confidential* Case File.

Case Name: The Prosecutor – v- Charles Ghankay Taylor  
Case Number: SCSL-2003-01-T  
Document Index Number: 381  
Document Date 07 January 2008  
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Number of Pages 2

Page Numbers from: 14326-14359

- Application
- Order
- Indictment
- Motion**
- Correspondence

Document Title:

**EX PARTE ANNEX TO PROSECUTION RESPONSE TO “DEFENCE MOTION PRUSUANT TO RULE 75(G) TO MODIFY SESAY DEFENCE PROTECTIVE MEASURES DECISION OF 30 NOVEMBER 2006 FOR ACCESS TO CLOSED SESSION DEFENCE WITNESS TESTIMONY AND LIMITED DISCLOSURE OF DEFENCE WITNESS NAMES AND RELATED EXCLUPATORY MATERIAL**

Name of Officer:

Rosette Muzigo-Morrison

Signed: