1316) SCSL-04-15-A (5111 - 5133) 5111

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

IN THE APPEALS CHAMBER

Before: Hon. Justice Renate Winter, Pre-Hearing Judge

Acting Registrar: Ms Binta Mansaray

Date filed: 1 September 2009

THE PROSECUTOR **Against** **ISSA HASSAN SESAY**
MORRIS KALLON
AUGUSTINE GBAO

Case No. SCSL-04-15-A

PUBLIC

PROSECUTION RESPONSE TO SESAY REQUEST TO ADMIT EXHIBIT MFI-134 FROM PROSECUTOR V. TAYLOR

Office of the Prosecutor:
Dr Christopher Staker
Mr Vincent Wagona
Dr Nina Jørgensen
Mr Reginald Fynn

Defence Counsel for Issa Hassan Sesay
Mr Wayne Jordash
Ms Sareta Ashraph

Defence Counsel for Morris Kallon
Mr Charles Taku
Mr Kennedy Ogeto

Defence Counsel for Augustine Gbao
Mr John Cammegh
Mr Scott Martin

I. INTRODUCTION

1. The Prosecution files this response to the Sesay Defence's "Request that the Pre-Hearing Judge Present to the Appeals Chamber Exhibit MF1-134 from *Prosecutor v. Taylor*", filed on 31 August 2009 ("**Rule 115 Motion**").[1]
2. The Sesay Defence seeks to have admitted, pursuant to Rule 115 of the Rules of Procedure and Evidence ("**Rules**") or alternatively pursuant to the Appeals Chamber's inherent power, Exhibit MFI-134 (DCT-195) from the Charles Taylor trial as additional evidence on appeal in the RUF proceedings.
3. The Prosecution submits that the Rule 115 Motion should be rejected for the reasons given below.

II. REQUIREMENTS UNDER RULE 115

4. In order for additional evidence to be admissible under Rule 115 the Applicant must demonstrate that the evidence:
   (i) was not available at trial;
   (ii) is relevant and credible; and
   (iii) could have been a decisive factor in reaching the decision at trial.[2]
5. As the Pre-Hearing Judge has held, "[a] party seeking to admit additional evidence bears the burden of specifying with clarity the impact the additional evidence could have on the Trial Chamber's decision."[3]
6. The question of whether the evidence was "not available to … [the Defence] at the trial" is not merely a question of whether or not the evidence in question was "available" in a literal sense.[4] It must be shown that the additional evidence was not available at trial *in any form whatsoever*,[5] and furthermore, that the additional evidence could *not have*

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[1] *Prosecutor v. Sesay*, SCSL-04-15-A-1315, "Request that the Pre-Hearing Judge Present to the Appeals Chamber Exhibit MFI-134 from Prosecutor v. Taylor", 31 August 2009 ("**Rule 115 Motion**").
[2] Rule 115 (B) of the Rules.
[3] *Prosecutor v. Sesay*, SCSL-04-15-A-1311, "Decision on Gbao Motion to Admit Additional Evidence Pursuant to Rule 115", 5 August 2009 (**"Decision on Gbao Rule 115 Motion"**), para. 12.
[4] *Prosecutor v. Mrškić et al.*, IT-95-13/1-A, "Decision on Mile Mrškić's Second Rule 115 Motion", Appeals Chamber, 13 February 2009, ("***Mrškić* Second Rule 115 Decision**") , para. 6.
[5] *Prosecutor v. Nahimana et al.*, ICTR-99-52-A, "Decision on Appellant Jean-Bosco Barayagwiza's Motions for Leave to Present Additional Evidence Pursuant to Rule 115 of the Rules of Procedure and Evidence", Appeals Chamber, 8 December 2006, (**"Nahimana Decision on Additional Evidence of 8 December 2006"**) para. 40; *Prosecutor v. Ntagerura et al.*, ICTR-99-46-A, "Decision on Prosecution Motion for Admission of Additional Evidence", Appeals Chamber, 10 December 2004, ("***Ntagerura* Decision on Additional Evidence**") para. 9.

been discovered at an earlier date through the exercise of due diligence.[6]

7. It has been established that "additional evidence is not admissible under Rule 115 in the absence of a reasonable explanation as to why it was not available at trial. Such an explanation must include compliance with the requirement that the moving party exercised due diligence."[7] In other words, the question is "whether the [applicant] could, by exercising due diligence, have obtained the *information* [...] at an earlier date."[8]

8. What constitutes compliance with the due diligence requirement has been discussed in detail in the case law of the *ad hoc* tribunals. Specifically, "[t]he applicant's duty to act with due diligence includes 'making appropriate use of all mechanisms of protection and compulsion available under the Statute and the Rules of the Tribunal to bring evidence on behalf of an accused before the Trial Chamber'."[9]

9. The ICTR Appeals Chamber went into more detail on what constitutes acting with due diligence. It held that:

> Counsel is expected to apprise the Trial Chamber of all the difficulties he or she encounters in obtaining the evidence in question, including any problems of intimidation, *and his or her ability to locate certain witnesses*. The obligation to apprise the Trial Chamber constitutes not only a first step in exercising due diligence but also a means of self-protection in that non-cooperation of the prospective witness is recorded *contemporaneously*.[10]

The ICTY Appeals Chamber had also previously stated that "[a]ny difficulties, including those arising from intimidation, or *inability to locate witnesses*, should be brought to the attention of the Trial Chamber."[11] Thus, an applicant who follows these

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[6] *Prosecutor v. Milošević-Dragomir*, IT-98-29/1-A, "Decision on Dragomir Milošević's Further Motion to Present Additional Evidence", Appeals Chamber, 9 April 2009 ("***Milošević-Dragomir* Second Decision on Additional Evidence**"), para. 5; *Prosecutor v. Krstić*, IT-98-33-A, "Decision on Applications for Admission of Additional Evidence on Appeal", Appeals Chamber, 5 August 2003 ("***Krstić* Decision on Additional Evidence**").

[7] *Prosecutor v. Tadić*, IT-94-1-A, "Decision on Appellant's Motion for the Extension of Time-Limit and Admission of Additional Evidence", Appeals Chamber, 16 October 1998, (**"*Tadić* Decision on Additional Evidence"**) , para. 45.

[8] *Mrškić* Second Rule 115 Decision, para. 6 (emphasis added), citing *Haradinaj* Decision on Additional Evidence of 3 March 2006, para. 16. See also *Tadić* Decision on Additional Evidence, para. 47.

[9] *Tadić* Decision on Additional Evidence, para. 47.

[10] *Ntagerura* Decision on Additional Evidence, para. 9 (emphasis added), cited in *Nahimana* Decision on Additional Evidence of 8 December 2006, para. 5. See also *Nikolić-Momir* Decision on Additional Evidence, para. 21; *Krstić* Decision on Additional Evidence.

[11] *Tadić* Decision on Additional Evidence, para. 40 (emphasis added); *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, "Decision on Appellant Mario Cerkez's Motion for Additional Evidence Pursuant to Rule 115", Appeals Chamber, 26 March 2004 ("***Kordić and Čerkez* Rule 115 Decision**").: "this obligation to report to the Trial Chamber is intended not only as a first step in exercising due diligence but also as a means of self-protection, in that a contemporaneous record then exists that the cooperation of the prospective witness had not been obtained." See also *Prosecutor v. Naletilić and Martinović*, IT-98-34-A, "Decision on the Request for

steps will, in the usual case, be deemed to have acted with due diligence.[12] Conversely, an applicant may not have exercised due diligence if he claims that certain witnesses could not be located but did not bring that difficulty to the attention of the Trial Chamber.

10. The question of whether or not evidence was available *at trial* should be assessed with respect to the end of trial proceedings, i.e. the date of the trial decision.[13]

11. The applicant must also demonstrate that the evidence is both relevant to a material issue and credible. The case law on Rule 115 clearly shows that evidence is "relevant if it relates to findings material to the conviction or sentence, in the sense that those findings were *crucial or instrumental* to the conviction or sentence"[14] and it is "credible if it appears to be reasonably capable of belief or reliance."[15]

12. If the additional evidence has been demonstrated to be unavailable at trial and is relevant and credible, it must then be determined whether the evidence *could* have been a decisive factor in reaching the decision at trial. This requires the applicant to demonstrate that if the evidence is "considered in the context of the evidence given at trial, it could show that the decision was unsafe,"[16] in that "[...] there is a realistic possibility that the Trial Chamber's verdict might have been different if the new evidence had been admitted."[17]

13. Moreover, the applicant should not only demonstrate that the decision *could* have been different, but should also "specify *why* the Trial Chamber could have come to a different conclusion despite the existence of the evidence it relied upon in the Trial Judgement."[18]

III. LATE FILING OF RULE 115 REQUEST

14. The Defence correctly notes that the deadline for the filing of a Rule 115 application is set out in Rule 115(A) and is the same as the deadline for the filing of appeal

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Presentation of Additional Evidence", Appeals Chamber, 18 November 2003, paras 8-9; *Krstić* Decision on Additional Evidence.

[12] *Nikolić-Momir* Decision on Additional Evidence, para. 21.

[13] Decision on Gbao Rule 115 Motion, paras 16-19.

[14] *Mrškić* Second Rule 115 Decision, para. 7.

[15] *Krajišnik* Rule 115 Decision of 16 October 2008, para. 5; Decision on Gbao Rule 115 Motion, para. 11.

[16] *Milošević-Dragomir* Second Decision on Additional Evidence, para. 7; *Mrškić* Second Rule 115 Decision, para. 8; *Krajišnik* Rule 115 Decision of 16 October 2008, para. 6.

[17] *Milošević-Dragomir* Second Decision on Additional Evidence, para. 7; *Stanišić and Simatović* Decision of 26 June 2008, para. 7. Cf. Rule 115 Motion at para. 4.

[18] *Milošević-Dragomir* Second Decision on Additional Evidence, para. 19 (emphasis in original).

submissions in reply. Acknowledging the late filing, the Defence appeals to the inherent power of the Chamber to admit the proposed additional evidence "[s]hould Rule 115 not be applicable here".[19] No further elaboration or authority for this proposal is put forward.

15. The Prosecution submits that an extension of time may be allowed pursuant to Rule 116 for the filing of a Rule 115 motion outside the time frame prescribed in Rule 115. The Prosecution submits that there is no inherent power to allow additional evidence on appeal outside the scope of Rule 115.

16. It has been noted by the Pre-Hearing Judge that Rule 115 of the SCSL Rules is materially similar to Rule 115 of the Rules of Procedure and Evidence of the ICTY and ICTR.[20] Rule 115(A) of the ICTY Rules allows for the filing of a motion to present additional evidence after the deadline stipulated in the Rule upon a showing of good cause.[21] The Prosecution acknowledges that the document that the Sesay Defence seeks to have admitted as additional evidence on appeal was only disclosed to the Defence by the Prosecution after the time limit for Rule 115 motions. However, that of itself does not mean that there is good cause for granting an extension of time. A determination of the question whether good cause for an extension of time has been shown requires in this instance consideration of issues that are also relevant to the merits of the request, in particular to the first requirement under Rule 115, which are considered below.

IV. THE ADDITIONAL EVIDENCE: EXHIBIT MFI-134

A. Availability of the evidence at trial

17. The Sesay Defence devotes two sentences to the requirement that the evidence must not have been available in any form at trial, relying entirely on the fact the evidence was not disclosed to the Defence until 25 August 2009.

18. Exhibit MFI-134 was tendered by the Taylor Defence during an open session on 18 August 2009. The document came into the possession of the Prosecution for the first time on 16 July 2009 following disclosure to the Prosecution by the Taylor Defence. Taylor's archives from which the document was supposedly taken were not in the

[19] Rule 115 Motion, footnote 1.
[20] Decision on Gbao Rule 115 Motion, para. 8.
[21] See also, for example, *Prosecutor v. Simić*, IT-95-9-A, "Decision on Blagoje Simić's Motion for Admission of Additional Evidence, Alternatively for Taking of Judicial Notice", 1 June 2006; *Prosecutor v. Ntakirutimana*, ICTR-96-10-A and ICTR-96-17-A, "Reasons for the Decision on Request for Admission of Additional Evidence", 8 September 2004.

possession of the Prosecution but rather in the possession of Taylor or persons supportive of him.

19. The Exhibit is purportedly a letter personally written by Issa Sesay himself. If the letter is authentic as the Sesay Defence appears to contend, the Prosecution submits that Sesay is unlikely to have easily forgotten it, and the Prosecution submits that the letter presumably could have been discovered by the Sesay Defence at an earlier date through the exercise of due diligence. At the very least, given that Issa Sesay must have known of the existence of this letter if he personally wrote it, in order to establish that the letter could not have been obtained earlier with due diligence, it would be necessary for the Defence to demonstrate the efforts that it made to track down this letter during the pre-trial and trial stages of the case. Furthemore, even if the letter itself could not have been obtained earlier, Sesay himself would have had knowledge of it, such that even without having a copy of it, he was at trial in a position to give evidence of its existence and contents. It therefore cannot be said that that the additional evidence was not available at trial *in any form whatsoever* (see paragraph 6 above).

20. It is therefore submitted that the Defence has failed to establish that the document was not available at trial, and in particular, has not established that due diligence was exercised by the Sesay Defence in seeking to discover the evidence and that the evidence could have been made available at trial in some form. On this basis, it is also submitted that the Defence has failed to demonstrate good cause for the late filing of the Rule 115 Motion.

B. Relevance and Credibility

21. The Prosecution submits that the evidence is neither credible nor relevant. The Defence appears to argue that because the letter allegedly came from Taylor's archives, it is necessarily reasonably capable of belief or reliance. However, documents in this "archive" could have been fabricated after the fact and after the indictment against Taylor was issued. This would also be a plausible explanation for Sesay's failure to remember or mention the letter allegedly authored by him.

22. The letter is an unsigned copy and contains no stamp or other indicia of authenticity. Further, Issa Sesay is spelt in the unusual manner of "Essa Seasey". In the Taylor proceedings, Charles Taylor was unable to indicate how the letter had been delivered to him.[22] If such a letter were sent by Sesay, which the Defence claims is significant,

[22] Taylor Transcript, 18 August 2009, p. 27042.

Sesay himself is likely to have kept a copy and would not be dependent on an unsigned version in which his own name is spelt incorrectly.

23. Furthermore, although Taylor testified that Foday Sankoh was arrested on 8 May 2000, the Trial Chamber in the RUF Judgement found that Sankoh was arrested on 17 May 2000,[23] after the letter dated 11 May 2000 which requests the "unconditional release of our leader". This also casts doubt on the authenticity of the letter.

24. The Defence argues that the evidence is relevant to (i) Sesay's Article 6(3) liability for attacks on UNAMSIL peacekeepers; (ii) Sesay's *mens rea* as it relates to those attacks; and (iii) the sentence imposed on Sesay. While *prima facie* relevant, the Prosecution submits that the evidence could not have had any impact on the Trial Chamber's decision for the reasons given below.

C. Impact of the evidence on the decision at trial

25. If the Pre-Hearing Judge were to find that the evidence was not available to the Sesay Defence at trial and to consider it to be credible and relevant, it is submitted that the evidence could not have been a decisive factor in reaching the decision at trial.

26. The Defence argues that Exhibit MFI-134 affects the Trial Chamber's findings at paragraphs 2280-2284 of the Trial Judgement. The Prosecution submits that it could have no impact on these findings. The Trial Chamber considered and rejected the Sesay Defence argument that Sesay believed there to be a conflict between UNAMSIL and the RUF initiated by UNAMSIL.[24] The Trial Chamber found Sesay's characterisation of the situation to be without reasonable foundation in light of the peacekeepers' mandate and their interaction with the RUF prior to the attacks.[25]

27. The mere purported contemporaneous assertion by Sesay in Exhibit MFI-134 that the UN attacked RUF positions has no bearing on the Trial Chamber's findings as to Sesay's Article 6(3) responsibility. The Trial Chamber had already considered whether Sesay could genuinely have believed the RUF was under attack by the UN and dismissed this possibility. It is not evident how Exhibit MFI-134 demonstrates that "the measures that Sesay took could have been reasonable to prevent or punish".[26] Furthermore, the tone of the letter in Exhibit MFI-134 rather reveals frustration with the UN, and a desire to eliminate UN involvement, consistent with Sesay's conduct as

[23] *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-1234, "Judgement", 2 March 2009 ("**Trial Judgement**"), para. 916.
[24] Trial Judgement, para. 2281.
[25] Ibid.
[26] Rule 115 Motion, para. 10.

found by the Trial Chamber.

28. The Defence argues that the impact of the evidence on the convictions under Counts 15 and 17 would consequentially mean that the question of mitigation in sentencing would need to be revisited. While acknowledging the Trial Chamber's conclusions at paragraph 228 of the Sentencing Judgment,[27] the Prosecution submits that for the reasons given above, the additional evidence could not have any impact on the convictions under Counts 15 and 17 and therefore could not impact upon the sentence.

29. The Prosecution submits further that the additional evidence is merely cumulative of evidence that was already before the Trial Chamber when it reached its verdict. The Defence presented evidence at trial to support the contention that "Sesay did not believe that UNAMSIL had been acting in their capacity as peacekeepers."[28] The proposed additional evidence does not contain new information that is capable of rendering the verdict unsafe.

V. CONCLUSION

30. For these reasons, the Prosecution submits that the Rule 115 Motion should be dismissed.

Filed in Freetown,
1 September 2009
For the Prosecution,

Christopher Staker

Vincent Wagona

Nina Jørgensen

[27] "The Chamber finds that the Defence have proved mitigating circumstances on the basis of a balance of probabilities in relation to Sesay's real and meaningful contribution to the peace process in Sierra Leone following his appointment as interim leader of the RUF, however, the Chamber does not accept Sesay's explanation of his reasons for failing to prevent or punish the perpetrators of the attacks against the UNAMSIL personnel, a direct affront to the international community's own attempts to facilitate peace in Sierra Leone." *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-1251, "Sentencing Judgement", 8 April 2009, para. 228.
[28] *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-1221, "Sesay Defence Final Trial Brief", 7 August 2008, para. 1332.

ANNEX A

INDEX OF AUTHORITIES

Index of Authorities

SCSL Jurisprudence

Motions, Decisions and Judgements

Prosecutor v. Sesay, Kallon, Gbao, SCSL-04-15-T-1234, "Judgement", 2 March 2009 ("**Trial Judgement**")

Prosecutor v. Sesay, SCSL-04-15-A-1315, "Request that the Pre-Hearing Judge Presnt to the Appeals Chamber Exhibit MFI-134 from Prosecutor v. Taylor", 31 August 2009 ("**Rule 115 Motion**")

Prosecutor v. Sesay, SCSL-04-15-A-1311 Decision on Gbao Motion to Admit Additional Evidence Pursuant to Rule 115, 5 August 2009 **("Decision on Gbao Rule 115 Motion")**

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Prosecutor v. Taylor, SCSL-03-01-T, Transcript 18 August 2009

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Prosecutor v. Blaškić, IT-95-14-A, "Decision on Additional Evidence", Appeals Chamber, 31 October 2003 ("***Blaškić* Decision on Evidence"**). http://www.icty.org/x/cases/blaskic/acdec/en/031031.htm.

Prosecutor v. Haradinaj, "Decision on Lahi Brahimaj's Request to Present Additional Evidence Under Rule 115", Appeals Chamber, 3 March 2006 (**"*Haradinaj* Decision on Additional Evidence of 3 March 2006"**) http://www.icty.org/x/cases/haradinaj/acdec/en/060303.htm

Prosecutor v. Kordić and Čerkez. IT-95-14/2-A, "Decision on Appellant Mario

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http://www.icty.org/x/cases/krstic/acdec/en/030805.htm

Prosecutor v. Kupreškić et al., IT-95-16-A, "Judgement", Appeals Chamber, 23 October 2001 ("***Kupreškić* Appeal Judgement**")
http://www.un.org/icty/kupreskic/appeal/judgement/index.htm

Prosecutor v. Milošević-Dragomir, IT-98-29/1-A, "Decision on Dragomir Milošević's motion to present additional evidence", Appeals Chamber, 20 January 2009, ("***Milošević-Dragomir* First Decision on Additional Evidence"**).
http://www.icty.org/case/dragomir_milosevic/4#acdec

Prosecutor v. Milošević-Dragomir, IT-98-29/1-A, "Decision on Dragomir Milošević's Further Motion to Present Additional Evidence", Appeals Chamber, 9 April 2009 ("***Milošević-Dragomir* Second Decision on Additional Evidence**")
http://www.icty.org/x/cases/dragomir_milosevic/acdec/en/090409.pdf

Prosecutor v. Mejakić et al., IT-02-65-AR11bis.1, "Decision on Joint Defence Motion to Admit Additional Evidence Before the Appeals Chamber Pursuant to Rule 115", Appeals Chamber, 16 November 2005 ("***Mejakić* Rule 115 Decision"**).
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Prosecutor v. Nikolić-Momir, IT-02-60/1-A, "Decision on Motion to Admit Additional Evidence", Appeals Chamber, 9 December 2004 ("***Nikolić-Momir* Decision on Additional Evidence"**).
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Prosecutor v. Simić, IT-95-9-A, "Decision on Blagoje Simić's Motion for Admission of Additional Evidence, Alternatively for Taking of Judicial Notice", 1 June 2006 (Copy attached in Annex B)

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("Nahimana Decision on Additional Evidence of 8 December 2006")
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ANNEX B

COPY OF AUTHORITY

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IT-95-9-A
A1190 - A1181
01 June 2006

A1190

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 No. IT-95-9-A

Date: 1 June 2006

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Mehmet Güney, Presiding**
Judge Mohamed Shahabuddeen
Judge Liu Daqun
Judge Andrésia Vaz
Judge Wolfgang Schomburg

Registrar: **Mr. Hans Holthuis**

Decision of: **1 June 2006**

PROSECUTOR

v.

BLAGOJE SIMIĆ

DECISION ON BLAGOJE SIMIĆ'S MOTION FOR ADMISSION OF ADDITIONAL EVIDENCE, ALTERNATIVELY FOR TAKING OF JUDICIAL NOTICE

Office of the Prosecutor:

Mr. Peter Kremer

Counsel for the Appellant:

Mr. Igor Pantelić
Mr. Peter Murphy

1. The Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("Appeals Chamber" and "International Tribunal", respectively) is seized of the "Motion of Blagoje Simić for Admission of Additional Evidence, Alternatively for Taking of Judicial Notice", filed confidentially by Blagoje Simić ("Appellant") on 5 April 2006 ("Motion"). The Prosecution filed its partly confidential response on 18 April 2006[1] and the Appellant filed his confidential reply on 23 April 2006.[2]

II. PROCEDURAL BACKGROUND

2. On 17 October 2003, Trial Chamber II rendered a judgement against the Appellant finding him guilty of persecutions as a crime against humanity and sentencing him to 17 years of imprisonment.[3] On 17 November 2003, the Appellant lodged an appeal against the Trial Judgement,[4] in which he challenges, as a sixteenth ground of appeal, the Trial Chamber's decision denying him access to medical reports filed confidentially before the Trial Chamber seized of the *Todorović* case[5] ("*Todorović* Trial Chamber") relating to the psychiatric examination of Stevan Todorović ("Medical Reports"), a former co-accused of the Appellant who pled guilty and subsequently testified as a witness in the Prosecution's case against him.[6]

3. On 3 February 2006, the Appeals Chamber, acting "out of an abundance of caution and for the purpose of being able to fully assess the merits of the Appellant's sixteenth ground of appeal", *proprio motu* granted to the Appellant and his Defence access to the Medical Reports, subject to certain conditions.[7] A redacted version of the Medical Reports was disclosed to the Appellant on

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[1] Prosecution's Consolidated Response to Simić's Additional Evidence Motion and to his Further Submissions of 5 April 2006, Partly Confidential, 18 April 2006 ("Response").
[2] Reply of Blagoje Simić to Prosecution's Consolidated Response to Further Submissions on 16th Ground of Appeal and Motion for Admission of Additional Evidence or Taking of Judicial Notice, Confidential, 24 April 2006 ("Reply").
[3] *Prosecutor v. Blagoje Simić et al.*, Case No.: IT-95-9-T, Judgement, 17 October 2003. On 29 October 2003, Judge Mumba, Presiding Judge, considering that the Judgement rendered on 17 October 2003 contained clerical errors which did not affect in any way its content, recalled the Judgement and issued in its place the judgement accompanying the order to recall: *see Prosecutor v. Blagoje Simić et al.*, Case No. IT-95-9-T, Order Recalling Judgement and Substituting New Judgement, 29 October 2003 ("Trial Judgement"). See Trial Judgement, paras. 115 and 118.
[4] Appellant Blagoje Simić's Notice of Appeal, 17 November 2003. *See* also Appellate Brief of Blagoje Simić, 17 June 2004; Prosecution's Response Brief, Confidential, 27 July 2004; Public Redacted Version of Prosecution's Response Brief of 27 July 2004, 19 October 2004; Reply Brief of Blagoje Simić, Partly Confidential, 10 August 2004; Appellant Blagoje Simić's Amended Notice of Appeal Filed Pursuant to the Decision of the Presiding Judge of 16 September 2004, 22 September 2004.
[5] *Prosecutor v. Stevan Todorović*, Case No: IT-95-9/1-S ("*Todorović* case")
[6] Appellant Blagoje Simić's Notice of Appeal, 17 November 2003, para. 18. *See* also Appellate Brief of Blagoje Simić, 17 June 2004, paras 100-109. The Appeals Chamber understands the Appellant to be referring to the Report of Dr. Lecić-Tosevski and the Report of Dr. Soyka referred to by the *Todorović* Trial Chamber as the "Soyka Report" and the "Lecić-Tosevski Report". *See Prosecutor v. Stevan Todorović*, IT-95-9/1-S, Sentencing Judgement, 31 July 2001 ("*Todorović* Sentencing Judgement"), para. 94.
[7] Order *Proprio Motu* Granting Access to Confidential Material, 3 February 2006 ("Order Granting Access"), pp. 3-4.

22 February 2006 as a confidential annex to the Appeals Chamber's "Decision on Application of Stevan Todorović for Additional Protective Measures", dated 22 February 2006.

4. On 27 February 2006, the Appellant filed a confidential motion before the Appeals Chamber, in which he requested, *inter alia*, leave to disclose the Medical Reports to an expert "for the purpose of obtaining an expert opinion which would assist the Appeals Chamber and Counsel in evaluating the Appellant's 16th Ground of Appeal".[8] In a decision dated 15 March 2006, the Appeals Chamber, considering "that, in the circumstances of the case, the Appellant [had] sufficiently demonstrated that the disclosure of the redacted Medical Reports [was] necessary for the preparation of his defence", granted the Appellant leave to disclose the confidential redacted Medical Reports to an expert, and ordered that the Appellant's additional submissions, if any, be filed no later than 5 April 2006.[9]

5. On 5 April 2006, the Appellant filed confidentially the "Further Submissions of Blagoje Simić Relating to Sixteenth Ground of Appeal", to which he attached, as Annex 3, a report written by Dr. Seth W. Silverman – the forensic psychiatric expert to whom the Medical Reports had been disclosed – "dealing with his findings and opinion relating to the possible implications of the medical reports for the reliability of the testimony of Stevan Todorović at the trial of this case."[10]

6. In his Motion, the Appellant requests the Appeals Chamber to admit as additional evidence pursuant to Rule 115 of the Rules of Procedure and Evidence of the International Tribunal ("Rules"), both the Medical Reports and the report of Dr. Seth W. Silverman as contained in Annex 3 of his Further Submissions ("Silverman Report").[11] Alternatively, "[i]f the Appeals Chamber does not wish to admit additional evidence",[12] the Appellant requests the Appeals Chamber to take judicial notice of the Medical Reports and the Silverman Report pursuant to Rule 94(A) of the Rules.[13]

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[8] Motion of Blagoje Simić (1) for Access to Further Confidential Materials; (2) for Leave to Disclose Confidential Materials to Expert; and (3) to Vary Scheduling Provisions of Orders of 3 February and 17 February 2006, 27 February 2006, paras 2(2) and 9(2).
[9] Decision on Blagoje Simić's Motion (1) for Access to Further Confidential Materials; (2) for Leave to Disclose Confidential Materials to Expert; and (3) to Vary Scheduling Provisions of Orders of 3 February and 17 February 2006, 15 March 2006. *See* pp. 5, 7.
[10] Further Submissions of Blagoje Simić Relating to Sixteenth Ground of Appeal, 5 April 2006 ("Further Submissions"), para. 1.
[11] Motion, para. 1(A) ("Rule 115 Request").
[12] Motion, para. 10 ("Request for Judicial Noticc") .

II. RULE 115 REQUEST

A. Submissions of the parties

7. The Appellant first contends that there is good cause for the filing of the Rule 115 Request at this late stage on the grounds that he had no access to the Medical Reports until they were disclosed by virtue of the Order Granting Access, and that the Silverman Report was only prepared after the Appeals Chamber authorised him to disclose the Medical Reports to an expert.[14] With respect to their admissibility, the Appellant submits that the Medical Reports were not available at trial because the Trial Chamber had denied him access[15] and that the Medical Reports and the Silverman Report are relevant and credible evidence.[16] The Appellant further submits that the evidence he seeks to have admitted "could have been a decisive factor in the decision at trial" in that it "could have affected the decision of the Trial Chamber to investigate the question of Todorović's credibility; the admissibility of Todorović's testimony; the weight to be attached to it; and potentially the outcome of the case".[17]

8. In response, the Prosecution submits that the Rule 115 Request should be denied. It argues that the report of Dr. Lecić-Tosevski ("Lecić-Tosevski Report") submitted for admission as part of the Medical Reports was available at trial through the *Todorović* Sentencing Judgement and the transcript of Dr. Lecić-Tosevski's public testimony.[18] It adds that "[a]ny further evidence was available through Witness Todorović".[19] As to the Silverman Report, the Prosecution submits that "a similar report could have been written on the basis of the oral testimony of Lecić-Tosevski and on relevant evidence which could have been obtained from Todorović in cross examination."[20] The Prosecution contends that the evidence proposed will merely provide evidence available at trial in a different form. In this respect, it emphasises that "evidence is only *new* evidence in the sense of Rule 115, if it was not available at trial 'in any form whatsoever'."[21]

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[13] Motion, para. 1(B).
[14] Motion, para. 5.
[15] Motion, para. 6.
[16] Motion, paras 4 and 6, referring to Further Submissions.
[17] Motion, para. 7.
[18] The Appeals Chamber notes that the Prosecution does not discuss the availability of the information contained in the report of Dr. Soyka ("Soyka Report") as a consequence of its misreading of the Appellant's Motion. *See* Response, paras 2 and 5, where it affirms that the Appellant does not request the admission of the Soyka Report.
[19] Response, para. 9. *See* also para. 15.
[20] Response, para. 18.
[21] Response, para. 17, referring to *Prosecutor v. Ntagerura et al.*, Case No.: ICTR-99-46-A, Decision on Prosecution Motion for Admission of Additional Evidence, 10 December 2004 ("*Ntagerura et al.* Rule 115 Decision"), para. 9 and *Prosecutor v. Krstić*, Case No.: IT-98-33-A, Decision on Application for Subpoenas, 1 July 2003 ("*Krstić* Subpoenas Decision"), para. 4.

9. While arguing that the Appellant failed to discharge his burden to show that the proposed evidence would have been a decisive factor at trial,[22] the Prosecution also contends that it is "clear from the additional evidence itself that it neither could nor would have impacted upon the verdict."[23] According to the Prosecution, the Medical Reports provide no support for the contention that Stevan Todorović's memory was affected.[24] The Silverman Report, the Prosecution submits, only offers general theoretical observations or speculations and sets out a variety of proposals to explore without drawing any conclusions on the accuracy of Stevan Todorović's testimony.[25]

10. In the event that the Appeals Chamber were to grant the admission of the proposed evidence, the Prosecution requests admission of the transcript of Dr. Lecić-Tosevski's public testimony in the *Todorović* case as rebuttal evidence.[26]

11. The Appellant replies, *inter alia*, that "if the evidence had been available at trial, the Appeals Chamber's [Order Granting Access] would have been unnecessary."[27] The Appellant submits that any finding that the evidence of a vital witness testifying against him was unreliable "could well have affected the Trial Chamber's view of [his] criminal responsibility".[28] Contrary to the Prosecution's submission, he argues that the Lecić-Tosevski Report provides compelling reasons to doubt the credibility of Stevan Todorović.[29]

B. Applicable Law

12. The admission of additional evidence on appeal is regulated under Rule 115 of the Rules. In order to be admissible pursuant to this Rule, the evidence put forward must satisfy a number of requirements. The applicant must first demonstrate that the additional evidence tendered on appeal was not available to him at trial in any form,[30] or discoverable through the exercise of due

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[22] Response, paras 9, 22-25.
[23] Response, para. 26.
[24] Response, paras 28-33, 39, referring to the Lecić-Tosevski Report, at RP 948, 942, 952 and the Soyka Report, at RP 919.
[25] Response, paras 9, 36-38.
[26] Response, paras 42-51, 62. The Appeals Chamber notes that, as a consequence of its misreading of the Appellant's Motion, the Prosecution also requests admission of the Soyka Report as rebuttal evidence although this report is part of the evidence the Appellant seeks to have admitted as additional evidence. *See* Response, paras 40-51, 62.
[27] Reply, para. 5.
[28] Reply, para. 5.
[29] Reply, para. 6.
[30] *See, e.g., Krstić* Subpoenas Decision, para. 4; *Ntagerura et al.* Rule 115 Decision, para. 9; *Prosecutor v. Stanislav Galić*, Case No.: IT-98-29-A, Decision on Defence Second Motion for Additional Evidence Pursuant to Rule 115, 21 March 2005 ("*Galić* Rule 115 Decision"), para. 9; *Prosecutor v. Mejakić et al.*, Case No.: IT-02-65-AR11*bis*.1, Decision on Joint Defense Motion to Admit Additional Evidence before the Appeals Chamber Pursuant to Rule 115, 16 November 2005 ("*Mejakić et al.* Rule 115 Decision"), para. 8; *Prosecutor v. Haradinaj et al.*, Case No.: IT-04-84-

diligence.[31] The applicant's duty to act with reasonable diligence includes making "appropriate use of all mechanisms of protection and compulsion available under the Statute and the Rules of the International Tribunal to bring evidence on behalf of an accused before the Trial Chamber."[32] He then must show that the evidence is both relevant to a material issue and credible, and that it *could* have had an impact on the verdict. In other words, the evidence must be such that, considered in the context of the evidence given at trial, it could demonstrate, in the case of a request by a defendant, that the conviction was unsafe.[33] A party seeking to admit additional evidence bears the burden of specifying with clarity the impact the additional evidence could have upon the Trial Chamber's decision.[34]

13. If the evidence was available at trial, it may still be admissible on appeal if the applicant can meet the burden of establishing that exclusion of the evidence would lead to a miscarriage of justice, in that if it had been available at trial it *would* have affected the verdict.[35]

14. Whether the evidence was available at trial or not, the Appeals Chamber has repeatedly recognised that the evidence shall not be assessed in isolation, but in the context of the evidence given at the trial.[36]

C. Discussion

15. According to Rule 115(A), a party may apply to present additional evidence not later than thirty days from the date for filing of the brief in reply, unless good cause is shown for the delay. The Appeals Chamber notes, as the Appellant concedes, that the Motion was filed long after the expiration of the required time-limit. However, in light of the fact that the Medical Reports were only disclosed to the Appellant on 22 February 2006 pursuant to the Order Granting Access and

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AR65.2, Decision on Lahi Brahimaj's Request to Present Additional Evidence Under Rule 115, 3 March 2006, para. 10.

[31] *See, e.g., Prosecutor v. Krstić*, Case No. IT-98-33-A, Decision on Application for Admission of Additional Evidence on Appeal, 5 August 2003 ("*Krstić* Rule 115 Decision"), p. 3; *Galić* Rule 115 Decision, para. 9.

[32] *Prosecutor v. Dusko Tadić*, Case No.: IT-94-1-A, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, 15 October 1998, para. 47; *Prosecutor v. Kupreškić et al.*, IT-95-16-A, Appeal Judgement, 23 Oct 2001 ("*Kupreškić et al.* Appeal Judgement), para. 50; *Momir Nikolić v. Prosecutor*, Case No.: IT-02-60/1-A, Decision on Motion to Admit Additional Evidence, 9 December 2004, public redacted version ("*Nikolić* Rule 115 Decision"), para. 21.

[33] *See, e.g., Krstić* Rule 115 Decision, p. 3; *Ntagerura et al.* Rule 115 Decision, para. 10; *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No. IT-98-34-A, Decision on Naletilić's Amended Second Rule 115 Motion and Third Rule 115 Motion to Present Additional Evidence, 7 July 2005 ("*Naletilić and Martinović* Rule 115 Decision"), para. 12.

[34] *Kupreškić et al.* Appeal Judgement, para. 69.

[35] *See, e.g., Krstić* Rule 115 Decision, p. 4; *Nikolić* Rule 115 Decision, para. 24; *Naletilić and Martinović* Rule 115 Decision, para. 13.

[36] *See, e.g., Kupreškić* Appeal Judgement, paras 66 and 75; *Krstić* Rule 115 Decision, p. 4; *Ntagerura et al.* Rule 115 Decision, para. 12; *Nikolić* Rule 115 Decision, para. 25.

that the Silverman Report could only be prepared on the basis of the said Medical Reports, the Appeals Chamber finds that there is good cause to consider the Motion as validly filed.

16. The Medical Reports were only disclosed to the Appellant on 22 February 2006, after the Appellant tried unsuccessfully to obtain them at trial.[37] As a result, they were not "available" at trial in a literal sense. The question for the Appeals Chamber is, however, whether the Appellant could, by exercising due diligence, have obtained the information contained in them during trial. The Appeals Chamber recalls in this respect that the Appellant must demonstrate that the additional evidence tendered on appeal was not available to him at trial "in any form".[38]

17. The Appeals Chamber considers that some of the information contained in the Medical Reports could have easily been obtained during trial. For instance, the public testimony of Dr. Lecić-Tosevski before the *Todorović* Trial Chamber, to which the Prosecution refers, contains information regarding the fact that Stevan Todorović manifested "post-traumatic stress disorder which is in Axis I of DSM-IV" and suffered "psychosomatic disorders or psychophysiological disorders".[39] However, a careful examination of the Lecić-Tosevski Report shows that other details concerning Stevan Todorović's condition were not disclosed during Dr. Lecić-Tosevski's public testimony.[40] Likewise, such information was not divulged in the *Todorović* Sentencing Judgement, which only revealed, in very general terms, the final conclusions of Dr. Lecić-Tosevski and Dr. Soyka regarding Stevan Todorović's psychiatric condition.[41] Insofar as the Prosecution relies on Stevan Todorović's testimony before the *Simić* Trial Chamber, it does not refer to the relevant transcripts. The Appeals Chamber further notes that, if the Appellant could have cross-examined Stevan Todorović on certain issues contained in the Medical Reports, he could have done it only to the extent that the information was publicly available.

18. The Appeals Chamber therefore finds that the totality of the information offered in the Medical Reports could not have been obtained during trial. Given that the Silverman Report was written on the basis of the Medical Reports, the Appeals Chamber finds that it too was not available at trial within the meaning of Rule 115 of the Rules.

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[37] *See Prosecutor v. Blagoje Simić et al.*, Case No.: IT-95-9-T, Oral Motion for Access to the Medical Records of Witness Stevan Todorović, 3 September 2002, T. 11981-11983, and Oral Decision on Oral Motion to Access to the Medical Records of Witness Stevan Todorović, 3 September 2002, T. 11985-11986.
[38] *See supra*, para. 12, footnote. 30.
[39] *Prosecutor v. Stevan Todorović*, Case No: IT-95-9/1-S, Sentencing Hearing, 4 May 2001, T. 28. *See also* T. 29-52.
[40] The Appeals Chamber refers, for instance, to specific details regarding Stevan Todorović's "behavior and psychological state during the war" or "particulars on his traumas or stressors experienced during the war".
[41] See *Todorović* Sentencing Judgement, para. 94.

19. The Appeals Chamber finds that the Medical Reports and the Silverman Report are credible and that they are relevant to the issues raised by the Appellant's sixteenth ground of appeal. However, the Appeals Chamber is not satisfied that, had the Medical Reports and the Silverman Report been adduced at trial, they could have had an impact on the verdict. Because some of the arguments raised by the parties in this regard are closely inter-related with some of the issues raised in the Appellant's sixteenth ground of appeal, the Appeals Chamber reserves its reasons motivating its conclusion in the present decision. The Appeals Chamber's reasoned opinion will be disclosed to the parties in the final appeal judgement.

20. Accordingly, for reasons which will be fully set forth in its appeal judgement, the Appeals Chamber denies the Appellant's Rule 115 Request.

III. REQUEST FOR JUDICIAL NOTICE

B. Submissions of the Parties

21. In support of his alternative Request for Judicial Notice, the Appellant contends that judicial notice is not "confined to matters of common knowledge in the sense of matters of trivial knowledge held by almost every member of society" but encompasses matters "which are specialized, and which would not be known without resort to background materials supplied by the parties or consulted by a Chamber *proprio motu*."[42] Relying upon the *Čelebići* case, where the Trial Chamber took judicial notice of a number of documents which, according to the Appellant, contained "many facts which can be described as 'common knowledge' only in the light of sources consulted by the Chamber *proprio motu* or at the suggestion of the parties", he submits that the Appeals Chamber could take judicial notice of the Medical Reports.[43] He adds that common law jurisdictions may take judicial notice of facts stated in authoritative sources, "even though such facts may be understandable only with the aid of expert evidence."[44] He avers that, in such cases, the fact judicially noticed must be beyond reasonable dispute.[45]

22. The Prosecution opposes the Appellant's request on the ground that the reports are not commonly or universally known nor are they generally known in the International Tribunal's jurisdiction as required by Rule 94(A). It also emphasises that the Lecić-Tosevski Report and the Silverman Report are not unchallenged.[46]

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[42] Motion, para. 10.
[43] Motion, paras 11, 12.
[44] Motion, para. 11.
[45] Motion, para. 11.
[46] Response, para. 52.

23. In reply, the Appellant argues that he has demonstrated in his motion that the jurisprudence of the International Tribunal "has developed more broadly to encompass a variety of matters which are beyond reasonable dispute, though hardly matters of common knowledge."[47]

B. Applicable Law and Discussion

24. Rule 94(A) of the Rules reads:

> A Trial Chamber shall not require proof of facts of common knowledge but shall take judicial notice thereof.

25. The Appeals Chamber has held that the basis on which judicial notice is taken pursuant to this sub-Rule is that the material is notorious.[48] Facts of common knowledge under Rule 94(A) of the Rules have been considered to encompass common or universally known facts, such as general facts of history, generally known geographical facts and the laws of nature, as well as those facts that are generally known within a tribunal's territorial jurisdiction.[49] Once a Chamber deems a fact to be of common knowledge, it must also determine that the matter is not the subject of reasonable dispute.[50] Obviously, neither the Medical Reports nor the Silverman Report can be considered as "facts of common knowledge" within the meaning of Rule 94(A): not only are they not notorious, common or universally known facts, but they also are the subject of reasonable dispute as pointed out by the Prosecution. The Appeals Chamber therefore considers that the evidence presented by the Appellant does not qualify for judicial notice pursuant to Rule 94(A) of the Rules.

26. Furthermore, the Appeals Chamber recalls that "Rule 94 of the Rules is not a mechanism that may be employed to circumvent the general Rules governing the admissibility of evidence and litter the record with matters which would not be admitted otherwise."[51] The Appeals Chamber emphasises that to admit on appeal a fact capable of judicial notice, the requirements provided for by Rule 115 of the Rules must also be satisfied,[52] which is not the case in this instance. Had the Medical Reports and the Silverman Report met the requirements of Rule 94(A), they would not have been admitted on appeal.

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[47] Reply, para. 7.
[48] *Momir Nikolić v. Prosecutor*, Case No.: IT-02-60/1-A, Decision on Appellant's Motion for Judicial Notice, 1 April 2005 ("*Nikolić* Judicial Notice Decision"), para. 10, referring to *Prosecutor v. Slobodan Milošević*, Case No.: IT-02-54-AR73.5, Decision on the Prosecution's Interlocutory Appeal Against the Trial Chamber's 10 April 2003 Decision on Prosecution Motion for Judicial Notice of Adjudicated Facts, 28 October 2003, pp. 3 and 4.
[49] *Nikolić* Judicial Notice Decision, para. 10.
[50] *Idem.*
[51] *Ibid*, para. 17.
[52] *Ibid*, paras 17, 18.

27. For the foregoing reasons, the Appeals Chamber denies the Appellant's alternative Request for Judicial Notice.

IV. DISPOSITION

28. The Appeals Chamber dismisses the Appellant's Motion in its entirety.

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

Done this first day of June 2006,
At The Hague,
The Netherlands.

Judge Mehmet Güney
Presiding Judge

[Seal of the International Tribunal]