

IN THE APPEALS CHAMBER

Before:

Judge Mehmet Güney, Presiding
Judge Mohamed Shahabuddeen
Judge Liu Daqun
Judge Andrézia Vaz
Judge Wolfgang Schomburg

Registrar:

Mr. Hans Holthuis

Order of:

3 February 2006

PROSECUTOR

v.

BLAGOJE SIMIC

ORDER *PROPRIO MOTU* GRANTING ACCESS TO CONFIDENTIAL MATERIAL

Counsel for the Prosecutor:

Mr. Peter Kremer

Counsel for the Appellant:

Mr. Igor Pantelic
Mr. Peter Murphy

Interested Party:

Mr. Stevan Todorovic

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 ("Appeals Chamber" and "International Tribunal", respectively),

NOTING the Amended Notice of Appeal filed by Blagoje Simic ("Appellant") on 22 September 2004,¹ and the Appellant's Brief filed on 17 June 2004;²

NOTING that the Appellant in his sixteenth ground of appeal challenges the Trial Chamber's decision denying him access to medical reports filed confidentially before the Trial Chamber seized of the *Todorovic* case³ relating to the psychiatric examination of Stevan Todorovic ("Medical Reports"), a

former co-accused who pled guilty and subsequently testified as a witness in the Prosecution's case against the Appellant;⁴

NOTING the Appellant's Motion for Disclosure,⁵ whereby the Appellant requested that the Appeals Chamber obtain and review the Medical Reports on a confidential basis, following which, if satisfied that Stevan Todorovic's medical condition or medication may have adversely affected his reliability or credibility as a witness, it should, according to the Appellant, refer the Medical Reports to a panel of qualified practitioners and, at the same time, provide the Medical Reports to the Appellant;⁶

NOTING that, in his Motion for Disclosure, "the Appellant [was] not seeking to obtain [the Medical Reports] himself on the premise that they may be material for the preparation of the defence, but instead requests that the Appeals Chamber itself obtain the said reports confidentially and examine them in order to assess the merits of the sixteenth ground of appeal";⁷

NOTING further that in the Decision on Motion for Disclosure, the Appeals Chamber held that it was premature to decide whether it needed to consult the Medical Reports for the determination of the Appellant's sixteenth ground of appeal;⁸

NOTING that the Appellant has not been provided with access to the Medical Reports;

NOTING that, pursuant to Rule 75(F)(i) of the Rules of Procedure and Evidence of the International Tribunal ("Rules"), "[o]nce protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal (the "first proceedings"), such protective measures 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";

NOTING that, pursuant to Rule 75(G)(ii) of the Rules, if no Chamber remains seised of the first proceedings, the Chamber seised of the second proceedings may rescind, vary or augment the protective measures ordered in the first proceedings;

NOTING that, pursuant to Rule 75(H) of the Rules, before determining whether to rescind, vary or augment the protective measures pursuant to Rule 75(G)(ii), the Chamber seised of the second proceedings shall obtain all relevant information from the first proceedings, and shall consult with any Judge who ordered the protective measures in the first proceedings, if that Judge remains a Judge of the International Tribunal;

CONSIDERING that, as no Chamber remains seised of the *Todorovic* case (the first proceedings), the Appeals Chamber, being seised of the Appellant's case (the second proceedings), may rescind, vary or augment the protective measures ordered in the *Todorovic* case;

CONSIDERING that the Appeals Chamber has obtained all relevant information from the first proceedings and has consulted the only Judge of the *Todorovic* case who remains a Judge of the International Tribunal, namely Judge Patrick Robinson;

CONSIDERING that, pursuant to Rule 54 as read together with Rule 107 of the Rules, the Appeals Chamber may *proprio motu* issue such orders as may be necessary for the preparation or conduct of the appeal;

FINDING that, 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 in the event that the Appeals Chamber were to find that the Trial Chamber erred in denying the Appellant access to the Medical Reports, it is necessary that the Appellant be provided with access to the Medical Reports at this juncture;

FINDING further that the Medical Reports "are likely to be of material assistance" in the preparation of the Appellant's case;²

EMPHASIZING that whether the Trial Chamber erred in denying the Appellant access to the Medical Reports is an issue on the merits before the Appeals Chamber and that the present order in no way expresses the Appeals Chamber's view on the Appellant's sixteenth ground of appeal, which issue will be finally determined in the Appeal Judgement;

CONSIDERING that because this order grants access to the Medical Reports, it affects the interests of Stevan Todorovic and therefore it allows him to apply for additional protective measures or redactions;

PURSUANT TO Rules 54, 75(G)(ii), 75(H) and 107 of the Rules;

HEREBY GRANTS *proprio motu* the Appellant and his Defence access, subject to the conditions set forth below, to the Medical Reports;

ORDERS that:

- a. the Prosecution and Stevan Todorovic, as parties to the first proceedings, apply to the Appeals Chamber for additional protective measures or redactions of the Medical Reports, if required, within seven working days of this order;
- b. where no additional protective measures or redactions are requested either by the Prosecution or Stevan Todorovic within seven working days, the Registry shall provide the Appellant and his Counsel and any employees who have been instructed or authorised by his Counsel with access to the Medical Reports;
- c. where additional protective measures or redactions are requested for the Medical Reports, either by the Prosecution or Stevan Todorovic, the Registry shall withhold the Medical Reports until the Appeals Chamber has issued a decision on the request(s):
 - i. if the Appeals Chamber denies the request(s), the Registry shall be ordered to provide the Appellant and his Counsel and any employees who have been instructed or authorised by the Counsel with access to the Medical Reports;
 - ii. if the Appeals Chamber grants the request(s), the party or parties applying for redactions shall be ordered to proceed with the authorised redactions and, thereafter, shall provide the redacted Medical Reports to the Registry for provision to the Appellant and his Counsel and any employees who have been instructed or authorised by the Counsel;
- d. save for the disclosure granted by this order, the Medical Reports provided by the Registry shall remain subject to any protective measures previously imposed by the *Todorovic* Trial Chamber;
- e. the Appellant, his Counsel and any employees who have been instructed or authorised by Counsel to have access to the Medical Reports shall not, without express leave of the Appeals Chamber based on a finding that it has been sufficiently demonstrated that third-party disclosure is necessary for the preparation of the defence of the Appellant, disclose to any third party the Medical Reports or any parts thereof:
 - i. if, for the purposes of preparing the defence of the Appellant the Medical Reports or any parts thereof are disclosed to third parties – pursuant to the authorisation of the Appeals Chamber – any person to whom disclosure in this case is made shall be informed that he or she is forbidden to copy, reproduce or publicise, in whole or in part, the Medical Reports or to disclose them to any other person, and further that, if any such person has been provided with

the Medical Reports or any parts thereof, he or she must return them to the Defence of the Appellant as soon as they are no longer needed for the preparation of the Appellant's defence;

- ii. for the purposes of this paragraph, third parties exclude: (i) the Appellant; (ii) his Counsel; (iii) any employees who have been instructed or authorised by the Appellant's Counsel to have access to the Medical Reports; and (iv) personnel from the International Tribunal, including members of the Prosecution;
- f. if Counsel for the Appellant, or any members of his Defence who are authorised to have access to the Medical Reports should withdraw from the case, any parts of the Medical Reports that are in their possession shall be returned to the Registry of the International Tribunal; and

FURTHER ORDERS that:

- a. the Appellant's additional submissions, if any, shall be filed within seven days from the date of receiving the Medical Reports;
- b. the Prosecution's response, if any, shall be filed within five days of the filing of the additional submissions; and
- c. the Appellant's reply, if any, shall be filed within three days of the filing of the Prosecution's response.

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

Done this 3rd day of February 2006,
At The Hague,
The Netherlands.

Judge Mehmet Güney
Presiding Judge

[Seal of the Tribunal]

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1. Appellant Blagoje Simic's Amended Notice of Appeal, 22 September 2004.
 2. Appellate Brief of Blagoje Simic, 17 June 2004 ("Appeal Brief").
 3. *Prosecutor v. Stevan Todorovic*, Case No: IT-95-9/1-S.
 4. Appeal Brief, paras 100-109. The Appeals Chamber understands the Appellant to be referring to the Report of Dr. Lecic-Tosevski and the Report of Dr. Soyka referred to by the *Todorovic* Trial Chamber as the "Soyka Report" and the "Lecic-Tosevski Report". See *Prosecutor v. Stevan Todorovic*, IT-95-9/1-S, Sentencing Judgement, 31 July 2001, para. 94.
 5. Motion of Blagoje Simic for Disclosure of Evidence, 25 June 2004 ("Motion for Disclosure").
 6. Motion for Disclosure, para. 10.
 7. Decision on Motion of Blagoje Simic for Disclosure of Evidence, 23 September 2004 ("Decision on Motion for Disclosure"), p. 3.
 8. Decision on Motion for Disclosure, p. 3.
 9. Decision on Defence Motion by Franko Simatovic for Access to Transcripts, Exhibits, Documentary Evidence and Motions Filed by the Parties in the *Simic et al.* Case, 13 April 2005, p. 3.