



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: 20 February 2002  
Original: English

Before: Judge Florence Ndepele Mwachande Mumba  
Registrar: Mr Hans Holthuis  
Decision of: 20 February 2002

**PROSECUTOR**

v

**TIHOMIR BLAŠKIĆ**

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**DECISION GRANTING ACCESS TO NON-PUBLIC MATERIALS**

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**The Office of the Prosecutor:**

Mr Norman Farrell

**Counsel for the Applicant:**

Mr Anto Nobile  
Mr Russell Hayman  
Mr Andrew M Paley

1. I, Florence Ndepele Mwachande Mumba, Judge of the International Criminal Tribunal for the former Yugoslavia (“Tribunal”), am seized of the confidential “Prosecution’s Response to “Decision to Stay Matter of Access to Non-public Materials” of 24 January 2002”, filed on 7 February 2002 (“Motion”). I am also seized of the “Appellant’s Reply to Prosecutor’s Response to Decision to Stay Matter of Access to Non-public Materials of 24 January 2002”, filed on 14 February 2002 (“Response”). The history of the matter before me, which essentially concerns the access sought by the Applicant to all non-public materials submitted as evidence<sup>1</sup> in the cases *Prosecutor v Kupreškić*,<sup>2</sup> *Prosecutor v Furundžija*<sup>3</sup> and *Prosecutor v Kordić and Čerkez*<sup>4</sup> and the Prosecution’s request for the imposition of stringent protective measures with respect to such materials in the event that I order its disclosure, is sufficiently set out in previous filings and orders.<sup>5</sup>

2. In the Motion, the Prosecution requests that I forward the material relating to the “remaining allegations” of non-compliance with previous Tribunal orders against one of the co-counsel of the Applicant to the President for the purpose of carrying out an assessment to determine whether an investigation or prosecution under Rule 77 is warranted.<sup>6</sup> The Applicant disagrees that Rule 77 proceedings are required.<sup>7</sup> Three allegations of non-compliance with previous Tribunal orders have been made against one of the co-counsel of the Applicant, namely, Mr Anto Nobile. The first

<sup>1</sup> “Appellant’s Motion for Access to Non-public Transcripts and Exhibits in Response to 11 October 2001 Order”, 19 Oct 2001 (“Fresh Motion”), pp 7 and 8 (where the Applicant indicates that he is seeking access to the non-public materials “submitted as evidence” in the said three cases).

<sup>2</sup> Case IT-95-16 (“*Kupreškić* case”).

<sup>3</sup> Case IT-95-17/1 (“*Furundžija* case”).

<sup>4</sup> Case IT-95-14/2 (“*Kordić* case”).

<sup>5</sup> See, *inter alia*, “Appellant’s Motion Requesting Assistance of the Appeals Chamber in Gaining Access to the Non-public Transcripts and Exhibits”, 28 Dec 2000; “Prosecution Response to “Appellant’s Motion Requesting Assistance of the Appeals Chamber in Gaining Access to the Non-public Transcripts and Exhibits””, 8 Jan 2001; “Appellant’s Reply to Prosecution Response to Appellant’s Motion Requesting Assistance of the Appeals Chamber in Gaining Access to the Non-public Transcripts and Exhibits”, 15 Jan 2001; “Order in Relation to Application by Tihomir Blaškić for Access to Non-public Transcripts and Exhibits”, 11 Oct 2001; Fresh Motion; “Prosecution’s Response to Appellant’s Motion for Access to Non-public Transcripts and Exhibits in Response to 11 October 2001 Order and Further Application for an Extension of Time”, 31 Oct 2001 (“Fresh Response”); “Order for Submissions on Specific Protective Measures Required”, 5 Nov 2001 (“Order”); “Prosecution’s Supplementary Response on Protective Measures and Disclosure of Rule 70(C) Material”, 16 Nov 2001 (“Supplementary Response”); public redacted version of “Prosecution’s Response to Appellant’s Motion for Access to Non-public Transcripts and Exhibits in Response to 11 October 2001 Order and Further Application for an Extension of Time”, 16 Nov 2001 (“Redacted Response”); “Order Granting Leave to Reply”, 7 Dec 2001 (“Order of 7 December”); confidential and *ex parte* “Appellant’s Consolidated Reply to Prosecutor’s Supplementary Responses on Protective Measures and Disclosure of Rule 70(C) Material”, 10 Jan 2002 (“Reply”); confidential and *ex parte* “Declaration of Anto Nobile in Support of Appellant’s Consolidated Reply to Prosecutor’s Supplementary Responses on Protective Measures and Disclosure of Rule 70(C) Material”, 10 Jan 2002 (“Declaration”); “Prosecution Response to the Reply of the Appellant’s Motion to Gain Access to Non-public Transcripts and Exhibits”, 16 Jan 2001 (“Response to Reply”); “Decision to Stay Matter of Access to Non-public Materials”, 24 Jan 2002 (“Decision”).

<sup>6</sup> Motion, par 5(a).

<sup>7</sup> Response, pp 1 and 3-4.

allegation concerns the handing over of a witness statement to representatives of the then Croatian government, leading to its publication in the Croatian press.<sup>8</sup> The second allegation concerns the disclosure of closed and private session hearings on an internet web site.<sup>9</sup> The third allegation concerns the publication of portions of closed session trial testimony in two Croatian newspapers.<sup>10</sup> The reference to “remaining allegations” in the Motion appears to be to the second and third of these allegations, the Prosecution seemingly interpreting the qualified observation in the Decision concerning the first allegation<sup>11</sup> as an apparent conclusion that it does not merit further examination.<sup>12</sup> Nothing in the Decision can be interpreted as closing the door on a comprehensive assessment of any of the allegations.<sup>13</sup>

3. Since my position at the moment appears to be that of *acting* Vice-President for the purposes of the matter of the access sought to non-public materials, and since none of the alleged events underlying the allegations of non-compliance against co-counsel for the Applicant took place before me, I do not consider it appropriate at this point to forward the material relating to the “remaining allegations” to the President for the purpose of carrying out an assessment to determine whether an investigation or prosecution under Rule 77 is warranted, however much I consider it necessary that such an assessment be made. The Prosecution should first determine exactly what allegations it considers to be necessary to be further assessed, assuming that it considers it necessary that such an assessment is necessary, an assumption which the Motion supports.<sup>14</sup> The Prosecution can then approach the President directly, a course of action to which, in my view, there should be no bar, although it would of course be for the President to decide whether he is empowered to deal with the matter.<sup>15</sup>

4. The Prosecution has also submitted that the issue of the appropriate protective measures in the present case has to be distinguished from the matter of whether any of the evidence underpinning the Prosecution’s request for protective measures also constitutes *prima facie* evidence of a case of contempt.<sup>16</sup> It is stated that though “some of the allegations” contained in the Supplementary Response may also fall under one or more sub-headings of Rule 77, this should not be an obstacle

<sup>8</sup> See Supplementary Response, pars 6(a)-(c); *Prosecutor v Blaškić*, Decision of Trial Chamber I on the Requests of the Prosecutor of 12 and 14 May 1997 in Respect of the Protection of Witnesses, Case IT-95-14-PT, 6 June 1997.

<sup>9</sup> See Supplementary Response, par 6(d).

<sup>10</sup> See Supplementary Response, par 6(e).

<sup>11</sup> Decision, par 5.

<sup>12</sup> Motion, par 2. *Also see* Motion, pars 17-21.

<sup>13</sup> See, eg, Decision, par 6.

<sup>14</sup> Motion, par 7.

<sup>15</sup> Since the original Chamber before which the alleged non-compliance with previous orders took place is no longer or can no longer be constituted, it would appear as if the matter would have had to be placed before the President for a determination of how it should be dealt with.

<sup>16</sup> Motion, par 5(b).

to a determination of the applicability of the requested protective measures under Rule 75.<sup>17</sup> It is submitted that a determination of the applicability of protective measures under Rule 75 is “necessarily” independent of a determination under Rule 77.<sup>18</sup> The Prosecution has submitted that protective measures ought to be imposed “where there is evidence indicating the likelihood of danger or risk to witnesses if protective measures are not granted”,<sup>19</sup> if there is “some objective foundation” underpinning the request.<sup>20</sup> It is then asserted that the evidence adduced by the Prosecution has amply met the appropriate standard of proof for the imposition of protective measures, that the material adduced on its face establishes an objective foundation for granting protective measures.<sup>21</sup> It is further submitted that there are “compelling interests” at stake, including that of the victims and witnesses and of the Applicant, which require a prompt determination of the matter of access and of the conditions under which such access may be granted.<sup>22</sup>

5. The Applicant has also submitted, without any reasoning, that the issue of whether heightened protective measures are, or are not, justified pursuant to Rule 75 is distinct from the question of whether an investigation is warranted pursuant to Rule 77.<sup>23</sup> It is submitted that the disclosure of non-public materials should not be delayed pending a decision regarding whether an investigation under Rule 77 should be initiated.<sup>24</sup>

6. The determination of the applicability of protective measures under Rule 75 is *generally* independent of a determination as to contempt under Rule 77. None of my previous orders can be construed differently.<sup>25</sup> However, in the instant case the Prosecution has made certain allegations of non-compliance with previous Tribunal orders against one of the Applicant’s co-counsel, allegations that the Applicant has answered, not denied in a blanket or blatantly irrelevant manner. The nature of the answers to the allegations are such that it would make it very difficult if not impossible for me to fairly determine, on the basis of written filings or an oral hearing, whether the allegations are merely just that. A more comprehensive assessment would be required to make such a determination. In the circumstances it cannot on the basis of the filings before me be said that there is “the likelihood of danger or risk to witnesses” if the particular protective measures sought are not granted, or that there is an “objective foundation” underpinning the request for those

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<sup>17</sup> Motion, par 10.

<sup>18</sup> Motion, par 11.

<sup>19</sup> Motion, par 11, with reference to *Prosecutor v Brdanin & Talić*, Case IT-99-36-PT, Decision on Third Motion by Prosecution for Protective Measures, 8 Nov 2000 (“*Brdanin & Talić Decision*”), par 13.

<sup>20</sup> *Ibid.*

<sup>21</sup> Motion, pars 14-23.

<sup>22</sup> Motion, par 10.

<sup>23</sup> Response, pp 1 and 4.

<sup>24</sup> Response, pp 1 and 4.

measures.<sup>26</sup> Notwithstanding this finding, from the Motion and Response it is quite obvious that both the Prosecution and the Applicant are also – rightly – concerned about an undue delay of the relevant appeal proceedings should the access matter be stayed pending Rule 77 proceedings, if any. In the circumstances, in particular in the light of the pressing time concerns, I therefore consider it appropriate, first, to determine the issue of whether the Applicant should be granted access to the non-public materials, as requested, second, to identify those documents to which the Applicant should be granted access, and, third, to determine what, if any, protective measures should apply.

7. The Applicant satisfied what I and the Prosecution<sup>27</sup> consider to be the relevant conditions for being granted the access sought to the non-public materials from cases other than his own, in this instance the *Kupreškić*, *Furundžija* and *Kordić* cases. The Applicant has (a) identified the documents sought or described them by their general nature, and (b) shown a legitimate forensic purpose for such access.<sup>28</sup> With respect to the first requirement, the Applicant identified the material, which is not in the public domain, and the exact form and nature of which he therefore cannot know, as clearly as he possibly could.<sup>29</sup> I therefore consider the remark, which in any event is *obiter*, by the Appeals Chamber, relating to the requirements that have to be satisfied for a request under Rule 75(D),<sup>30</sup> stating that the material be exactly identified, as setting too strict and high a standard.<sup>31</sup> As to the second requirement, the Applicant must identify the legitimate forensic purpose for which access is sought; it should be demonstrated that such access is likely to assist his case materially, or that there is at least a good chance that it will give that assistance.<sup>32</sup> The Applicant is seeking access, in the main,<sup>33</sup> for the purposes of Rule 115, which concerns the admission of additional evidence before the Appeals Chamber.<sup>34</sup> To be considered as additional evidence within the meaning of Rule 115, the material sought to be admitted has to relate to facts or issues litigated at trial. I am satisfied that the material sought by the Applicant in the present case sufficiently relates to facts and issues litigated in the three other cases as to warrant access being

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<sup>25</sup> See Order of 7 December; Decision, par 4.

<sup>26</sup> Using the borrowed phraseology used by the Prosecution is not to be construed as that I accept that the referred to part of the *Brđanin & Talić* Decision is relevant to the present case.

<sup>27</sup> Fresh Response, pars 9-11.

<sup>28</sup> *Prosecutor v Hadžihasanović and Others*, Case IT-01-47-PT, Decision on Motion by Mario Čerkez for Access to Confidential Supporting Material, 10 Oct 2001 (“*Hadžihasanović* Decision”); *Prosecutor v Brđanin and Talić*, Case IT-99-36-PT, Decision on Motion by Momir Talić for Disclosure of Evidence, 27 June 2000 (“*Talić* Decision”), par 7.

<sup>29</sup> *Hadžihasanović* Decision, par 11. See Fresh Motion, pp 1, 4-6.

<sup>30</sup> *Prosecutor v Blaškić*, Case IT-95-14-A, Decision on the Appellant’s Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 Sept 2000, par 55.

<sup>31</sup> *Hadžihasanović* Decision, par 11.

<sup>32</sup> *Hadžihasanović* Decision, par 11; *Talić* Decision, par 7.

<sup>33</sup> Reference is made in the Fresh Motion to access being sought to evaluate whether there is any Rule 68 material to which the Applicant is entitled (at pp 5-6). This will be dealt with below.

<sup>34</sup> Fresh Motion, pp 1, 4-5.

granted, as set out in the Fresh Motion.<sup>35</sup> The access sought by the Applicant clearly is no “fishing expedition”. Any questions relating to whether the said non-public materials would satisfy the requirements of Rule 115, including whether the said materials were available to the Applicant at his trial,<sup>36</sup> are matters for the Appeals Chamber to determine.

8. The Applicant has also made reference to access being sought to evaluate whether there is any Rule 68 material, with examples from the *Kordić* case, to which he is entitled.<sup>37</sup> Both parties have noted that the Prosecution has filed confidentially on 24 January 2001 a motion requesting the release of specific material as exculpatory under Rule 68,<sup>38</sup> a motion on which it has received no decision yet.<sup>39</sup> For the reasons set out in the “Order for Submission on Specific Protective Measures Required”,<sup>40</sup> I consider that I have the competence to authorise the release of Rule 68 materials from the *Kordić* case to the Applicant. The said materials are those identified in the annex to a document filed on an *ex parte* basis before the *Blaškić* Appeals Chamber on 2 February 2001.<sup>41</sup> This material can be disclosed to the Applicant.

9. The question whether I would have had the authority to order the disclosure of non-public Rule 70(C) material to the Applicant, regardless of whether the provider of such information consented,<sup>42</sup> need not be addressed, since the Prosecution has sought and obtained the consent of the provider of that material.<sup>43</sup> This material can be disclosed to the Applicant.

10. There appears to be no need to consider whether I would have had the authority to order the disclosure of non-public Rule 53(C) material from the *Furundžija* case,<sup>44</sup> since that material was never tendered into evidence in that case.<sup>45</sup> It thus falls outside the scope of the Applicant’s request, which is for access to non-public materials presented as evidence.

<sup>35</sup> See, eg, pp 1, 4-6.

<sup>36</sup> As is asserted by the Prosecution in relation to some of that material (Fresh Response, par 14). Also see Fresh Response, pars 15 and 16, for other submissions by the Prosecution that the said materials would be inadmissible as Rule 115 evidence.

<sup>37</sup> Fresh Motion, pp 5-6.

<sup>38</sup> Confidential Prosecution Notice of Intention to Seek the Release of Non-public Exculpatory Material from the Trial Chamber in *Prosecutor v Kordić and Čerkez* for Disclosure in the Appeal of *Prosecutor v Blaškić*, 24 Jan 2001 (“Rule 68 Motion”), filed before the Appeals Chamber in *Prosecutor v Blaškić*.

<sup>39</sup> Fresh Motion, p 5; Fresh Response, par 18.

<sup>40</sup> 5 Nov 2001, par 3.

<sup>41</sup> *Prosecutor v Blaškić*, Case IT-95-14-A, *ex parte* and confidential Prosecution Request to Release Non-public Exculpatory Material from the Trial Chamber in *Prosecutor Kordić and Čerkez* for Disclosure Pursuant to Rule 68 in the Appeal of *Prosecutor Blaškić*, 2 Feb 2001. The Prosecution telephonically agreed to this document being referred to in this decision.

<sup>42</sup> See Fresh Response, par 23; Order for Submission on Specific Protective Measures Required, 5 Nov 2001, par 3.

<sup>43</sup> Supplementary Response, par 13.

<sup>44</sup> See Fresh Response, par 20.

11. The remaining non-public material submitted as evidence in the *Kupreškić, Furundžija* and *Kordić* cases and covered by Rule 75(D), can be disclosed to the Applicant.

12. On the whole, in the interests of justice, since an assessment of possible Rule 77 proceedings is yet to be made, and given the indication by the Applicant of additional protective measures which he considers would be sufficient, and notwithstanding my finding that in the instance Rule 75 access cannot be separated from Rule 77 proceedings, I consider that the access should be granted subject to some protective measures in addition to those already in place with respect to the materials to be disclosed. The Prosecution has requested that in addition to any other protective measures already adopted or to be adopted by a Trial Chamber, certain other measures be taken prior to granting access.<sup>46</sup> These requested protective measures are as follows:

- (i) Access to protected testimony and materials shall be conditioned upon each counsel for the Appellant signing a written undertaking that each counsel will not reveal the identity of the protected witness or disclose the contents of the protected materials to anyone else except and unless counsel has made a written application to the Trial Chamber that issued the original protective orders, identifying the person to whom the identity of the protected witness or the protected material is to be disclosed and the purpose for such disclosure.
- (ii) If disclosure to other persons is granted, those who are informed of the identity of a protected witness and who are provided with materials covered by this Order shall each sign and date a written undertaking stating that they will not reveal the identity of the protected witness nor copy confidential materials and said undertakings shall be filed with the Vice Presidency [sic].<sup>47</sup>

It is further requested that as the original Trial Chambers are no longer constituted by the same judges, the responsibility for the adoption and maintenance of the said protective measures be undertaken by the Vice-Presidency pursuant to the authority conferred by Rule 75(D).<sup>48</sup>

13. The Applicant does not oppose providing a written undertaking that counsel will not disclose the identities of protected individuals or the contents of protected material to third parties absent authorisation from the Tribunal.<sup>49</sup> However, the Applicant submits that, if read literally, the Prosecution's requested measures would prevent the Applicant's counsel from disclosing the material to any support personnel working for the counsel's respective law firms, and arguably even the Applicant, without prior authorisation. The requested measures would, it is further submitted, also require each individual in counsels law firms who might have access to such material to sign a written undertaking.<sup>50</sup> It is submitted that should "interim" protective measures be deemed necessary, the following protective measures would be sufficient:

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<sup>45</sup> Supplementary Response, par 12.

<sup>46</sup> Supplementary Response, par 8.

<sup>47</sup> Supplementary Response, par 8.

<sup>48</sup> Supplementary Response, par 8(iii).

<sup>49</sup> Response, pp 2-3.

<sup>50</sup> Response, p 3.

- (a) One counsel on behalf of each of the law firms representing Appellant will provide a written undertaking stating that neither the identities of protected witnesses nor the content of protected documents shall be disclosed to any third party (individuals other than: (i) Appellant; (ii) persons employed by counsel's law firms; (iii) Tribunal personnel; or (iv) members of the Prosecutor's Office) without prior authorisation from the Tribunal. Counsel's undertaking shall state that all individuals employed by counsel's respective law firms to whom access is provided to the protected material shall be informed of the obligation to maintain the confidentiality of the protected material.
- (b) If Appellant desires to disclose any protected information to third parties, Appellant shall file a written application with the Tribunal. Such application can be made on an ex parte and confidential basis. Any third party to whom access is granted shall sign a written undertaking acknowledging their obligation to maintain the confidentiality of the material.<sup>51</sup>

The Applicant also requests that as the original Trial Chambers are no longer constituted by the same Judges, responsibility for the adoption and maintenance of the protective measures should be vested in the Vice-Presidency.<sup>52</sup> Furthermore, since the current President and Vice-President were both members of the Applicant's Trial Chamber, the Applicant has submitted that jurisdiction regarding these matters should remain with me.<sup>53</sup>

14. I consider the protective measures sought by the Prosecution and submitted by the Applicant to go beyond what is necessary in the circumstances. The additional measures that I will order would be less burdensome for all involved, without compromising on their effectiveness.

15. Pursuant to Rule 75, I hereby decide that the Applicant shall be granted access to all the non-public materials that have been submitted as evidence in the *Kupreškić*, *Furundžija* and *Kordić* cases, as well as the Rule 68 material from the *Kordić* case, subject to any other protective measures already adopted or to be adopted by a Chamber and the following additional protective measures:

- (a) Every person within the law firms of all the counsel of the Applicant, including the said counsel, who will or may have access to the disclosed materials shall, *prior to having such access*, file with the Registry a written undertaking. That written undertaking shall (i) state that he/she shall not disclose to any third party either the identities of protected witnesses or the content of protected documents, unless sub-paragraph (c) has been complied with, and (ii) that he/she is fully apprised of Rule 77 and accept the jurisdiction of the Tribunal to deal with any breaches of the protective measures in terms of that Rule.
- (b) Third parties exclude (i) the Applicant; (ii) persons employed by counsel's law firms who have filed such a written undertaking; (iii) Tribunal personnel; or (iv) the Prosecution.

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<sup>51</sup> Response, p 3.

<sup>52</sup> Response, p 3.

<sup>53</sup> Response, p 3, fn 1.



(c) In the event that the Applicant considers it necessary to disclose any of the disclosed materials to third parties, that third party, the Applicant shall file, *at least four working days prior to having such access*, a written undertaking by that third party in the terms set out in subparagraph (b) of this paragraph, as well as an undertaking not to copy any of the disclosed material, with the Registry. Such an undertaking shall not be made on an *ex parte* basis.

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

Done the twentieth day of February 2002  
At The Hague  
The Netherlands



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Florence Ndepele Mwachande Mumba  
Judge

**[Seal of the Tribunal]**