SCSL-2004-15-PT 6422

145

(6422 - 6465)

THE SPECIAL COURT FOR SIERRA LEONE

BEFORE:

Judge Benjamin Itoe
Judge Bankole Thompson
Judge Pierre Boutet

Registrar: **Mr. Robin Vincent**

Date filed: **28th May 2004**

The Prosecutor

-v-

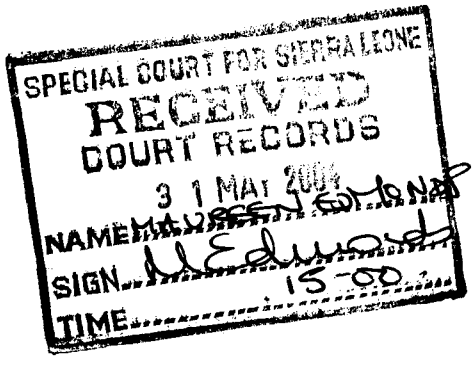
Issa Hassan Sesay

Case No: SCSL – 2004 – 15 – PT

Defence Motion for disclosure pursuant to Rule 66 and Rule 68

Office of the Prosecutor

Luc Cote
Robert Petit



Defence Counsel

Tim Clayson
Wayne Jordash
Serry Kamal
Sareta Ashraph

INTRODUCTION

RULE 66(A) (ii)

1. On the 6th May 2004 the Prosecution (Mr Robert Petit) agreed, during the Pre – trial conference, that the defence would be given access to the evidence which it had in its possession and which, pursuant to Rule 66(A) (ii) it did not seek to rely upon. This was explicitly and categorically stated by Mr Petit following defence submissions during which the defence invited the Trial Chamber to order the Prosecution to "list and describe" the evidence it possessed in order for the defence thereafter to show the "good cause" envisaged by the rule.[1] Mr Petit submitted that this was unnecessary given that the Prosecution were willing to allow the defence access to the evidence (in order to be able to peruse and assess their evidential value).

2. In other words the Prosecution made clear to the Trial Chamber that it need not address its mind to the defence request since it would provide the defence with the information it sought by granting the defence direct access to the evidence. The defence conceded that in these circumstances it would no longer need the requested order.[2]

3. On the 10th May 2004 the defence (and copied to the Trial Chamber)[3] wrote to Mr Robert Petit and requested that the Prosecution provide dates (after the 21st May 2004) when it would be convenient for a member of the Sesay team to peruse the evidence. The letter was copied to the Trial Chamber.

4. On the 19th May 2004 the Prosecution (Mr Petit) responded. In the letter inter alia it was asserted;

   (i) "It (the Prosecution) (was) willing to grant the Defence access to any non – disclosed material in its possession, in accordance with the provisions of Rule 66(A)"

   (ii) "Hence upon demonstrating that any statements that were made by witnesses the Prosecution does not intend to call to trial, are material to the preparation of the defence, the Prosecution will comply with its obligation under Rule 66(A)(ii) and allow the Defence access to these

[1] The defence submitted that in order for it to show "good cause" pursuant to Rule 66(A)(ii) it would need (i) confirmation that statements of additional witnesses existed and (ii) notice of the contents (in summary form). In short the defence argued (and continue to do so) that it is impossible to show good cause (however that phrase is interpreted) without this information (at a minimum). The defence can not show that it has "good cause" to obtain the material in the possession of the Prosecution if it does not know of its existence or has no indication of its content.

[2] The defence concluded the discussion with the remark (from memory) "if the Prosecution say we can see it (that is the evidence) then we can see it (and we therefore do not proceed with the present application) (brackets added).

[3] The defence document is in Freetown and therefore not attached.

statements. Furthermore, the Defence is free to apply to the Chamber and in accordance with Rule 66(A) (i), request that it orders the Prosecution to disclose statements of witnesses the Prosecution does not intend to call to trial".

5. The defence invite the Trial chamber to obtain the Court transcript of the hearing to ascertain the clear and unequivocal guarantee given by Mr Pettit, on behalf of the Prosecution, to allow access to this material. The defence abandoned their request for a schedule of the evidence on the basis that this guarantee was a commitment offered in good faith and with due regard to the accused's rights.

6. Sadly this appears not to have been the case. It is more than unfortunate that the defence are unable to rely upon the clear commitments given by the Prosecution, in open court.[4] It is equally regrettable that it has to wait for several weeks until an issue of this importance is able to be adjudicated upon due to the dilatory nature of the Prosecution response. The defence invite the Trial Chamber to observe the failure of the Prosecution to remain true to their stated guarantee.

7. Moreover the defence takes this opportunity to state, as a matter of public record, its concern with the Prosecution overall approach to disclosure in Mr Sesay's case. The defence note:

   (i) The failure of the Prosecution to have a clear and agreed interpretation of Rule 66. At the Status conference the defence submitted that the Prosecution ought to show "good cause" if it was to allowed to rely upon witness evidence served after the thirty day period, following the accused's initial appearance (according to the plain meaning of Rule 66 as it was before amendment at the Plenary – 11th – 14th March 2004). It was clear that the two senior Prosecutors did not even agree upon the interpretation of Rule 66. At first Mr Petit offered an interpretation of the Prosecutions obligation pursuant to Rule 66. Mr Cote then rose to his feet (clearly dissatisfied with his colleague's interpretation) and offered an alternative (and equally restrictive) view[5] of the Prosecutions obligations. In other words, a year after the first appearance of the accused the two senior Prosecutors had not reached agreement between themselves as to the nature and degree of the Prosecution's disclosure obligations pursuant to Rule 66. This did not and does not inspire confidence.

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[4] The defence note the same situation arose in the Pre – trial Conference on the 6th May 2004 wherein the Prosecution were invited by the defence to detail in their renewed application for Special Measures the *specific* security concerns of their individual experts to allow a proper determination of their refusal to disclose their identities. This was an invitation which was accepted by the Prosecution (or rather no objection was made to the request) and the defence were satisfied that an agreement had been reached and in good faith would be kept. Sadly it was not to be and the defence through the machinations of the Prosecution have again been disadvantaged.

[5] And in fact stated explicitly that he had a different view!

(ii) The failure of the Prosecution to identify and distinguish which material it was serving pursuant to Rule 66 and Rule 68. The Prosecution approach was to serve several hundred pages and assert that somewhere within the defence would find the Rule 68 material. This approach has since changed but only upon the intervention of the Trial Chamber (and only when the defence had raised the issue at the Status conference and even then only after the Prosecution had fought to maintain their unhelpful position). This is an area which has been the subject of much discussion at the ad hoc Tribunals and in particular has been adjudicated upon at the International Criminal Tribunal for the former Yugoslavia on several occasions[6]. The jurisprudence clearly demonstrates (at the very least) the desirability of identifying the material pursuant to Rule 68. It must be assumed that the experienced Prosecutors in this case were well aware of this jurisprudence and yet felt it appropriate to take no lesson or warning from it. Instead their approach, sadly oft repeated, was to seek to obtain as much advantage for themselves, irrespective of the rights of the accused to a fair and expeditious trial. Whilst it is right that the Special Court (nor the Prosecution) does not *have* to follow the jurisprudence of other Tribunals nevertheless when considering the rights of the accused to a fair trial nothing except unfairness arises from ignoring lessons learnt elsewhere.

(iii) The refusal of Mr Pettit at the Status conference to even admit to having material in their possession which they were not seeking to rely upon. The defence asked the Prosecution on three occasions to confirm (or otherwise) whether it had material in its possession which it was not seeking to rely upon. The Prosecution refused to answer this question on each occasion. One wonders how these refusals could ever be consistent with the Prosecution' overall disclosure obligations. It is difficult to see how the rights implicit in Rule 66, 67 and 68 could even begin to be properly addressed by the Prosecution when at a crucial time in the Proceedings they refused to answer such a simple question.

8. The defence submit that the three examples aforementioned characterise the unfortunate and unfair approach taken by the Prosecution at key points over the

[6] See for example Prosecutor v Kordic and Cerkez, Decision on Second Motions to Extend Time for Filing Appellants Brief, Case IT -95-14/2-A, 2 July 2001, paras. 9 – 10 and Prosecutor v. Krajianik & Plavaic, Decision on Motion from Momcilo Krajianik to Compel Disclosure of Exculpatory Evidence Pursuant to Rule 68, Case IT-00-39 & 40- PT, 19 July 2000, (Decision on Motion to Compel Disclosure. pp 2 in which it was held that as a "matter of practice and in order to secure a fair and expeditious trial, the Prosecution ought to indicate which material it is disclosing under the Rule. See also the later case of Branin & Tali, Decision on Request for Dismissal Filed by Momir Tali. On 29 November 2001, Case IT – 99 – 36 – PT, Para. 21 where it was reiterated that it was "highly desirable" for the Prosecutor to adopt a practice of identifying material that was being disclosed pursuant to Rule 68.

last year. The latest "change of heart" by the Prosecution is another example of the restrictive and unhelpful positions adopted by the Prosecution on the issue of disclosure.

9. The defence are extremely concerned about this approach and believe it to be dangerous and against the interests of justice and the accused. The Prosecution may be a party to these proceedings but it ought not to adopt a partisan position. It is a Minister of Justice[7] and ought not to struggle for convictions at any cost. As was made abundantly clear in the case of the Prosecutor v. Krajisnik, Decision on Prosecution Motion for Clarification in respect of the Application of Rules 65*ter*, 66B and 67(C), August 1, 2001 the overriding objective in implementing these (disclosure) rules is to guarantee fair and expeditious proceedings and equality between the parties in the preparation of the case. The Prosecution appear to be unaware of this or even worse to simply believe it is acceptable to treat them as sticks by which the defence can be beaten.

10. In the aforementioned case of Krajisnik, the Trial Chamber rightly interpreted the Rules of disclosure widely (in that specific instance it interpreted the requirement to file a *list* of exhibits as an obligation to file the exhibits themselves) and in favour of more disclosure to the defence because to do otherwise "would.....allow a narrow interpretation of the Rules to override elementary notions of a fair trial".[8] The defence commend this is approach which is the only approach to disclosure which is fair and which ensures that the rights of the accused remain paramount. *Nothing, except miscarriages of justices, are gained from an all encompassing and restrictive approach to disclosure.*

7. The defence hereby request that the Trial Chamber order the Prosecution to allow access to the evidence in accordance with their stated intention. At the Pre- trial conference the Prosecution effectively brought all argument concerning the interpretation of Rule 66(A) (ii) (and how the defence could show "good cause" without the assistance of a schedule detailing the evidence retained) to a close by explicitly guaranteeing that the defence could instead peruse the evidence as a necessary stage in the process by which a showing of "good cause" might be possible. The defence reiterate that this guarantee (or disclosure generally) should not be viewed as a favour bestowed upon the defence by the Prosecution but instead a necessary concession by the Prosecution to allow them to fulfil their disclosure obligations and thereafter to give voice to Rule 66(A) (ii). The defence seek an order that the Prosecution comply with the guarantee given. It is the respectful submission of the defence that anything less would effectively penalise the defence for the assumption that open court statements by a party were given in good faith.

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[7] See Prosecutor v Branin & Talic, Case IT – 99 – 36 – AR 73.9, Decision on Interlocutory Appeal, 11 December 2002.

[8] See International Archbold pp 189. para Case Management.

MR PETIT'S LETTER

8. ***The Prosecution (in their letter of response dated 19th May 2004) assert that (i) they will comply with their obligations pursuant to Rule 66(A)(ii) (and allow access to the statements) upon the defence showing that the statements are "material to the preparation of the defence and additionally (ii) the defence is "free to apply to the Chamber and in accordance with Rule 66(A)(i) request that it orders the Prosecution to disclose statements of witnesses the Prosecution does not intend to call to trial".***

GENERAL OBSERVATIONS

9. These two assertions betray the lack of willingness of the Prosecution to do more than pay lip service to their disclosure obligations. Moreover they display a curious lack of understanding of the disclosure provisions (and the obligations which arise therein) as well as a disturbingly casual approach to legitimate defence requests.

(i) " they will comply with their obligations pursuant to Rule 66(A)(ii) (and allow access to the statements) upon the defence showing that the statements are "material to the preparation of the defence"

10. In the first place it is obvious from a reading of Rule 66(A) (ii) that the obligation is on the defence to show "good cause". It is not for the Prosecution to unilaterally decide that "good cause" equates to or interprets as "material to the preparation of the defence" nor is it for them to place restrictions upon the right to disclosure unless those arise from the Rules of Procedure and Evidence. In the second place, as is obvious, the defence can not show "good cause" without knowing what material exists in the possession of the Prosecution.

(ii) the defence is "free to apply to the Chamber and in accordance with Rule 66(A)(i) request that it orders the Prosecution to disclose statements of witnesses the Prosecution does not intend to call to trial".

11. This assertion is but a mystery. Rule 66(A) (i) does not involve either an obligation on the defence nor a mechanism by which the defence might seek statements of witnesses. The prosecution may mean Rule 66(A) (ii) or they may not. What is clear however is, by virtue of the promise made (and their subsequent reneging on the promise) the defence have been disadvantaged. The Trial of the accused is but one month away and the Prosecution believe it is acceptable to behave in this inconsistent way thus (by their machinations) denying the defence the fundamental right to know what material the Prosecution has in its possession in order to be able to "show good cause" to be able to obtain it.

12. In summary (and perhaps more importantly) the assertions made by the Prosecution give rise to a suspicion that they seek to avoid the Trial Chambers supervision in the crucial area of disclosure. The advantage gained by stymieing

debate at the Pre –trial conference by the promise made; the late response to the defence to their letter of the 10th May 2004 and the erroneous and unhelpful assertions as aforementioned, leave the defence in the position where they have to return (late in the day) to seek enforcement of their rights by way of this motion. It is difficult to accept that this situation has arisen without aforethought. It is (as has been stated before)[9] "trial by ambush" which seeks to take/gain advantage of the little time remaining for these crucial issues to be resolved.

13. The defence reiterates its request to the Trial Chamber insofar as we seek an order that the Prosecution not be allowed to take advantage by their change of mind. In the event that the Trial Chamber is not minded to grant the request for an order the defence would seek an order that the Prosecution provide a schedule (with summaries) of the statements in its possession which it does not seek to rely upon. As the defence submitted at the Pre – trial conference the defence can not show "good cause" (or even "materiality") without knowing what material exists.

RULE 68

11. The defence do not accept that the Prosecution have served all the evidence in its possession which ought properly to fall within the wide ambit of Rule 68. The investigations conducted thus far (on behalf of the defence) suggest that there are not an inconsiderable number of witnesses whose evidence would be wholly exculpatory of Mr Sesay. In the first 10 days of investigation the defence were able to locate several. However surprisingly the Prosecution have only served exculpatory evidence contained within statements which are principally incriminatory in their nature. The defence do not accept that the Prosecution do not have in their possession witness evidence which is wholly or principally exculpatory.

12. As stated by the Appeals Chamber in Prosecutor v Blasic, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule and Additional Filings, September 26, 2000, the duty of the Prosecution to disclose exculpatory evidence is of "great importance"[10]. The Appeals Chamber also concluded that "the duty of the Prosecution to disclose to the defence the existence of such evidence pursuant to Rule 68 continues at least until the date when the Trial Chamber delivers its judgement" (para. 31).

13. The Prosecution's various stances concerning disclosure, with all due respect to them, does not engender confidence. The late admission (albeit only obliquely during their submissions concerning Rule 66(A)(ii) as outlined in paragraph 1 above) that there is material in their possession upon which they do not seek to rely upon and their failure to respond to the request to facilitate arrangements to allow the defence access have done little to provide reassurance.

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[9] See defence Response to the Prosecution Motion for concurrent hearing of evidence (20th May 2004)
[10] See para 47 - 50

14. The defence invites the Trial Chamber to exercise a supervisory role in relation to this issue of fundamental importance. In particular the defence seeks the following orders:

    (i) That the Prosecution comply by a specified date (prior to trial) with its obligations pursuant to Rule 68 and disclose to the defence the existence of evidence known to it:

        (a) which in any way tends to suggest the innocence of, or to mitigate the guilt of, the accused, or

        (b) that may affect the credibility of prosecution evidence .

    (ii) On or before the specified date the Prosecution should file a signed report by a member of its team in which he or she certifies:

        (a) that a full search has been conducted throughout the materials in the possession of the prosecution or otherwise within its knowledge for the existence of such evidence; and
        (b) that he or she is aware of the continuing nature of the obligation pursuant to Rule 68.

    The member of the team who signs the report should identify in the report his or her knowledge of that material which enables him or her to so certify.

15. The defence refer the Trial Chamber to the Honourable Judge Hunt's identical order in the case of Prosecutor v. Krnojelac, Decision on Motion by Prosecution to modify Order of Compliance with Rule 68, November 1, 1999.

16. It must be recalled that the expression "evidence" is intended to include any material which put the accused on notice that material exists which may assist him in his defence, and it is not limited to material which is itself admissible in evidence.[11] In this regard the defence seek at a minimum:

    (i) All evidence which relates to inducements made to witnesses to facilitate their "cooperation" in giving evidence. On the face of many of the witness interviews of the so called "insiders"[12] the interviewers appear to offer rewards for continued cooperation. The defence seeks all the details of offers made and rewards (including relocation packages, amnesties and monies) given or due.

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[11] See Prosecutor v Milorad Krnojelac (ante) para. 11(1).

[12] For the avoidance of doubt those who were previous members of either the RUF or the AFRC or are in other ways implicated in the events the subject of the indictment or crimes which are not within the jurisdiction of the Special Court but nevertheless are potentially judiciable within Sierra Leone law.

(ii) All evidence which relates to information the Prosecution have which would enable the defence to locate evidence (for example witness testimony which indicates further investigations)

(iii) All evidence which relates to the credibility of any witness (including prior statements (whether oral or written) antecedents, evidence of criminal conduct)

(iv) All evidence which relates to the practice of any of the investigators involved in obtaining (or trying to obtain) evidence including Alan White; Gibrille Morisette and John Berry. (In particular the specific details of their offers to each and every witness who has been promised *anything* in return for them giving evidence);

(v) Any document which relates to the positive role played by the accused in the disarmament process including any contacts with United Nation personnel, the Government of Sierra Leone and the ECOWAS leaders.

(vi) Any evidence which relates to the reason why the accused was selected to play the role identified in (vi) above;

(vii) All evidence including statements of any witness which provides notice to the defence of any defence to any of the allegations;

RULE 66(A)(iii)

17. The defence hereby gives notice to the Prosecution pursuant to Rule 66(A) (iii) of a request to permit the defence to inspect any books, documents, photographs and tangible objects in their custody or control, which are material to our defence. In particular the defence seek disclosure of the following categories:

(i) All books, documents, photographs and tangible objects which relate to or help to clarify the role of ECOWAS in the eventual peace agreement and disarmament of the RUF, the AFRC and the CDF.

(ii) All books, documents, photographs and tangible objects which relate to or help to clarify the role played by Charles Taylor within the overall conflict; diamond trading and also within ECOWAS.

(iii) All books, documents, photographs and tangible objects which relate to or help to clarify the alleged training of the RUF command structure in Libya;

(iv) All books, documents, photographs and tangible objects which relate to or help to clarify the command structure of the RUF and the accused's position in it;

(v) All books, documents, photographs and tangible objects which relate to or help to clarify the distinct roles of the RUF and AFRC within the conflict;

(vi) All books, documents, photographs and tangible objects which relate to or help to clarify the role the accused played in the release of any UNAMSIL troops at any time during the conflict;

(vii) All books, documents, photographs and tangible objects which relate to or help to clarify the role the accused played in securing the lives of prisoners; civilians; soldiers; peacekeepers; ECOMOG;

(viii) All books, documents, photographs and tangible objects which relate to or help to clarify the means and extent of communication between the rebel groups and those indicted (present and past) by the Special Court;

(ix) All books, documents, photographs and tangible objects which relate to or help to clarify the nature of the relationship between those indicted (present and past) at any time in the conflict;

(x) All books, documents, photographs and tangible objects which relate to or help to clarify any discord between the accused and others indicted (present and past);

(xi) All books, documents, photographs and tangible objects which relate to or help to clarify any communications between UNAMSIL; the Government of Sierra Leone; ECOWAS and the accused during the conflict and the disarmament process;

(xii) All books, documents, photographs and tangible objects which relate to or help to clarify the position the United Nations; UNAMSIL; the Government of Sierra Leone held in relation to the continuation of diamond mining by the RUF.

REQUEST

18. The defence respectfully request that:

(i) the Trial Chamber order the Prosecution to allow access to the defence to the evidence it does not seek to rely upon;

(ii) In the alternative to (i) that the Prosecution provide a schedule of the evidence it does not seek to rely upon;

(iii) The Trial Chamber order the Prosecution to comply with its Rule 68 obligations (as outlined in paragraph 14 and 16 above)

(iv) The Trial Chamber order the Prosecution to disclose the items listed in paragraph 17 pursuant to Rule 66(A)(ii).

Dated the 28th day of May 2004

Tim Clayson

Wayne Jordash

Serry Kamal

Sareta Ashraph

6432

IN THE APPEALS CHAMBER

Before: Judge David Hunt, Pre-Appeal Judge

Registrar: Mr Hans Holthuis

Decision of: 2 July 2001

PROSECUTOR

v

Dario KORDIC & Mario CERKEZ

DECISION ON SECOND MOTIONS TO EXTEND TIME FOR FILING APPELLANT'S BRIEFS

Office of the Prosecutor:

Mr Upawansa Yapa and Mr Norman Farrell

Counsel for the Defence:

Mr Mitko Naumovski for Dario Kordic
Mr Božidar Kovacic and Mr Goran Mikulicic for Mario Cerkez

1. On 11 May 2001, and on the application by both appellants, the Appeals Chamber extended until 9 August 2001 the time limit for the filing of Appellant's Briefs, imposed by Rule 111 of the Rules of Procedure and Evidence ("Rules").[1] In doing so, consideration was given to:

(i) the fact that the B/C/S translation of the Trial Chamber's judgment would not be available until June,[2] and

(ii) the awaited production of additional material by the prosecution, pursuant to Rule 68 ("Disclosure of Exculpatory Evidence"), from archives made available to it last year.[3]

2. In the course of considering the first of those matters, it was stated in that decision that each of the two appellants is represented by one counsel who is accepted by the Tribunal as being competent in the English language (the language in which the Trial Chamber's judgment was given).[4] In the course of considering the second of these matters, it was stated that, if the appellants, having examined any of the additional material to which they have been given access, believe that there are additional arguments or grounds of appeal available to them, it would be open to them to make an application to add those arguments or grounds of appeal to their Appellant's Briefs after they have been filed.[5]

3. On the day before the Status Conference held on 22 June, the appellant Dario Kordic ("Kordic")

filed a fresh application for a further delay in the filing of his Appellant's Brief.[6] The Appellant Mario Cerkez ("Cerkez") orally joined in that Motion during the course of the Status Conference,[7] and he has since filed a formal motion to that effect.[8]

4. Kordic has challenged both of the statements in the previous decision identified in par 2, *supra*. His counsel (Mr Mitko Naumovski), it is said, does not read English well, and he has not been certified by the Registry as being competent in the English language. He had appeared at the trial as co-counsel with English speaking lawyers, but he now appears alone, and that, since the B/C/S translation of the Trial Chamber's judgment became available earlier last month, he has become aware of "many points and much nuance of language" which had escaped him when reading the English version.[9] Cerkez does not rely upon these arguments, it being conceded that he is represented by counsel who is competent in the English language.[10]

5. Counsel seeking to represent an accused person is required to satisfy the Registrar, *inter alia*, that he speaks one of the two working languages of the Tribunal, English and French,[11] to demonstrate that he is qualified to appear as counsel.[12] The Registrar does have a discretion to admit a counsel who does not speak either of those languages, but who speaks the native language of the accused, where the interests of justice so demand, and he may impose such conditions as are deemed to be appropriate.[13] No such discretion has been exercised by the Registrar in favour of Mr Naumovski. These rules came into effect only in July 2000, but no doubt that discretion would otherwise have been exercised in his favour if sought at the trial, because counsel appearing with him in the trial were native English speakers.[14] It is by no means clear whether such a discretion would be exercised in his favour now that Mr Naumovski is appearing alone. It has proved to be a major impediment to the smooth operation of the Tribunal's procedures where the accused is not represented by any counsel who is able to speak one or the other of the Tribunal's working languages.

6. It is the obligation of Mr Naumovski to satisfy the Registrar that he is qualified to appear for Kordic in the appeal or that the interests of justice nevertheless demand his admission as counsel for that purpose. At the present time, the Appeals Chamber is entitled to assume that Mr Naumovski is sufficiently competent in the English language. It should also be noted that Mr Naumovski is presently being assisted in the preparation of certain appeal papers on a *pro bono publico* basis by persons who were associated with him in the trial and who are native English speakers.[15]

7. Kordic has also argued that it would be both unfair and inefficient for the additional material to which the defence is being given access to be used only to supplement his Appellant's Brief; the only viable course, he says, is to defer briefing entirely until there has been "full, fair and direct access" to these materials.[16] He says that the recent disclosure by the prosecution of one particular document has made the situation distinguishable from that previously considered by the Appeals Chamber.[17] The previous documents disclosed by the prosecution to the appellants either related to two associated "Lasva Valley" cases,[18] or came from the National Archives of the Republic of Croatia in Zagreb ("Zagreb Archives"). However, the document revealed by the prosecution only on 13 June is one which was found by the prosecution during searches through what has been described as the "ABiH archive".[19]

8. This document purports to be a security report made to the Bosnia and Herzegovina Army ("ABiH"), dated 16 April 1993, stating that all units of the 7th Muslim Brigade were in a state of readiness, given what is stated to be the deterioration of relations between the ABiH and units of the Croatian Defence Council (HVO) in Zenica and other parts of Central Bosnia. The document purports to report that an artillery attack had been launched that morning on Vitez, that the villages of Vranjska, Vecerska and Ahmici were shelled, that fierce fighting was going on in Ahmici, and that Army members have been forced to retreat to reserve positions.

9. It is said that this document constitutes "powerful" evidence which supports the defence case upon these issues, and which contradicts the prosecution's case which was accepted by the Trial Chamber.[20] It is also said that the mere existence of the ABiH archive indicates that other documents relevant to these issues must also exist.[21] Such documents had been sought on many occasions during the trial, and a binding order to both Bosnia-Herzegovina and the Federation of Bosnia-Herzegovina had been issued by the Trial Chamber on 18 July 2000 requiring their production.[22] The existence of the ABiH archive had not been revealed until June this year.[23]

10. The prosecution has conceded that it obtained the ABiH archive during an operation in October 2000, the documents having been located on a shelf in the ABiH 3rd Corps archive room.[24] At that time, the trial was still in progress and the defence cases were being presented.[25] It is alleged that the prosecution knew full well that the defence had been seeking access to such an archive,[26] yet the prosecution did not reveal to either the defence or the Trial Chamber that it had come into possession of the archive which had been sought. Although a search of this archive is said to have been commenced by the prosecution in October, in compliance with its obligations pursuant to Rule 68, this document now disclosed was not found until June.[27] These matters obviously require proper investigation and explanation by the prosecution.

11. Kordic has filed a fresh application for a binding order to both Bosnia-Herzegovina and the Federation of Bosnia-Herzegovina for the production of further documents,[28] in which Cerkez has joined.[29] The prosecution has yet to respond to that application. There is nevertheless a possibility that other documents may be forthcoming, either from that source or from the continuing search by the prosecution through the ABiH archive.[30]

12. It is accepted that the absolutely perfect Appellant's Brief is one which addresses, at the one time, every issue which is to be argued in the appeal. However, this Tribunal does not operate under absolutely perfect conditions. The circumstances under which all three Lasva Valley cases presently under appeal are proceeding make that clear. In one of the other two cases,31 the applicant was required to file his Appellant's Brief notwithstanding the possibility that further material would continue to become available, and both the Appeals Chamber and the prosecution are now familiar with most of the issues to be raised in that appeal. In the third case,32 the appellant has not been required to file his Appellant's Brief, and there is no present sign as to when either the Appeals Chamber or the prosecution will become even aware of the issues to be raised in that appeal.

13. Each of the appellants says that he has issues to raise in the appeal other than the existence of this new exculpatory evidence.[33] No reason, other than an understandable desire for perfection, exists as to why the appellants cannot file their Appellant's Briefs in relation to those other issues. Cerkez has nevertheless argued that a reasonable balance must be achieved between the two guarantees given to the accused by the Tribunal's Statute: one to have adequate time and facilities for the preparation of his defence,[34] and the other to be tried without undue delay.[35] The possibility that additional evidence will become available, and that supplements may have to be added to such Appellant's Briefs, does not deny to the appellants the guarantees given to them by the Tribunal's Statute. The Appeals Chamber will understand the circumstances in which the Appellant's Briefs have been compiled.

14. However, the experience gained in the other two Lasva Valley appeals demonstrates that counsel will always find some reason why the absolutely perfect Appellant's Brief should be delayed. It is inappropriate that both the Appeals Chamber and the prosecution should remain ignorant of the issues to be raised in appeals until an absolutely perfect Appellant's Brief can be completed.

1. For these reasons, both the Kordic Motion and the Cerkez Motion are refused.

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

Dated this 2nd day of July 2001,
At The Hague,
The Netherlands.

Judge David Hunt
Pre-Appeal Judge

[Seal of the Tribunal]

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1. Decision on Motions to Extend Time for Filing Appellant's Briefs, 11 May 2001, par 23.
2. *Ibid,* par 18.
3. *Ibid,* par 22.
4. *Ibid,* par 18 (footnote 30).
5. *Ibid,* par 22.
6. Motion for Assignment of a Supplemental Briefing Schedule, or, in the Alternative, for a Short Extension of the Briefing Schedule, 20 June 2001 [filed 21 June 2001] ("Kordic Motion").
7. Status Conference, 22 June 2001, Transcript pp 2-3.
8. Appellant Mario Cerkez's Notice of Joinder in Appellant Dario Kordic's Motion for Assignment of a Supplemental Briefing Schedule, or, in the Alternative, for a Short Extension of the Briefing Schedule, 25 June 2001 ("Cerkez Motion"). A "Corridendum" filed the same day verified the "authenticity"of the facts stated in the Cerkez Motion.
9. Kordic Motion, par 11; Status Conference, 22 June 2001, Transcript pp 13-14.
10. Cerkez Motion, par 2.
11. Rule 3(A).
12. Rule 44(A).
13. Rule 44(B).
14. Status Conference, 22 June 2001, Transcript p 14.
15. Notification dated 20 June 2001, pursuant to the Trial Chamber's Order for Measures to Protect Victims and Witnesses, 15 Jan 1999. Although that document is filed *ex parte* and under seal, the information from it which is revealed in the text of this decision cannot justifiably be regarded as confidential in the circumstances of the application which Kordic has now made.
16. Kordic Motion, par 10.
17. *Ibid*, par 9.
18. *Prosecutor v Blaskic,* IT-95-14-A ("*Blaskic* Appeal") and *Prosecutor v Kupreskic et al,* IT-95-16-A ("*Kupreskic* Appeal").
19. Letter from Mr Upawansa Yapa, Senior Appeals Counsel for the prosecution, 13 June 2001.
20. Motion, par 4.
21. *Ibid,* par 4.
22. *Ibid,* par 5.
23. *Ibid,* par 5.
24. Status Conference, 22 June 2001, Transcript, p 4.
25. *Ibid,* p 11.
26. *Ibid,* pp 8-9.
27. *Ibid,* pp 4-7.
28. Appellant Dario Kordic's Application for Issuance of an Order to Bosnia-Herzegovina and to Federation of Bosnia-Herzegovina Compelling the Production of Documents and Other Materials, 20 June 2001.
29. Appellant Mario Cerkez's Notice of Joinder in Appellant Dario Kordic's Application for Issuance of an Order to Bosnia-Herzegovina and to Federation of Bosnia-Herzegovina Compelling the Production of Documents and Other Materials, 25 June 2001.
30. No application has been made by either of the appellants for access to that particular archive.
31. The *Kupreskic* Appeal.
32. The *Blaskic* Appeal.
33. Status Conference, 22 June 2001, Transcript, pp 13,26.
34. Tribunal's Statute, Article 21.4(b).
35. *Ibid,* Article 21.4(c).

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IN THE APPEALS CHAMBER

Before:
Judge Lal Chand Vohrah, Presiding
Judge Rafael Nieto-Navia
Judge Patricia Wald
Judge Fausto Pocar
Judge Liu Daqun

Registrar:
Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of:
26 September 2000

PROSECUTOR

v.

TIHOMIR BLASKIC

DECISION ON THE APPELLANT'S MOTIONS FOR THE PRODUCTION OF MATERIAL, SUSPENSION OR EXTENSION OF THE BRIEFING SCHEDULE, AND ADDITIONAL FILINGS

The Office of the Prosecutor:

Mr. Upawansa Yapa

Counsel for the Appellant:

Mr. Anto Nobilo
Mr. Russell Hayman
Mr. Andrew M. Paley

I. INTRODUCTION

A. Procedural Background

1. On 3 March 2000, Trial Chamber I 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 Tribunal") convicted Tihomir Blaškic ("the Appellant") of crimes against humanity, violations of the laws or customs of war and the grave breaches the Geneva Conventions of 1949, under the Statute of the Tribunal, and sentenced him to a term of 45 years' imprisonment ("the Judgement"). On 17 March 2000, the Appellant filed a Notice of Appeal against the Judgement. Pending the filing of the Appellant's Brief, on 4 April 2000 the Appellant filed two motions ("the Motions"):

(1) "Appellant's Motion for the Production by the Office of the Prosecutor of

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Improperly Withheld Discovery Material, and Production by the Registrar of Trial Transcripts and Exhibits from other Lasva Valley Cases" (confidential) ("the Production Motion");[1] and
(2) "Appellant's Motion to Suspend Briefing Schedule, or Alternatively, for Extension of Time to File Appellate Brief" ("the Motion to Suspend or for Extension").

2. On 14 April 2000, the Office of the Prosecutor ("the Prosecution") filed its confidential response to the Appellant's two motions ("the Prosecution Response").[2] On 18 April 2000, the Appellant filed his replies to the Prosecution Response.[3] On 20 April 2000, the English translation of the Judgement was filed.

B. The Production Motion

3. By the Production Motion, the Appellant seeks an order from the Appeals Chamber directing the Prosecution to produce to the Appellant:[4]

1) all witness statements of witnesses who testified in his trial in the form of trial transcripts from other cases and accompanying exhibits as required under sub-Rule 66 (A) (ii) of the Rules of Procedure and Evidence ("the First Request" and "the Rules", respectively);

2) all exculpatory material and/or evidence that affects the credibility of Prosecution witnesses, including trial transcripts, witness statements, notes and the substance of all other verbal information ("the Second Request"); and

3) a signed certificate, within 14 days of the issuance of an order on the First and Second Requests, that the Prosecution has complied with the First and Second Requests and is furthermore aware of its *continuing* obligations under Rules 66 and 68 ("the Third Request").

4. Further, in the Production Motion, the Appellant also seeks an order directing the Registrar to produce to the Appellant any and all public transcripts and exhibits from the other Lasva Valley cases[5] as such transcripts become available in unofficial form, and to disclose all non-public transcripts and exhibits from those cases to the Appellant subject to any protective measures required by the Tribunal ("the Fourth Request").

C. The Motion to Suspend or for Extension

5. In conjunction with his Production Motion, the Appellant seeks, by the Motion to Suspend or for Extension, an order pursuant to sub-Rule 127 (B) from the Appeals Chamber to temporarily suspend the time-limit imposed by Rule 111 of the Rules, until such time as the Prosecution complies with any order granting the Production Motion, and/or pending the translation of the Judgement into English and Bosnian-Croatian-Serbian ("the B/C/S"), whichever is later. In the alternative, the Appellant requests that he be granted an additional 90 days to submit his Appellant's Brief, allowing him a total of 180 days, due to the need for the disposition of the Production Motion, translation of the Judgement, and the voluminous trial record and the complexities of the case.[6]

D. Suspension of the Briefing Schedule

6. By order of 19 May 2000, the Appeals Chamber suspended the filing schedule imposed by Rule 111 pending its decision on the Motions.

E. Supplemental Filing

7. On 27 June 2000, the Appellant filed a confidential document, entitled "Appellant's Supplemental Filing re: Motion to Suspend Briefing Schedule, or Alternatively, for Extension of Time to File Appellate Brief" ("the Supplemental Filing"), wherein he requested the Appeals Chamber to suspend the briefing schedule until 1) the date that the Prosecution certified that it had produced to the Appellant all witness statements and exculpatory evidence as required by sub-Rule 66 (A) (ii) and Rule 68, or 2) the date of the completion of translation of certain new documents turned over by the Croatian authorities to the Appellant since the suspension of the briefing schedule by the Appeals Chamber on 19 May 2000, whichever was later. The Prosecution filed a confidential response on 7 July 2000.[7] Considering that the Supplemental Filing supplements the Motions, the Appeals Chamber will consider it in this decision.

F. Additional Supplemental Filing and the Corrigendum

8. On 20 July 2000, the Appellant filed under seal the "Appellant's Additional Supplemental Filing re: Motion to Suspend Briefing Schedule, or Alternatively, for Extension of Time to File Appellate Brief" ("the Additional Supplemental Filing"). He requested the Appeals Chamber to suspend the briefing schedule till either the date when the Prosecution certified that it had produced to the Appellant all relevant materials as required by sub-Rule 66 (A) (ii) and Rule 68, or the date when the translation of a second group of documents turned over by the Croatian authorities to the Appellant was completed, whichever date was later.

9. On 1 August 2000, the Appellant filed under seal a Corrigendum to the Additional Supplemental Filing.

10. There has been no response from the Prosecution to these two filings.

II. APPLICABLE PROVISIONS

11. Rule 66 (A) of the Rules provides, in part:

> Subject to the provisions of Rules 53 and 69, the Prosecutor shall make available to the Defence in a language which the accused understands
>
> (i)...
>
> (ii) within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge appointed pursuant to Rule 65 *ter*, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial, and...copies of the statements of additional prosecution witnesses shall be made available to the defence when a decision is made to call those witnesses.

Rule 68 provides:

> The Prosecutor shall, as soon as practicable, disclose to the defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence.

Rule 75 (D) provides:

> Once protective measures have been issued in respect of a victim or witness, only the Chamber granting such measures may vary or rescind them or authorise the release of protected material to another Chamber for use in other proceedings. If, at the time of the request for variation or release, the original Chamber is no longer constituted by the same Judges, the President may authorise such variation or release.

Rule 107 provides:

> The rules of procedure and evidence that govern proceedings in the Trial Chambers shall apply *mutatis mutandis* to proceedings in the Appeals Chamber.

Rule 115 provides:

> (A) A party may apply by motion to present before the Appeals Chamber additional evidence which was not available to it during the trial. Such motion must be served on the other party and filed with the Registrar not less than fifteen days before the date of the hearing.
>
> (B) The Appeals Chamber shall authorise the presentation of such evidence if it considers that the interests of justice so require.

Rule 127 provides, in part:

> (A) Save as provided by Sub-rule (B), a Trial Chamber may, on good cause being shown by motion,
>
> (i) enlarge or reduce any time prescribed by or under these Rules;
>
> (ii)...
>
> (B) In relation to any step falling to be taken in connection with an appeal or application for leave to appeal, the Appeals Chamber or a bench of three Judges of that Chamber may exercise the like power as is conferred by Sub-rule (A) and in like manner and subject to the same conditions as are therein set out.

III. THE PRODUCTION MOTION

A. The First Request

1. Submissions of the Parties

(a) The Appellant

12. It is the argument of the Appellant that, where a witness who testified in the *Blaskic* case subsequently gives evidence in another case before the Tribunal, the Prosecution is obliged to disclose the transcript of the subsequent testimony and any exhibits admitted through that witness, pursuant to its duties under sub-Rule 66 (A) (ii) of the Rules. He submits that the Tribunal's case-law has affirmed the principle that a witness's testimony in another Tribunal case constitutes a "witness statement" under sub-Rule 66 (A) (ii).[8] He points out that at least 15 witnesses who testified against him at trial have subsequently testified in the *Kordic/Cerkez* case alone, but despite being repeatedly requested to disclose the trial transcript containing their testimony, the Prosecution has failed to produce a single page of transcript.[9] He requests that the Appeals Chamber order the Prosecution to produce to him all such witness statements and any evidentiary exhibits admitted through the witnesses, and he agrees to abide by any appropriate protective measures.

(b) The Prosecution

13. The Prosecution Response submits that the First Request is based on a premise that the Prosecution's disclosure obligation is a "continuing" one, to which the Prosecution remains subject

even after the end of the trial proceedings.[10] The Prosecution argues that the first obligation of the Prosecution under sub-Rule 66 (A) (ii) is to disclose copies of the statements of all witnesses whom the Prosecution "intends to call to testify at trial". Once a witness has testified, he or she is no longer one whom the Prosecution "*intends* to call to testify". Disclosure of witness statements is only required *prior* to the time at which the witness testifies.[11] The second obligation of the Prosecution under the Rule, in the view of the Prosecution, is to disclose copies of statements of additional Prosecution witnesses "when a decision is made to call those witnesses." Nothing in the wording of the Rule suggests that it imposes a continuing obligation.

(c) The Appellant in Reply

14. The Appellant contends that Rule 66(A) retains its utility even after a particular witness testified in his trial, and that the Prosecution has voluntarily undertaken to produce to him testimony given in a related proceeding by witnesses who have testified in this case.[12]

2. Discussion

15. Before considering what the Prosecution's duty of disclosure is under sub-Rule 66 (A) (ii) of the Rules, it is necessary to consider whether the testimony given by a witness in a case can constitute a "witness statement" within the meaning of the sub-Rule. The Rules do not define what constitutes a witness statement. The usual meaning of a witness statement in trial proceedings is an account of a person's knowledge of a crime, which is recorded through due procedure in the course of an investigation into the crime. The Appeals Chamber is of the view that when a witness testifies during the course of a trial before the Tribunal, the witness's verbal assertions recorded by the Registry's technical staff through contemporaneous transcription, are capable of constituting a witness statement within the meaning of sub-Rule 66 (A) (ii). The testimony will constitute such a witness statement and therefore be subject to disclosure, only if the witness is intended to be called, in accordance with the sub-Rule, to testify in subsequent proceedings in relation to the subject-matter of the testimony. In other words, the testimony is a witness statement for the subsequent proceedings.

16. It follows that the Prosecution does have a duty to disclose such witness statements to the Defence under certain conditions. Whether or not they should be "made available" pursuant to sub-Rule 66 (A) (ii) depends upon the stage of the proceedings that a case has reached. The Prosecution's argument is correct that the sub-Rule should be given its plain meaning that, once a witness has given evidence in court, the Prosecution can no longer *intend* to call that witness to testify, and that there is therefore no obligation to make available any subsequent statements from the witness, unless the witness will be recalled as an additional Prosecution witness in the sense of the sub-Rule. In the present case, the witnesses that the Appellant refers to had concluded providing testimony before the *Blaškic* Trial Chamber before they gave evidence before the Trial Chamber in the *Kordic/Cerkez* case. Following the giving of their testimony in the *Blaškic* case, the witnesses ceased to be "witnesses whom the Prosecutor intends to call to testify at trial" in that case within the meaning of sub-Rule 66 (A) (ii), and there was no obligation on the part of the Prosecution to disclose to the Appellant transcripts of their subsequent testimony provided in the course of a different case. Had the testimony in the other case or cases been given prior to the tendering of it by those same witnesses in the *Blaškic* trial, the Prosecution would have been obliged under the sub-Rule to disclose that testimony in the latter trial.

17. The Appeals Chamber is also of the view that sub-Rule 66 (A) (ii) can be applied, *mutatis mutandis*, in appeals, pursuant to Rule 107. Additional evidence may be admitted on appeal by way of Rule 115, and prior to the presentation of such evidence through witnesses under the rule, the presenting party shall follow the procedure of sub-Rule 66 (A) (ii) to disclose witness statements to the other party.

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3. Conclusion

18. For the foregoing reasons and in the circumstances of this case, the First Request is denied.

B. The Second Request

1. Submissions of the Parties

(a) The Appellant

19. The Appellant submits that Rule 68, which obliges the Prosecution to disclose to the Defence exculpatory evidence, places a *continuing* obligation on the Prosecution. He contends that the Tribunal's case-law suggests that the Prosecution is under an obligation at all times to disclose to the Defence any material which might exculpate the accused or infringe on the credibility of inculpatory material.[13]

20. He argues that this continuing obligation extends to include potentially exculpatory material arising in other proceedings before the Tribunal. Having accessed media reports on the *Kordic/Cerkez* case,[14] the Appellant submits that, in that case, the Prosecution presented evidence that was exculpatory to the case of the Appellant.

(b) The Prosecution

21. The Prosecution argues that the Second Request of the Appellant should be rejected for four reasons. First, the Prosecution avers that Rule 68 does not impose a "continuing" obligation to which the Prosecution remains subject even after the end of the trial proceedings.[15] It submits that if, after a trial had concluded, the Prosecution became aware of the existence of such evidence as casts serious doubt on the correctness of the Trial Chamber's judgement, it would inform the Defence. It explains that this would not be due to the operation of Rule 68, but by virtue of the Prosecution's role as an organ of the Tribunal and of international criminal justice, and that this view has been reflected in the Standards of Professional Conduct for Prosecution Counsel, issued by the Prosecutor. The Prosecution also submits that the types of evidence that it would be expected to inform the Defence of, after the conclusion of the trial, would be such that might justify review of the Trial Chamber's judgement under Article 26 of the Statute and Rules 119-120.[16]

22. The Prosecution submits that Rule 68 may apply to evidence which would not of itself be likely to affect the verdict in the case but which may be material to the Defence for the reason that it may affect the credibility of some part of the Prosecution evidence or is inconsistent with some aspect of the Prosecution case. So long as the trial proceedings are still pending there will be an obligation to disclose such material to the Defence. However, once the judgement has been given, the principle of finality applies.

23. The Prosecution accepts that after the conclusion of the trial, an appellant may seek leave to present additional evidence under Rule 115. It submits that the Appeals Chamber in the *Tadic* case made it clear that, to enable new evidence to be admitted on appeal under Rule 115, the additional evidence "must be such that it would probably show that the conviction was unsafe."[17] The Prosecution submits that not every item of evidence which would have fallen under Rule 68 at trial and which was not known at trial would be admissible in appellate proceedings under Rule 115, or would justify review under Article 26 of the Statute.

24. Secondly, the Prosecution submits that the material referred to in the Second Request is not exculpatory within the meaning of Rule 68 and is not so important that, had it been proved at trial, it would have been likely to have resulted in a different verdict.[18] The Prosecution points out that the

testimony of certain witnesses referred to by the Appellant relates to the question of authority over HVO special units operating in Central Bosnia Operative Zone. It argues that both Blaskic and Kordic bear criminal responsibility for the crimes committed by the HVO in Central Bosnia and that, as every one of the witnesses testified in open session, the Prosecution did not withhold their testimony from the Defence.

25. Thirdly, the Prosecution argues that even if Rule 68 were applicable, the Production Motion fails to specify the particular material sought by the Defence. In the *Celebici* case, it was held that "any request for disclosure of information should clearly specify the material desired."[19] The Prosecution suggests that the Second Request is inconsistent with this requirement of specificity.

26. Fourthly, the Prosecution also argues that even if Rule 68 were applicable, the Second Request would impose obligations going beyond the requirements of the Rule as it would require the Prosecution "to disclose this information through written witness statements, witness summaries, trial transcripts and/or other forms". However, Rule 68 only requires the Prosecution to disclose to the Defence "the *existence* of evidence", but does not require the Prosecution to actually provide the Defence with all of the evidence in question.

(c) The Appellant in Reply

27. In his Reply, the Appellant argues that at the *Blaskic* trial, the Prosecution unambiguously stated "the Prosecutor acknowledges her continuing obligations before, during, and after trial to disclose to the Defence the existence of any exculpatory evidence pursuant to Rule 68. Exculpatory material would include testimony of any *Blaskic* witness given in a different proceeding at the Tribunal (at whatever time) which 'in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence.'"[20] The Appellant argues that the Prosecution should be estopped from arguing a contrary position.

28. Furthermore, the Appellant emphasises that the witness summaries cited by him in the Production Motion all bear directly on the question of the actual chain of command over paramilitary and independent units that were responsible for most of the crimes committed in the Lašva Valley. He further explains that in the *Blaskic* case, the trial proceedings concluded on 30 July 1999 and the Judgement was issued on 3 March 2000, and that the several witnesses in question gave their evidence during this period. He submits that the Appeals Chamber should order the Prosecution to produce forthwith to him any and all evidence that "tends to suggest" the innocence of or mitigates the guilt of the Appellant, or that "may affect" the credibility of Prosecution witnesses against him.

2. Discussion

29. The issue raised by the Second Request is as to whether there is a continuing obligation for the Prosecution to disclose exculpatory evidence at the post-trial stage. The Appellant relies on the language of Rule 68, the relevant case-law of the Tribunal, and a statement by the Prosecution made at the trial in this case that the Prosecution "acknowledges" the continuing obligations "before, during, and after trial to disclose to the Defence the existence of any exculpatory evidence pursuant to Rule 68".[21] The effect of this undertaking of the Prosecution to continue to honour its obligation under Rule 68 is a matter additional to the resolution of the issue raised by the Second Request. Even assuming that this statement could be held against the Prosecution in appeals, the issue raised by the Second Request remains to be resolved. The reason is that the statement was made at the trial in this case but the issue raised by the Second Request is of general importance.

30. Rule 68 of the Rules provides:

> The Prosecutor shall, as soon as practicable, disclose to the defence the existence of

> evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence.

In respect of the Second Request, there may be four possible results from the application of the rule:

1) the obligation continues until the close of the presentation of evidence stage;
2) the obligation continues until the Trial Chamber delivers its Judgement in the case;
3) if a judgement is appealed against, the obligation continues until the Appeals Chamber delivers its Judgement on Appeal; or
4) the Prosecution is always under an obligation to disclose under this Rule.

31. The first question is what constitutes the close of trial proceedings: whether it is the situation envisaged in result 1) or 2). The preferred answer is that the close of trial proceedings means the close of all proceedings before a Trial Chamber, ending with the delivery of the judgement. This is result 2). The first result does not comport with the practice of the Tribunal, in that evidence disclosed after the close of hearings but before judgement may lead to the re-opening of a case at first instance.[22] The situation could arise where, following the close of the presentation of evidence, but prior to the delivery of the judgement of the Trial Chamber, exculpatory evidence relating to the accused has come to the possession of the Prosecution. A Trial Chamber is entitled to have the benefit of all relevant evidence put before it in order to reach an informed and well-balanced judgement, and its ability to accept evidence late prior to judgement is in conformity with the requirement of a fair trial under the Statute and the Rules. In such a situation, it would be open to the Defence to move before the Trial Chamber, right up to the date of judgement, to seek permission to re-open the trial proceedings to enable the Defence to present the new exculpatory evidence that has come to light. The Appeals Chamber therefore takes the view that the duty of the Prosecution to disclose to the Defence the existence of such evidence pursuant to Rule 68 continues at least until the date when the Trial Chamber delivers its judgement.

32. Should the Prosecution's duty under Rule 68 continue, either after the close of trial proceedings and up until the Appeals Chamber delivers its Judgement on Appeal which is described as result 3), or always as envisaged by result 4)? Contrary to the position of the Appellant, the Prosecution argues that, at the stages corresponding to result 3) or 4), it has a duty to continue to disclose evidence by virtue of its being an "organ" of the Tribunal and of international criminal justice, but not due to Rule 68. The Appeals Chamber is of the view that the Appellant is in effect seeking to rely possibly on a general interpretation of Rule 68 by this Chamber to the effect that, the Prosecution is at all times required by Rule 68 to disclose exculpatory evidence. On the other hand, the Appeals Chamber takes note, with appreciation, of the position of the Prosecution which, in its view, conforms with the mandate of the Tribunal to dispense justice on behalf of the international community and with the status of the Prosecutor and her staff being, as it were, "ministers of justice assisting in the administration of justice".[23] However, the Appeals Chamber also believes that the Prosecution is under a *legal* obligation to continually disclose exculpatory evidence under Rule 68 in proceedings before the Appeals Chamber. The application of Rule 68 is not confined to the trial process. Like sub-Rule 66 (A) (ii), Rule 68 provides a tool for disclosure of evidence. In the context of the Rules, admission of evidence on appeal can be effected through either Rule 115 or Rule 89, but the Rules do not specify means of disclosure in appeals. This is where Rule 107 has a role to play: to enable the Appeals Chamber to import rules for trial proceedings to fill a lacuna in appellate proceedings, subject to appropriate modifications. With this principle in mind, the Chamber will proceed to deal with the Second Request in substance.

33. The Appeals Chamber considers that the factual circumstances surrounding the filing of the Production Motion, uncontested by both parties, are that, in November and December 1999, the Appellant's counsel were put on notice of certain media reports of several witnesses testifying in the *Kordic/Cerkez* case, who presented a version of the events in the Lasva Valley that the counsel considered to be somewhat different from what was described by their evidence given in the *Blaskic*

trial. This information was not brought to the attention of the Trial Chamber, which was in the process of drafting the Judgement. It first came to light in the Production Motion filed before the Appeals Chamber.

34. The Appeals Chamber is aware that the Appellant does not expressly rely on Rule 107 in his argument and the Chamber cannot but assume Rule 107 to be one of the reasons for the Second Request, since it is obvious that Rule 68 with its specific reference to the accused cannot be directly applicable in appeals.

35. The Appeals Chamber considers that the admission of evidence on the appellate level is a necessarily limited exercise due to the corrective nature of the appellate proceedings.[24] The Chamber refers to the provisions of Rule 109 of the Rules which define the record on appeal as being "the parts of the trial record, as certified by the Registrar, designated by the parties", and to those of Rule 117 which require the Chamber to "pronounce judgement on the basis of the record on appeal with such additional evidence as has been presented to it".

36. Following the conviction of an accused, there are three ways of bringing new information before the Appeals Chamber: by way of Rule 115 to introduce additional evidence; by way of Rule 89 to present evidence in respect of issues which were not litigated at trial; or by way of Rule 119 to present a new fact for the purpose of review. In this appeal, the Appeals Chamber cannot consider the evidence sought by the Second Request unless it is admitted pursuant to Rule 115 which governs additional evidence. The reason is that the examples of evidence given in the Production Motion pertain to facts already litigated at trial.[25] The Appeals Chamber thus disposes of the first reason given by the Prosecution in its Response.

37. The Appeals Chamber notes that, in respect of the Prosecution's second reason, the Appellant's counsel knew of the existence of the evidence that might exculpate the Appellant soon after the evidence was given in open court at the Tribunal. Yet he remained silent before the Trial Chamber until the Production Motion was filed on appeal. There has been no explanation from the Appellant as to why he remained reticent in spite of this information. A fact concerning the question as to whether the Appellant was capable of ordering certain units of the HVO to attack villages and towns should have alerted any diligent counsel so that he or she would bring it to the attention of the Trial Chamber which might be persuaded to reconsider the evidence. However, this Chamber is not prepared to say that the Appellant has effectively waived his right to complain about non-disclosure. As this Chamber considers that Rule 68 continues to be applicable at the appellate stage of a case before this Tribunal, the Prosecution continues to be under a duty to disclose by virtue of the Statute and the Rules, being thus bound to do so as a matter of law. Further, the Chamber takes note that counsel for the Appellant renewed a request for discovery under, inter alia, Rule 68, in a letter dated 10 February 2000 addressed to the Prosecution, which was sent some time before the delivery of the judgement by the Trial Chamber.[26] The delayed reaction by the Defence in this case cannot alter the duty of the Prosecution to comply with Rule 68.

38. However, the Appeals Chamber considers that the Prosecution may still be relieved of the obligation under Rule 68, if the existence of the relevant exculpatory evidence is known and the evidence is accessible to the appellant, as the appellant would not be prejudiced materially by this violation. In this case, the Appellant knew that the several witnesses in question, who allegedly gave exculpatory evidence in other trials, all did so in public sessions. There was no difficulty for him to seek access to their testimony with the assistance of the Trial Chamber, if necessary. He did not.

39. The Appeals Chamber notes the Prosecution's reasoning that the evidence referred to by the Appellant was not exculpatory because, in its view, both the Appellant and Mr. Kordic shouldered criminal responsibility for the events in the Lasva Valley. Under Rule 68, the initial decision as to whether evidence is exculpatory has to be made by the Prosecutor. Without further proof that the Prosecution abused its judgement, the Appeals Chamber is not inclined to intervene in the exercise

of this discretion by the Prosecution. It is for the Appellant to seek out the transcript of the testimony of the several witnesses referred to in the Production Motion to show this Chamber that the evidence is exculpatory. The second reason given by the Prosecution is rejected, because the Prosecution is under a legal duty to continually disclose exculpatory evidence in appeals. The failure in discharging this duty does not necessarily require the Appeals Chamber to grant relief to the Appellant if the Appellant himself has no difficulty to access such evidence.

40. In relation to the third reason of the Prosecution, it is true that the Production Motion seeks production of "all exculpatory evidence relating to Appellant from all investigations and prosecutions conducted by the Tribunal".[27] The Appeals Chamber recalls an early decision in the *Celebici* appeal which states:[28]

> In the present case, the Appellant is seeking a copy of the video recording on the basis of the alleged observations of his counsel asserted in the Motion and Reply. The Respondent is disputing the Appellant's right of access. Under these circumstances, first-hand and detailed evidence citing specific instances is necessary in affidavit form in accordance with the law and procedure of the State in which such affidavits are signed before access can be granted.

The Appeals Chamber considers that the Second Request will not fall within the category of requests for production in that it seeks the production of all exculpatory evidence which it has not specified. It is in the nature of a request seeking assistance for disclosure. A request for production of documents has to be sufficiently specific as to the nature of the evidence sought and its being in the possession of the addressee of the request.[29] It is to be noted, however, that a request based on Rule 68 is not required to be so specific as to precisely identify which documents shall be disclosed. The third reason is not persuasive.

41. With regard to the fourth reason of the Prosecution, the Appeals Chamber is of the view that it is misconceived, in that it does not make sense that the Prosecution can stop short of providing exculpatory evidence in its possession, having pointed out to the Defence that it possesses such evidence. If the evidence is in the sole possession of the Prosecution, it is obvious that if the fourth reason were upheld, the Defence would be hindered from discovering it, thus frustrating the principle of a fair trial. The fourth reason cannot stand.

3. Conclusion

42. For the foregoing reasons, the Second Request is granted to the extent that the Appeals Chamber finds that the Prosecution is under a continuing obligation under Rule 68 to disclose exculpatory evidence at the post-trial stage, including appeals.

C. The Third Request

1. Submissions of the Parties

(a) The Appellant

43. The Appellant submits that the Appeals Chamber should order the Prosecution to submit a signed, sworn affidavit to certify that it is aware of its continuing obligations under sub-Rule 66 (A) (ii) and Rule 68 and has produced to the Appellant all material requested in the First and Second Requests.[30] He points out that such an order has been made before in *Prosecutor v. Krnojelac*.[31] He suggests that certification is required so that the Appellant and the Appeals Chamber can be assured that the Prosecution has discharged its obligations before the appeal process may proceed. He also asks that the Prosecution be required to review the material, produce it to the Appellant, and provide

certification within 14 days of the issuance of an order by the Appeals Chamber on the Motions.

(b) The Prosecution

44. The Prosecution argues that if the First and Second Requests are rejected, the Third Request must also be rejected. It also suggests that the decision of *Prosecutor v. Krnojelac*, as a decision of a pre-trial Judge, is not binding on the Appeals Chamber. The Prosecution is aware of its disclosure obligations, and as officers of the court, they will discharge these obligations in good faith.[32]

2. Discussion

45. This type of order is one that should only be made by a Chamber in very rare instances. The Prosecution is expected to fulfil its duties in good faith. This has been acknowledged in the document known as the Standards of Professional Conduct for Prosecution Counsel, issued by the Chief Prosecutor on 14 September 1999. Only where the Defence can satisfy a Chamber that the Prosecution has failed to discharge its obligations should an order of the type sought be contemplated.

3. Conclusion

46. As the Appellant has not satisfied the Appeals Chamber that during this appeal, the Prosecution has failed to discharge its obligations under sub-Rule 66 (A) (ii) and Rule 68, the scope of the application of which has been clarified only in this decision, the Third Request is denied.

D. The Fourth Request

1. Submissions of the Parties

(a) The Appellant

47. The Fourth Request seeks an order directing the Registrar to produce to the Appellant any and all public and non-public transcripts and exhibits from other Lasva Valley cases as soon as they become available, even if in unofficial form.[33] He submits that he has a reasonable belief that the evidence presented in the *Kupreskic, Aleksovski, Furundžija* and *Kordic/Cerkez* trials concerning events in the Lasva Valley may include evidence helpful to his appeal.

48. Concerning public transcripts and exhibits, while the Registrar has provided the Appellant with such items upon request, the Appellant asks that the Appeals Chamber direct the Registrar to make all public transcripts and exhibits available on an expedited basis, even in unofficial form.

49. With regard to non-public transcripts, such as closed session transcripts, the Appellant submits that they should be made available to him on the same terms. The Appellant agrees to abide by any protective measures imposed by the Tribunal.

50. In his Production Motion Reply, the Appellant states there is a considerable time lag between the creation of a public transcript and/or exhibit, and its availability to the Appellant. The Appellant asks that he be permitted the earliest possible access to the material to review it prior to submitting his appeal.[34]

(b) The Prosecution

51. The Prosecution states that this Request should be denied. It argues that there is no provision in the Rules or Statute requiring the Registrar to provide transcripts and exhibits from one case to a

party in another case. The Prosecution submits that in respect of the request for non-public materials, the Appeals Chamber will be without the power to make such an order due to sub-Rule 75 (D) which provides that only the Chamber granting protective measures may vary or rescind them or authorise the release of protected material to another Chamber for use in other proceedings.

2. Discussion

52. There are two aspects to the Fourth Request. The first aspect concerns the production by the Registrar to the Appellant of testimony given by witnesses during the course of open session hearings before the Tribunal. It must be emphasised that only the Prosecution and the Defence (through the requirement of reciprocal disclosure under Rule 67 of the Rules) are required to disclose evidence or material in connection with proceedings before the Tribunal. The functions of the Registry are defined in Rule 33 of the Rules. However, the Tribunal is bound, above all, by its Statute. Article 21 (2) of the Statute provides for the right of an accused (who may become an appellant subsequently) to a fair and public hearing, subject to protective measures in respect of victims and witnesses. Article 21 (4) (b) guarantees the accused the right to have adequate time and facilities to prepare his defence. It follows that there is a duty on the part of the Registry to make available to the public and in particular, the accused or appellant, Tribunal materials, subject to appropriate protective measures indicated by Chambers, to facilitate the preparation of defence or appeal. It also follows that the Registrar through the Registry is required to assist counsel who seek access to testimony given in open session.

53. The Registry does, however, provide assistance in two ways. First, it maintains a computer web-site for the Tribunal that can be accessed by the public, including Defence counsel. On the web-site, the Registry normally posts an electronic version of the official transcript of testimony given by witnesses in cases before the Tribunal. There is a time-delay between a witness giving testimony in a case and the transcript of the testimony appearing on the web-site. A party wishing to obtain access to the testimony of a certain witness in a particular case may have to wait some while from the date the testimony was given until it can be read on the web-site.

54. The second type of assistance provided by the Registry is an arrangement whereby counsel may contact the Registry and request certain public documents such as transcripts and the Registrar may, where possible, grant the request. In this appeal, if such a request were made to the Registry, and the Registry was unable to comply with it, it would be open to the Appellant to apply to the Appeals Chamber by way of motion for assistance to obtain access to the documents. The Fourth Request falls within this category of motions. Such motions should provide information about the measures taken by the Defence to obtain the documents from the Registry and the problems arising from non-compliance, and the Appeals Chamber may also hear from the Registry as to why the information sought cannot be provided. The Appeals Chamber may then act accordingly.

55. So far as non-public transcripts are concerned, sub-Rule 75 (D) specifically provides that once protective measures have been issued in respect of a victim or witness, only the Chamber granting such measures may vary or rescind them. The Appeals Chamber may, at the request of a party, confer with a particular Trial Chamber that imposed the protective measures and request assistance in obtaining such materials subject to the existing protective measures. The onus however is on the requesting party to identify exactly what material it seeks and the purpose the material would be used for.

3. Conclusion

56. For the preceding reasons, the Fourth Request is denied.

IV. THE MOTION TO SUSPEND OR FOR EXTENTION

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A. Submissions of the Parties

57. Pursuant to sub-Rule 127 (B), the Appellant seeks an order from the Appeals Chamber temporarily suspending the timing requirement for the filing of the Appellant's Brief, i.e. within 90 days of the filing of the Notice of Appeal, or alternatively, an order granting an extension of time of 90 days to submit the Appellant's Brief after the expiry of the time-limit set by Rule 111.

58. With regard to the suspension of the filing deadline, the Appellant submits that his inability to proceed with the appeal effectively prior to the Prosecution complying with the Production Motion and prior to the translation of the Judgement constitutes "good cause" for the Appeals Chamber to suspend the filing schedule pursuant to sub-Rule 127 (B). He requests that the suspension be in effect until the Prosecution complies with any order made in connection with the Production Motion.[35]

59. The Prosecution responds that because the Production Motion should be rejected in its entirety, there cannot be "good cause" for extending the time-limit within the meaning of sub-Rule 127 (A).[36]

60. The Appellant also requests that the time-limit for the filing of the Appellant's Brief should not run pending the translation of the Judgement into English and the B/C/S, whichever is the later. In respect of this request, the Prosecution does not oppose an order that the time-limit should not run until the Judgement is made available in English.

61. In the alternative, the Appellant requests that he be granted 90 days to submit his Appellant's Brief, allowing him a total of 180 days, due to the complexity of the Appellant's trial. The Prosecution agrees that the complexity and size of a case may constitute good cause for the granting of an extension of time for the filing of briefs. Accordingly, it does not oppose the granting of the requested extension.

B. Discussion

62. The Judgement was delivered in French. In the Motions, the Appellant asked for the time-limit for the filing of the Appellant's Brief to run from the date on which the Judgement was issued in both English and the B/C/S. The Prosecution did not object to this request. The English version of the Judgement was filed with the Registry on 20 April 2000, and the B/C/S translation was filed on 6 June. Counsel for the Appellant ought to have been able to commence the preparation of the appeal case from the date that the English translation of the Judgement was filed. However, as the Appeals Chamber has yet to decide on the Production Motion which is one of the three reasons for the filing of the Motion to Suspend or for Extension, and as one other reason for this latter motion regarding translation is moot, it would not serve any useful purpose in ordering the parties to resume the briefing schedule as from 20 April 2000, when the English translation of the Judgement became available.

63. As the Appeals Chamber has suspended the briefing schedule in this case by its Order of 19 May 2000 and other issues in this Motion have since become moot, there is no need to consider this Motion any further.

C. Conclusion

64. For the foregoing reasons, the Motion to Suspend or for Extension is rejected in regard to the specific extension request contained therein; its good cause has already been recognised by the order of this Chamber of 19 May 2000 that suspended the briefing schedule under Rule 111.

V. SUPPLEMENTAL FILING, ADDITIONAL SUPPLEMENTAL FILING, AND

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CORRIGENDUM ("THE ADDIONAL FILINGS")

65. The Appellant has received certain new documents from the Croatian authorities since the order of the Appeals Chamber of 19 May 2000. The documents came in two batches, and each one has given rise to a supplemental filing. The documents are currently being translated by the Registry of the Tribunal. Given the confidential nature of these additional filings by the Appellant, wherein the Appellant describes the relevance of a number of sample documents in relation to his case, the Appeals Chamber simply notes that the Appellant in all three filings requests the Chamber to suspend the briefing schedule until: (1) the date when the Prosecution certifies that it has produced to the Appellant all witness statements and exculpatory evidence as required by sub-Rule 66 (A) (ii) and Rule 68; or (2) the completion of translation of the newly produced documents by the Registrar, whichever is later. In so requesting, the Appellant joins the Additional Filings to the Motions.

66. The Appeals Chamber also notes that the Prosecution argues, in its confidential Response to the Supplemental Filing, that the Appellant has not attached the sample documents referred to in the filing nor indicated the relevance to the case of any of the documents produced, and that therefore it cannot respond to the filing properly. Accordingly, the Prosecution asks the Chamber to reject the filing.

67. The Appeals Chamber refers to paragraph 46 of this decision in respect of the first request raised by the Appellant in the Additional Filings. It sees no reason to order the Prosecution to certify the production of evidence pursuant to sub-Rule 66 (A) (ii) and Rule 68 in the absence of proof of failure of the Prosecution to comply with the Rules as interpreted by the Appeals Chamber in this decision.

68. In respect of the second request of the Appellant through the Additional Filings, the Appeals Chamber notes that Article 25 (1) (b) of the Statute provides for appeals from errors of fact, which may arise in light of additional evidence, and that the Appellant relies on the newly produced documents to formulate at least some of his grounds of appeal. On the basis of the description given by him of the sample documents, it seems that the documents, if admitted, may affect his appeal. This Chamber will therefore exercise its power under sub-Rule 127 (B) to continue the suspension of the briefing schedule in this appeal, as imposed by Rule 111, until the translation of the documents which have been submitted to the Registry by the Appellant through the Additional Filings is completed.

VI. DISPOSITION

69. For the foregoing reasons, THE APPEALS CHAMBER, UNANIMOUSLY,

1) grants the Production Motion to the extent that the Prosecution is under continuing obligations of disclosure as required by sub-Rule 66 (A) (ii), Rule 68, and Rule 107;

2) dismisses the Motion to Suspend or for Extension;

3) grants the Additional Filings to the extent that the briefing schedule imposed by Rule 111 of the Rules shall remain suspended;

4) orders the Appellant to indicate by motion to this Chamber, within seven days of his receipt of all of the translated documents, as to whether he intends to rely on Rule 115 of the Rules to seek the admission of some or all of the documents as additional evidence; and if so, to specify, within 14 days of the motion, which documents he will submit under Rule 115 and why the documents are admissible under the rule;

5) orders the Prosecution to respond within 14 days of the filing of any such motion by

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the Appellant and the documents attached thereto; and

6) allows the Appellant to reply to any such Prosecution response within 10 days of the filing of the response.

The resumption of the briefing schedule will then be decided by further order of this Chamber.

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

Done this twenty-sixth day of September 2000,
At The Hague,
The Netherlands.

[Seal of the Tribunal]

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1. Reference to confidential filings in this decision is made with the nature of those filings being fully taken into account.
2. "Prosecution Response to the Defence Motions for Production of Discovery Material and for an Extension of Time", 14 April 2000.
3. "Appellant's Reply to Prosecutor's Response to Appellant's Motion for the Production by the Office of the Prosecutor of Improperly Withheld Discovery Material, and Production by the Registrar of Trial Transcripts and Exhibits from Other Lasva Valley Cases" (confidential), 18 April 2000 ("the Production Motion Reply"); and "Appellant's Reply to Prosecutor's Response to Appellant's Motion to Suspend Briefing Schedule, or Alternatively, for Extension of Time to File Appellate Brief", 18 April 2000 ("the Second Reply").
4. Production Motion, p. 9.
5. The other Lasva Valley cases are the *Prosecutor v. Zoran Kupreskic and Others,* Case No.: IT-95-16-T; *Prosecutor v. Zlatko Aleksovski,* Case No.: IT-95-14/1-T; *Prosecutor v. Anto Furundzija*, Case No.: IT-95-17/1-T; and *Prosecutor v. Dario Kordic/Mario Cerkez,* Case No.: IT-95-14/2-T.
6. Motion to Suspend or Extend, p. 6.
7. "Prosecution Response to Appellant's Supplemental Filing of 27 June 2000 to Suspend Briefing Schedule (confidential)", 7 July 2000.
8. In support of this proposition the Appellant cites "Opinion Further to the Decision of the Trial Chamber Seized of the Case of the Prosecutor v. Dario Kordic and Mario Cerkez Dated 12 November 1998", *The Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-T, 16 December 1998, p. 4. The Decision referred to in the Opinion was issued in *The Prosecutor v. Dario Kodic and Mario Cekez*, Case No. IT-95-14/2-PT.
9. Production Motion, p.3, referring to letters sent by defence counsel to the Prosecution both during and after the trial.
10. Prosecution Response, para. 5.
11. Ibid., para. 8.
12. The Production Motion Reply, p.11.
13. The Appellant cites the *Opinion further to the Decision of the Trial Chamber Seized of the Case The Prosecutor v. Dario Kordic and Mario Cerkez Dated 12 November 1998* in *Prosecutor v. Tihomir Blaskic*, Case No.: IT-95-14-T, 16 December 1998, p.5; and the *Decision on Motion by Prosecution to Modify Order for Compliance with Rule 68* in *Prosecutor v. Milorad Krnojelac*, Case No.: IT-97-25-PT, 1 November 1999, p.4, reaffirming an earlier order.
14. The source of the Appellant's information is the London-based Institute for War & Peace Reporting website: http://www.iwpr.net (Tribunal Update 151, 155, and 161).
15. Prosecution Response, para. 14.
16. Article 26 of the Statute provides that where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the International Tribunal an application for review of the judgement. The two Rules are based on this article.
17. *Prosecutor v. Dusko Tadic*, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, Case No. IT-94-1-A, A. Ch., 15 October 1998, para. 71 (c).
18. Prosecution Response, para. 28.
19. *Prosecutor v. Zejnil Delalic et al.* ("the *Celebici* case"), Decision on the Request of the Accused Hazim Delic Pursuant to Rule 68 for Exculpatory Information, Case No. IT-96-21-T, 24 June 1997, paras. 14-15.
20. *Prosecutor v. Tihomir Blaskic*, Prosecutor's "Response to Defence Motion for Access to Trial Testimony of Witnesses Given Under Pseudonym or in Closed Session in Related Proceedings", 23 June 1998.
21. *Ibid.*
22. *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-T, Judgement, para. 22.
23. Not to rely solely on a few domestic cases, it is nonetheless felt that this expression used therein is apt in this regard:

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R. v. Banks S1916C 2 K.B. 621 at 623 (*per* Avory J.). Also see *R. v. Brown (Winston)* S1998C A.C. 367 at 374, HL.
24. *Prosecutor v. Dusko Tadic,* Case No.: IT-94-1-A, A. Ch., Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, para. 42.
25. *Ibid.*, para. 32.
26. Production Motion, Annex B.
27. Production Motion, p.1.
28. *Prosecutor v. Zejnil Delalic and Others*, Case No.: IT-96-21-A, A. Ch., Decision on Motion to Preserve and Provide Evidence, 22 April 1999, p.4.
29. See *Prosecutor v. Tihomir Blaskic*, Case No.: IT-95-14-AR108*bis*, A. Ch., Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 20 Oct. 1997, para. 32; the same, Case No.: IT-95-14-T, Decision on the Production of Discovery Materials, 27 Jan.1997, para. 49.
30. Production Motion, p. 6.
31. *The Prosecutor v. Milorad Krnojelac*, Case No.: IT-97-25-PT, Decision on Motion by Prosecution to Modify Order for Compliance with Rule 68, 1 November 1999, pp. 4-5.
32. Prosecution Response, paras. 39-41.
33. Production Motion, p. 7.
34. Production Motion Reply, p. 13.
35. Motion to Suspend or Extend, p. 3.
36. Prosecution Response, para. 50.

Case No.: IT-99-36-AR73.9

IN THE APPEALS CHAMBER

Before:
Judge Claude Jorda, President
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Asoka de Z. Gunawardana
Judge Theodor Meron

Registrar:
Mr. Hans Holthuis

Decision of:
11 December 2002

PROSECUTOR
v.
RADOSLAV BRDJANIN
MOMIR TALIC

DECISION ON INTERLOCUTORY APPEAL

Counsel for the Appellant Jonathan Randal:

Mr. Geoffrey Robertson
Mr. Steven Powles

Counsel for the Prosecution:

Ms. Joanna Korner
Mr. Andrew Cayley

Counsel for Radoslav Brdjanin:

Mr. John Ackerman

Counsel for the *Amici Curiae*:

Mr. Floyd Abrams
Mr. Joel Kurtzberg
Ms. Karen Kaiser

I. Background

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 seised of the "Motion to Appeal the Trial Chamber's 'Decision on Motion on Behalf of Jonathan

Randal to Set Aside Confidential Subpoena to Give Evidence'" filed on 26 June 2002 ("Appeal") by counsel for Mr. Jonathan Randal ("Appellant"), pursuant to Rule 73 of the Rules of Procedure and Evidence of the International Tribunal ("Rules").

2. The Appeal concerns a subpoena issued by Trial Chamber II to compel the testimony of a war correspondent concerning an interview he conducted while reporting on the conflict in the former Yugoslavia. The questions presented are whether this International Tribunal should recognize a qualified testimonial privilege for war correspondents , and, if so, whether the privilege requires the quashing of the subpoena.

3. The Appellant served as a correspondent for the *Washington Post* in Yugoslavia . On 11 February, 1993, the *Washington Post* carried a story ("Article") by the Appellant containing quoted statements attributed to Radislav Brdjanin, one of the Accused, about the situation in Banja Luka and the surrounding areas.[1] The Article described Brdjanin as a "housing administrator" and "avowed radical Serb nationalist." He was quoted as saying that "those unwilling to defend [Bosnian Serb territory] must be moved out" so as "to create an ethnically clean space through voluntary movement." According to the article, Brdjanin said that Muslims and Croats "should not be killed, but should be allowed to leave – and good riddance." The article also quoted Brdjanin as saying that Serb authorities paid "too much attention to human rights" in an effort to please European governments and that "[w]e don't need to prove anything to Europe anymore. We are going to defend our frontiers at any cost . . . and wherever our army boots stand, that's the situation." The Article claimed that Brdjanin said that he was preparing laws to expel non-Serbs from government housing to make room for Serbs. The Appellant, who does not speak Serbo-Croatian, carried out the interview with the assistance of another journalist , who does speak Serbo-Croatian.

4. Brdjanin was charged in a 12-count indictment with, among other things, crimes against humanity and grave breaches of the Geneva Conventions of 1949 involving deportation, forced transfer, and appropriation of property. The Prosecution sought to have the Article admitted into evidence, claiming that it was relevant to establishing that the Accused possessed the intent required for several of the crimes charged . The Defense objected on several grounds, including that the statements attributed to Brdjanin were not accurately reported. The Defense stated that, if the article were admitted, they would seek to examine the Appellant so as to call into question the accuracy of the quotations noted above. The Prosecution then requested that the Trial Chamber issue a subpoena ("Subpoena") to the Appellant, and the Trial Chamber complied on 29 January 2002.

5. On 26 and 28 February 2002, 1 March 2002 and 18 March 2002, the Subpoena was discussed during sessions in the Trial Chamber. At these sessions, the Prosecution informed the Trial Chamber that the Appellant had refused to comply with the Subpoena . On 9 May 2002, the Appellant filed a written motion to set aside the Subpoena.[2] On the same day, the Prosecution filed its response.[3] On 10 May 2002, the Trial Chamber heard oral argument on this motion. On 7 June 2002, the Trial Chamber rendered its decision ("Impugned Decision"). Refusing to recognise a testimonial privilege for journalists when no issue of protecting confidential sources was involved, the Trial Chamber upheld the Subpoena. It also found that the *Article* was admissible.

6. On 14 June 2002, the Appellant sought certification for leave to appeal from the Trial Chamber.[4] The Trial Chamber granted it on 19 June 2002.[5] On 26 June 2002, the Appellant filed the Appeal. On 4 July 2002, the Appellant filed written submissions in support of the Motion to Appeal.[6] The Prosecution responded on 15 July 2002 and the Appellant replied on 6 August 2002.[7]

7. On 1 August 2002, pursuant to Rules 74 and 107 of the Rules, the Appeals Chamber granted the request of 34 media companies and associations of journalists to file a brief as *Amici Curiae* supporting the Appellant, which was filed on 16 August 2002.[8] On 4 September 2002, the Appeals Chamber issued a scheduling order granting the request made in the briefs of the Appellant and the

Amici Curiae for an oral hearing.[9] On 3 October 2002, the Appeals Chamber heard the arguments of the parties and of the *Amici Curiae*.[10]

II. Impugned Decision and Submissions of the Parties and the *Amici Curiae*

(a) The Impugned Decision

The Trial Chamber acknowledged that "'journalists reporting on conflict areas play a vital role in bringing to the attention of the international community the horrors and realities of the conflict'"[11] and that they should not be "subpoenaed unnecessarily."[12] It took the view, however, that, whatever the proper approach when confidential materials or sources are at issue[13], when the testimony sought concerns already published materials and already identified sources, compelling the testimony of journalists poses only a minimal threat to the news gathering and news reporting functions. Indeed, the Trial Chamber found that a published article is the equivalent of a public statement by its author and that when such a statement is entered in evidence in a criminal trial and its credibility challenged, the author, like anyone else who makes a claim in public, must expect to be called to defend its accuracy.[14]

In determining whether to issue a subpoena to compel the testimony of a journalist concerning already public materials and sources, the Trial Chamber thus held that it is sufficient if the testimony sought is "pertinent" to the case.[15] The Trial Chamber also considered whether requiring the Appellant to testify would place him in physical danger. Noting that the Appellant was retired from being a war correspondent and was living in France, the Trial Chamber found that he faced no prospect of harm from testifying about the contents of his article. The Trial Chamber thus upheld the validity of the Subpoena.

(b) The Appellant

The Appellant seeks the reversal of the Impugned Decision and the setting aside of the Subpoena. The Appellant submits that the Trial Chamber erred: (i) in not recognising a qualified testimonial privilege for journalists; and (ii) in not finding , on the facts of this case, that the Appellant should not be compelled to appear for testimony.

11. With regard to the first ground, the Appellant submits that the Trial Chamber erred in law by not recognising a qualified privilege for journalists. Such a privilege is warranted, the Appellant contends, in order to safeguard the ability of journalists to investigate and report effectively from areas in which war crimes take place. Without a qualified privilege, journalists may be put at risk personally, may expose their sources to risk, and may be denied access to important information and sources in the future. The result, in the Appellant's view, will be less journalistic exposure of international crimes and thus the hindering of the very process of international justice that international criminal tribunals such as this Tribunal are designed to serve. In support of these contentions, the Appellant submits statements from two journalists, the general secretary of the International Federation of Journalists , and the publisher of the *Washington Post.*

12. The Appellant suggests that the International Tribunal has recognised testimonial privileges for certain other classes of individuals. Rule 97 establishes a privilege for communications between attorneys and their clients. In *Simic ,(footnote 16)* a Trial Chamber afforded an absolute immunity from testifying to a former employee of the International Committee of the Red Cross ("ICRC") in order to protect the impartiality of the ICRC. Trial Chambers have also granted or recognized privileges against testifying to employees and functionaries of the ICTY[17] and to the Commander in Chief of the United Nations Protection Force.[18]

13. The Appellant also points to certain international legal materials in support of the qualified privilege he urges the Tribunal to adopt. He recalls that Rule 73 of the International Criminal Court ("ICC") recognises that certain relationships and classes of professionals should be granted some form of testimonial privilege . He suggests that Article 79 of the 1977 Protocol I Additional to the Geneva Conventions recognises that journalists are exposed to great dangers and thus have a special position in conflict zones, as do several documents produced by the European Council's Committee of Ministers to Member States on the Protection of Journalists in Situations of Conflict and Tension. He also contends that the decision of the European Court of Human Rights in *Goodwin* v. *United Kingdom*, supports the establishment of a qualified privilege.[19]

14. The Appellant claims that certain judicial decisions from the United States and the United Kingdom support the establishment of a qualified privilege for journalists . The Appellant also draws the Tribunal's attention to the internal guidelines of the United States Department of Justice visualising that subpoenas will be issued against members of the news media. Those guidelines, in the Appellant's view, recognize the importance of seeking subpoenas against members of the press only as a last resort when the information sought is crucial to the case and cannot reasonably be acquired by other means.

15. The Appellant submits that in determining whether to issue a subpoena to a journalist , it is not sufficient merely to find, as the Trial Chamber did, that the evidence is "pertinent" to the case. Rather, he asserts that a Trial Chamber should issue a subpoena only if it determines that the compelled journalist's testimony would provide admissible evidence that: (1) is "of crucial importance" to determining a defendant's guilt or innocence; (2) cannot be obtained "by any other means or from any other witness"; (3) will not require the journalist to breach any obligation of confidence; (4) will not place the journalist, his family, or his sources in reasonably apprehended personal danger; and (5) will not serve as a precedent that will "unnecessarily jeopardise the effectiveness or safety of other journalists reporting from that conflict zone in the future."[20]

16. The Appellant's second contention is that the Trial Chamber erred in fact when it found the Appellant's testimony to be pertinent to the Prosecution's case . According to the Appellant, his testimony cannot materially assist the Prosecution or the Defence. He does not speak Serbo-Croatian, and the interview in question was thus conducted through another journalist, who does. Hence, the Appellant asserts that he can only comment on *Brdjanin's* demeanor during the interview and cannot vouch for the accuracy of the translations of *Brdjanin's* statements as they appeared in his Article.

17. Moreover, the Appellant asserts that the Trial Chamber should have undertaken a careful analysis of the importance of the Appellant's testimony before issuing the subpoena, not just after the fact.

(c) The *Amici Curiae*

The *Amici Curiae* make largely the same arguments as the Appellant concerning the importance of a qualified privilege to ensuring journalists' ability to investigate in and report from areas where war crimes are taking place. Compelling journalists to testify against their own sources, confidential or otherwise, will make news sources less likely to come forward, less likely to speak freely, and more likely to fear that journalists are acting as possible agents of their future prosecutor . It will rob war correspondents of their status as observers and transform them into participants, undermining their credibility and independence and thus their ability to gather information. The *Amici Curiae* contend that this will curtail the important benefits that journalists provide to the public and to the courts.

The *Amici Curiae* assert that the Trial Chamber on the basis that the evidence need merely "be pertinent", permits the Tribunal to compel journalists to testify even when the relevance of their testimony is uncertain. According to the *Amici Curiae,* the standard applied by the Trial Chamber is so vague that it will inevitably lead to unease and confusion in the journalistic community and result

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in journalists being subpoenaed unnecessarily.

20. Those arguments lead the *Amici Curiae* to offer a simpler and somewhat less demanding test for the proposed qualified privilege than does the Appellant . According to the *Amici Curiae*, a Trial Chamber should not issue a subpoena to compel the testimony of a journalist unless the Trial Chamber determines that : (1) the testimony is essential to the determination of the case; and (2) the information cannot be obtained by any other means. For the testimony to be essential , "its contribution to the case must be critical to determining the guilt or innocence of a defendant."[21]

21. Applying this test, the *Amici Curiae* assert that the Appellant should not be compelled to testify. His testimony, in their view, is not absolutely essential to the case. Even if it were, the Prosecution has not demonstrated that his testimony is the only means of obtaining the same information.

(d) The Prosecution

22. The Prosecution submits that the Trial Chamber: (i) correctly declined the Appellant's invitation to create a precise journalistic privilege; and (ii) correctly determined , on the facts of this case, that the Appellant should be compelled to testify.

23. The Prosecution argues that, whatever beneficial effects a privilege for the protection of confidential sources and confidential information may have in promoting vigorous reporting and thus ultimately the cause of international justice , no such benefits accrue from a privilege protecting testimony concerning published materials and openly identified sources. The Prosecution stresses that this case fits in the latter category. In the Prosecution's view, what creates the admittedly significant risks for journalists operating in war zones – of physical harm and of loss of access to sources – is the publication of their stories exposing the conduct of parties to the conflict, not the later possibility that they might be called to testify about matters they have already revealed to the public in their stories.[22]

24. The Prosecution maintains that adoption of the privilege advocated by the Appellant would undermine the International Tribunal's ability to reach accurate judgements by requiring the exclusion of essential evidence. Moreover, the Prosecution contends that too generous a privilege could compromise the due process rights of accused persons.[23]

25. The Prosecution argues that the testimonial privileges extended by the International Tribunal to certain other classes of persons are distinguishable from the journalists' privilege proposed here. Those other privileges rest on concerns about confidentiality (ICRC), have long-established roots in national legal systems (attorney-client), or have independent bases in international law (ICRC, functional immunity for state officials). By contrast, according to the Prosecution, a privilege for journalists concerning non-confidential matters would be unprecedented in international or national legal systems.

26. The Prosecution asserts that the Trial Chamber was correct in interpreting the decision of the European Court of Human Rights in *Goodwin*[24]and the case law from the United States and the United Kingdom as being concerned largely, if not exclusively, with the protection of confidential sources.

27. The Prosecution submits that no precise journalists' privilege is warranted. Rather, the Appeals Chamber should endorse the approach of the Trial Chamber, which , in its view, was to balance "the legitimate interests of journalists" against "the interests of the international community and the victims of crime in ensuring the availability of all relevant and probative evidence" and, when appropriate " the interest of the Accused in exercising his right to examine witnesses against him."[25] Engaging in such a balancing , and considering that the statements by the Accused in question have

already been published and attributed to him and that the Appellant himself faces no risk of physical harm or loss of journalistic access in the area of the former Yugoslavia , the Trial Chamber correctly found that there was no basis for exempting the Appellant from his duty to testify.

Further, the Prosecution argues that even under the tests proposed by the Appellant and the *Amici Curiae*, the Trial Chamber would still have been correct to issue a subpoena for the Appellant's testimony. First, the statements by the Accused in the Article are essential to the Prosecution's case because they constitute direct evidence of the intent required for the establishment of some of the offences with which he is charged. Secondly, the evidence at issue is unavailable from other sources, as the only other witness to the Accused's statements was the journalist who served as an interpreter for the Appellant.

III. Discussion

(a) Preliminary Considerations

29. At the outset, the Appeals Chamber notes that, although the parties and the *Amici Curiae* frame the issue before the Appeals Chamber as one concerning journalists in general, it is important to appreciate that the case really concerns a smaller group, namely, war correspondents. It is the particular character of the work done and the risks faced by those who report from conflict zones that it is at stake in the present case. By "war correspondents," the Appeals Chambers means individuals who, for any period of time, report (or investigate for the purposes of reporting) from a conflict zone on issues relating to the conflict. This decision concerns only this group.

30. The issue of compelled testimony by war correspondents before a war crimes tribunal is a novel one. There does not appear to be any case law directly on point. War correspondents who have previously testified at the International Tribunal did so on a voluntary basis.[26] War correspondents are of course free to testify before the International Tribunal, and their testimony assists the International Tribunal in carrying out its function of holding accountable individuals who have committed crimes under international humanitarian law. The present ruling concerns only the case where a war correspondent, having been requested to testify, refuses to do so.

31. Neither the Statute nor the relevant Rules offer much guidance on the issue being considered here. Under Rule 54 of the Rules, a Trial Chamber may, at the request of either party or on its own initiative, issue a subpoena when it finds that doing so is "necessary for the purposes of an investigation or for the preparation or conduct of the trial." The discretion of the Trial Chambers, however, is not unfettered. They must take into account a number of other considerations before issuing a subpoena. Subpoenas should not be issued lightly, for they involve the use of coercive powers and may lead to the imposition of a criminal sanction.

32. In determining whether to issue a subpoena, a Trial Chamber has first of all to take into account the admissibility and potential value of the evidence sought to be obtained. Under Rule 89(C) of the Rules, a Trial Chamber "may admit any relevant evidence which it deems to have probative value," and under Rule 89(D) may "exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial." Secondly, the Trial Chamber may need to consider other factors such as testimonial privileges. For instance, Rule 97 of the Rules states that "all communications between lawyer and client shall be regarded as privileged, and consequently not subject to disclosure at trial, unless: (i) the client consents to such disclosure ; or (ii) the client has voluntarily disclosed the content of the communication to a third party, and that third party then gives evidence of that disclosure." Similarly, in the *Simic* case, the Trial Chamber made it clear that the ICRC has a right under customary international law to non-disclosure of information so that its workers cannot be compelled to testify before the International Tribunal .[27]

33. In this decision, the Appeals Chamber will address the factors that need to be considered before

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the issuance of a subpoena to war correspondents.

(b) Analysis

34. In the Appeals Chamber's view, the basic legal issue presented raises three subsidiary questions. Is there a public interest in the work of war correspondents ? If yes, would compelling war correspondents to testify before a tribunal adversely affect their ability to carry out their work? If yes, what test is appropriate to balance the public interest in accommodating the work of war correspondents with the public interest in having all relevant evidence available to the court and, where it is implicated, the right of the defendant to challenge the evidence against him? The Appeals Chamber will consider each of these questions in turn.

(i) *Is there a public interest in the work of war correspondents?*

35. The Appeals Chamber is of the view that the answer to the first question is clearly "Yes," as the Trial Chamber expressly recognised. Both international and national authorities support the related propositions that a vigorous press is essential to the functioning of open societies and that a too frequent and easy resort to compelled production of evidence by journalists may, in certain circumstances , hinder their ability to gather and report the news. The European Court of Human Rights has recognised that journalists play a "vital public watchdog role" that is essential in democratic societies and that, in certain circumstances, compelling journalists to testify may hinder "the ability of the press to provide accurate and reliable information."[28] National legislatures and courts have recognised the same principles in establishing laws or rules of evidence shielding journalists from having to disclose various types of information. As one federal court of appeals in the United States has put it, "society's interest in protecting the integrity of the newsgathering process, and ensuring the free flow of information to the public, is an interest 'of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice.'"[29]

36. The Appeals Chamber is of the view that society's interest in protecting the integrity of the newsgathering process is particularly clear and weighty in the case of war correspondents. Wars necessarily involve death, destruction, and suffering on a large scale and, too frequently, atrocities of many kinds, as the conflict in the former Yugoslavia illustrates. In war zones, accurate information is often difficult to obtain and may be difficult to distribute or disseminate as well. The transmission of that information is essential to keeping the international public informed about matters of life and death. It may also be vital to assisting those who would prevent or punish the crimes under international humanitarian law that fall within the jurisdiction of this Tribunal. In this regard, it may be recalled that the images of the terrible suffering of the detainees at the Omarska Camp that played such an important role in awakening the international community to the seriousness of the human rights situation during the conflict in Bosnia Herzegovina were broadcast by war correspondents. The Appeals Chamber readily agrees with the Trial Chamber that war correspondents "play a vital role in bringing to the attention of the international community the horrors and reality of conflict."[30] The information uncovered by war correspondents has on more than one occasion provided important leads for the investigators of this Tribunal.[31] In view of these reasons, the Appeals Chamber considers that war correspondents do serve a public interest.

37. The public's interest in the work of war correspondents finds additional support in the right to receive information that is gaining increasing recognition within the international community. Article 19 of the Universal Declaration of Human Rights provides that "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." This principle is reproduced in all the main international human rights instruments .[32] As has been noted,[33] the right to freedom of expression includes not merely the right of journalists and

media organizations freely to communicate information. It also incorporates a right of members of the public to receive information. As the European Court of Human Rights put it in its decision in *Fresso and Roire v. France*: "Not only does the press have the task of imparting information and ideas on matters of public interest: the public also has a right to receive them."[34]

38. Recognition of the important public interest served by the work of war correspondents does not rest on a perception of war correspondents as occupying some special professional category. Rather, it is because vigorous investigation and reporting by war correspondents enables citizens of the international community to receive vital information from war zones that the Appeals Chamber considers that adequate weight must be given to protecting the ability of war correspondents to carry out their functions.

(ii) *Would compelling war correspondents to testify in a war crimes tribunal adversely affect their ability to carry out their work?*

39. The Trial Chamber took the view that since the case at hand concerns only published information and not confidential sources, compelling the Appellant to testify posed no threat to the ability of war correspondents to carry out their newsgathering role. Thus, the Trial Chamber held that it "fail[ed] to see how the objectivity and independence of journalists can be hampered or endangered by their being called upon to testify, [. . .] especially in those cases where they have already published their findings."[35]

40. The *Amici Curiae*, by contrast, insist that "[e]ven when findings are published and sources are known, the link between the forced disclosure and the loss of journalist's independence is compelling, as it significantly changes the tone of journalist's work and the willingness of sources to comply with reporters' requests for interviews."[36] The Appellant similarly argues:

> If it becomes known in conflict zones that reporters may be compelled to testify about crimes they may witness or have been incautiously confessed to them by officials, they will not be accorded important interviews and facilities. They will increasingly be excluded from conflict zones and from places or positions where they might witness war crimes. Some guilty parties will cease to boast about criminal acts, or to give interviews at all.[37]

The Appeals Chamber acknowledges that it is impossible to determine with certainty whether and to what extent the compelling of war correspondents to testifying before the International Tribunal would hamper their ability to work. However, in the opinion of the Appeals Chamber, it is not a possibility that can be discarded lightly, as the Trial Chamber found, simply because the evidence sought concerned published information and not confidential sources. The potential impact upon the newsgathering function and on the safety of war correspondents as submitted by the Appellant and the *Amici Curiae* is great.

41. The Appeals Chamber recognises, as did the Trial Chamber, that many national jurisdictions afford a testimonial privilege for journalists only when it comes to protecting confidential sources.[38] It notes, however, that in some countries some privilege from testifying is also given in cases of non-confidential information.[39] In either case, the scope of the privilege rests on the legislature's or the courts' assessment of the need to protect the newsgathering function. By analogy, the Appeals Chamber considers that the amount of protection that should be given to war correspondents from testifying being the International Tribunal is directly proportional to the harm that it may cause to the newsgathering function.

42. The Appeals Chamber considers reasonable the claims of both the Appellant and the *Amici Curiae* that, in order to do their jobs effectively, war correspondents must be perceived as independent observers rather than as potential witnesses for the Prosecution. Otherwise, they may face more frequent and grievous threats to their safety and to the safety of their sources. These

problems remain, contrary to what was held by the Trial Chamber, even if the testimony of war correspondents does not relate to confidential sources.

43. What really matters is the perception that war correspondents can be forced to become witnesses against their interviewees. Indeed, the legal differences between confidential sources and other forms of evidence are likely to be lost on the average person in a war zone who must decide whether to trust a war correspondent with information . To publish the information obtained from an interviewee is one thing -- it is often the very purpose for which the interviewee gave the interview -- but to testify against the interviewed person on the basis of that interview is quite another. The consequences for the interviewed persons are much worse in the latter case, as they may be found guilty in a war crimes trial and deprived of their liberty. If war correspondents were to be perceived as potential witnesses for the Prosecution , two consequences may follow. First, they may have difficulties in gathering significant information because the interviewed persons, particularly those committing human rights violations, may talk less freely with them and may deny access to conflict zones. Second, war correspondents may shift from being observers of those committing human rights violations to being their targets, thereby putting their own lives at risk.

44. In view of the foregoing, the Appeals Chamber is of the view that compelling war correspondents to testify before the International Tribunal on a routine basis may have a significant impact upon their ability to obtain information and thus their ability to inform the public on issues of general concern. The Appeals Chamber will not unnecessarily hamper the work of professions that perform a public interest . In the next section, the Appeals Chamber will determine how the course of justice can be adequately assured without unnecessarily hampering the newsgathering function of war correspondents.

(iii) ***What test is appropriate to balance the public interest in accommodating the work of war correspondents with the public interest in having all relevant evidence available to the court?***

45. The Appellant proposes a five-part test for the issuance of subpoenas to war correspondents.[40] In the Appeals Chamber's view, that test amounts to a virtually absolute privilege. The *Amici Curiae* propose a more lenient test. In their view, war correspondents should be compelled to testify only if their evidence is essential to the case and cannot be obtained from another source. By "essential" they mean vital to the finding of guilt or innocence of the accused on a given charge.[41] The Prosecution asserts that both of these proposed tests are overly restrictive . For its part, the Trial Chamber in the Impugned Decision justified the issuing of the Subpoena on the ground that the evidence sought was "pertinent" to the Prosecution's case.

46. The Appeals Chamber considers that in order to decide whether to compel a war correspondent to testify before the International Tribunal, a Trial Chamber must conduct a balancing exercise between the differing interests involved in the case . On the one hand, there is the interest of justice in having all relevant evidence put before the Trial Chambers for a proper assessment of the culpability of the individual on trial. On the other hand, there is the public interest in the work of war correspondents, which requires that the newsgathering function be performed without unnecessary constraints so that the international community can receive adequate information on issues of public concern.

47. The test of "pertinence" applied by the Trial Chamber appears insufficient to protect the public interest in the work of war correspondents. The word "pertinent " is so general that it would not appear to grant war correspondents any more protection than that enjoyed by other witnesses. Thus, the Trial Chamber's test, while supposedly accounting for the public interest in the work of war correspondents, would actually leave that interest unprotected. On the other hand, the test proposed by the Appellant , as noted above, would amount to a virtually absolute privilege. Even the criteria proposed by *Amici Curiae* may be too stringent in that they may lead to significant evidence being

left out.

48. In the opinion of the Appeals Chamber, it is only when the Trial Chamber finds that the evidence sought by the party seeking the subpoena is direct and important to the core issues of the case that it may compel a war correspondent to testify before the International Tribunal. The adoption of this criterion should ensure that all evidence that is really significant to a case is available to Trial Chambers . On the other, it should prevent war correspondents from being subpoenaed unnecessarily .

49. Furthermore, if the evidence sought is reasonably available from a source other than a war correspondent, the Trial Chamber should look first to that alternative source. The Trial Chamber did not do that here.

50. In view of the foregoing, the Appeals Chamber holds that in order for a Trial Chamber to issue a subpoena to a war correspondent a two-pronged test must be satisfied . First, the petitioning party must demonstrate that the evidence sought is of direct and important value in determining a core issue in the case. Second, it must demonstrate that the evidence sought cannot reasonably be obtained elsewhere .

51. Finally, the Appeals Chamber will not address the submissions of the parties on the second ground of the appeal, that is, the application of the proper legal test to the facts. Having determined the principles governing the testimony of war correspondents before the International Tribunal, the Appeals Chamber considers that it is the role of the Trial Chamber to apply those principles in the particular circumstances of the case. The Appeals Chambers would, however, offer the following observations.

52. First, contrary to the Trial Chamber's apparent fear,[42] even if the Trial Chamber were to decide that the Appellant should not be subpoenaed to testify, that need not mean that the Article must be excluded (and the Prosecution disadvantaged to that extent). The admissibility of the Article depends principally on its probative value under Rule 89(C) and the balance between that probative value and its potential to undermine the fairness of the trial under Rule 89(D). Because the Article is hearsay, the Trial Chamber will also want to examine what indicia of reliability or unreliability it carries.[43] As with many pieces of hearsay evidence, the inability of a party to challenge its accuracy by cross-examining the declarant (in this case the Appellant) does not mean that it must be excluded.[44] Rather, that inability would diminish the confidence the Trial Chamber could have in its accuracy and thus the weight the Trial Chamber would give it.

53. At the same time, and contrary to the Trial Chamber's apparent counterbalancing fear,[45] admitting the Article without subpoenaing the Appellant need not prejudice the Accused. The Defence may still question the Article's accuracy, and the Trial Chamber will have to take account of the unavailability of the Appellant in determining how much weight to give the Article.

54. Finally, whatever evidentiary value the Article may have, it is the Trial Chamber's task to determine whether the Appellant's testimony *itself* will be of direct and important value to determining a core issue in the case. The Defence has offered two justifications for seeking the Appellant's testimony. The first is that his testimony will enable the Defence to challenge the accuracy of the statements attributed to Brdjanin in the Article. The second is that the Appellant may place Brdjanin's statements in a context that will cast them in a more favourable light for the Defence . With regard in particular to the first justification -- concerning accuracy -- given that the Appellant speaks no Serbo-Croatian, and thus that he relied on another journalist for interpretation, the Appeals Chamber finds it difficult to imagine how the Appellant's testimony could be of direct and important value to determining a core issue in the case.[46] In any event, determining whether the Appellant's testimony on either score may have direct and important value to a core issue in the case

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requires a factual determination that is properly left to the Trial Chamber.

55. Therefore, should the Prosecution (or the Defence) still desire that the Appellant be subpoenaed to testify before the International Tribunal, it will have to submit a new application before the Trial Chamber to be considered in the light of the principles set out in the present decision.

Disposition

56. For the foregoing reasons, the Appeals Chamber:

1. allows the Appeal;

2. reverses the Impugned Decision;

3. consequently, sets aside the Subpoena.

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

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Claude Jorda
Presiding Judge

Judge Shahabuddeen appends a separate opinion.

Dated this 11th day of December 2002
At The Hague,
The Netherlands.

[Seal of the Tribunal]

1 - Jonathan C. Randal, "Preserving the Fruits of Ethnic Cleansing; Bosnian Serbs, Expulsion Victims See Process as Beyond Reversal", Washington Post, Feb. 11, 1993, p. A34. The quotations in this paragraph are from the article. See also *Prosecutor v. Brdjanin and Talic*, Case No. IT-99-36-T, "Decision on Motion to Set Aside Confidential Subpoena to Give Evidence", 7 June 2002, para. 28.A.ii.
2 - *Prosecutor v. Radoslav Brdjanin and Momir Talic*, Case No.: IT-99-36-T, "Written Submissions on Behalf of Jonathan Randal to Set Aside 'Confidential Subpoena to Give Evidence' Dated 29 January 2002", 9 May 2002.
3 - *Prosecutor v. Radoslav Brdjanin and Momir Talic*, Case No.: IT-99-36-T, "Prosecution's Response to 'Written Submissions on Behalf of Jonathan Randal to Set Aside "Confidential Subpoena to Give Evidence" Dated 29 January 2002;', 9 May 2002.
4 - *Prosecutor v. Radoslav Brdjanin and Momir Talic*, Case No.: IT-99-36-T, "Application for Certification from Trial Chamber to Appeal 'Decision on Motion to Set Aside Confidential Subpoena to Give Evidence'", 14 June 2002.
5 - *Prosecutor v. Radoslav Brdjanin and Momir Talic*, Case No.: IT-99-36-T, "Decision to Grant Certification to Appeal the Trial Chamber's 'Decision on Motion to Set Aside Confidential Subpoena to Give Evidence'", 19 June 2002.
6 - *Prosecutor v. Radoslav Brdjanin and Momir Talic*, Case No.: IT-99-36-AR73.9, "Written Submissions in Support of Motion to Appeal Trial Chamber's 'Decision on Motion on Behalf of Jonathan Randal to Set Aside Confidential Subpoena to Give Evidence'", 4 July 2002.
7 - *Prosecutor v. Radoslav Brdjanin and Momir Talic*, Case No.: IT-99-36-AR73.9, "Appellant's Reply to 'Prosecution's Response to Written Submissions in Support of Motion to Appeal Trial Chamber's "Decision on Motion on Behalf of Jonathan Randal to Set Aside Confidential Subpoena to Give Evidence" Filed 4 July 2002'", 6 August 2002.
8 - *Prosecutor v. Radoslav Brdjanin and Momir Talic*, Case No.: IT-99-36-AR73.9, "Décision relative à la requête aux fins de prorogation de délai et autorisant à comparaître en qualité d'*amici curiae*",1 August 2002.
9 - *Prosecutor v. Radoslav Brdjanin and Momir Talic*, Case No.: IT-99-36-AR73.9, "Scheduling Order", 4 September 2002.
10 - Mr. Ackerman, counsel for the accused, had informed the Appeals Chamber that he would attend the hearing. Without explanation, he failed to appear.

11 - Impugned Decision, para. 25.
12 - *Id.* para. 27.
13 - The Trial Chamber implied that a qualified privilege was warranted to protect journalists from having to reveal confidential sources or materials. *Id.* para. 31.
14 - *Id.* para. 26.
15 - *Id.* para. 32.
16 - *Prosecutor v. Simic et al.*, "Decision on The Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness", Case No.: IT-95-9-PT, 27 July 1999 ("ICRC Decision").
17 - *Prosecutor v. Delalic et al.*, Case No.: IT-96-21-T, "Decision on the Motion *Ex Parte* by the Defence of Zdravko Mucic Concerning the Issue of a Subpoena to an Interpreter", 8 July 1997.
18 - *Prosecutor v. Blaskic*, Case No.: IT-95-14-T, "Decision of Trial Chamber I on Protective Measures for General Philippe Morillon, Witness of the Trial Chamber", 12 May 1999.
19 - *Goodwin v. United Kingdom*, Judgement of 22 February 1996, 22 EHRR 123.
20 - Para. 18.
21 - Para. 43.
22 - Paras. 6-8, 25.
23 - Para. 26.
24 - *Supra* n.14.
25 - Para. 58.
26 - E.G. Martin Bell (BBC), Jacky Rowland (BBC), and Ed Vulliamy (The Observer/Guardian).
27 - *Supra* n.11, in particular paras 73-74 and disposition.
28 - *Supra* n.14, para. 40.
29 - *Schoen v. Schoen*, 5 F.3d 1289, 1292 (9th Cir. 1993).
30 - Impugned Decision at para 25.
31 - *See, e.g.*, Exhibit A to *Amici* Brief, Affidavit of Elizabeth Neuffler.
32 - Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 3 September 1953; Article 19 of the International Covenant on Civil and Political Rights of 23 March 1976; Article 13 of the American Convention on Human Rights of 18 July 1978; and in Article 9(1) of the African Charter on Human and Peoples Rights of 26 June 1981.
33 - Weramantry C.G., "Access to Information: A New Human Right. The Right to Know", Asian Yearbook of International Law, Vol. 4, 1995, pp. 99-111.
34 - See *Fresso and Roire v. France*, Judgement of 21 January 1999, ECHR, para 51, *Erdogdu and Ince v. Turkey*, Judgement of 8 July 1999, ECHR, para 48 and *Sener v. Turkey*, Judgment of 18 July 2000, ECHR, para 41-42;
35 - Impugned Decision at para 26.
36 - *Amici* Brief at para. 36.
37 - Appellant's Brief at para. 9.
38 - *See, e.g.*, Contempt of Court Act 1981, Section 10, (United Kingdom); *Code de Procedure Penale Art.109* (France) and *Codice di Procedura Penale Art. 200(2)* (Italy).
39 - *See Strafprozessordnung § 53* (Germany), as amended on 15 February 2002; *United States v. LaRouche Campaign*, 841 F.2d 1176, 1181-82 (1st Cir. 1988); *United States v. Cuthbertson*, 630 F.2d 139, 147-48 (3d Cir. 1980) (United States). The Appeals Chamber also notes that the United States Department of Justice has established internal guidelines cautioning federal prosecutors to seek subpoenas against members of the media only when the information sought is essential and cannot reasonably be acquired from non-media sources. The guidelines appear to apply to subpoenas for non-confidential as well as confidential materials. *See* 28 C.F.R. § 50.10 (2002)."
40 - *See supra* para. 13; Appellant's Brief, para. 18.
41 - *See supra* para. 17; *Amici* Brief, para. 43.
42 - Impugned Decision, para. 32.
43 - *See Prosecutor v. Dario Kordic and Mario Cerkez*, Case No. IT-95-14/2-AR73.5, Decision on Appeal Regarding Statement of A Deceased Witness, paras. 23-24.
44 - *See, e.g., Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-AR73.5, Decision on Prosecution's Appeal on Admissibility of Evidence, para. 27.
45 - Impugned Decision, para. 32.
46 - The Appeals Chamber makes this observation while recognising that the Appellant's inexplicably inconsistent claims concerning his ability to vouch for the accuracy of the quoted statements in the Article left the Trial Chamber in an unenviable position.

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IN THE TRIAL CHAMBER

Before:
Judge Richard May, Presiding
Judge Patrick Robinson
Judge Mohamed Fassi Fihri

Registrar:
Mr. Hans Holthuis

Decision of:
19 July 2001

PROSECUTOR

v.

MOMCILO KRAJISNIK
&
BILJANA PLAVSIC

DECISION ON MOTION FROM MOMCILO KRAJISNIK TO COMPEL DISCLOSURE OF EXCULPATORY EVIDENCE PURSUANT TO RULE 68

Office of the Prosecutor:

Mr. Mark Harmon
Mr. Alan Tieger

Counsel for the Accused:

Mr. Deyan Brashich, for Momcilo Krajisnik
Mr. Robert. J. Pavich, for Biljana Plavsic

THIS TRIAL 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 ("International Tribunal"),

BEING SEISED of the "Notice of Motion to Compel Disclosure of Exculpatory Evidence Pursuant to Rule 68", filed by the Defence for Krajisnik on 13 May 2001 ("the Motion"), in which the accused seeks to compel the Office of the Prosecutor ("Prosecution") to identify the material served on the Defence pursuant to Rule 68, not to simply serve, as it has done, material without such identification,

NOTING the "Response to Notice of Motion to Compel Disclosure of Exculpatory Evidence Pursuant to Rule 68" filed by the Prosecution on 28 May 2001 ("the Response"), in which the Prosecution opposes the Motion, arguing that:

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(a) the plain meaning of Rule 68 does not require the Prosecution to characterise discovered material as inculpatory or exculpatory, it is for the Defence to define the character of the evidence discovered to it;

(b) the Motion is redundant as the Defence has indicated that it has reviewed the material already disclosed to it and has therefore been able to identify exculpatory material for itself; and

(c) the Defence is in the best position to identify what material disclosed to it is exculpatory, not the Prosecution,

NOTING the oral submissions of the parties made with respect to the Motion on 10 July 2001,

CONSIDERING

(a) that while Rule 68 does not specifically require the Prosecution to identify the relevant material, but merely to disclose it;

(b) nonetheless, as a matter of practice and in order to secure a fair and expeditious trial, the Prosecution should normally indicate which material it is disclosing under the Rule and it is no answer to say that the Defence are in a better position to identify it;

(c) however, in the instant case, the material has been disclosed and the Defence has had the opportunity of reviewing it and, therefore, no injustice is done to the Defence; and

(d) therefore, given the resources expended already and the stage of pre-trial development, it would not be efficient or reasonable to order the Prosecution to identify material that has already been disclosed in this way,

PURSUANT TO RULES 54 AND 68 OF THE RULES

HEREBY ORDERS that the Prosecution is not obliged to indicate whether material previously disclosed falls under Rule 68 or not, but that it will be required to do so for all material disclosed from the date of this Decision.

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

_____

Richard May
Presiding

Dated this nineteenth day of July 2001
At The Hague
The Netherlands
[Seal of the Tribunal]