



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of the
Former Yugoslavia since 1991

Case No. IT-95-14/2-A
Date: 11 February 2004
Original: English

IN THE APPEALS CHAMBER

Before: Judge Wolfgang Schomburg, Presiding
Judge Fausto Pocar
Judge Florence Ndepele Mwachande Mumba
Judge Mehmet Güney
Judge Inés Mónica Weinberg de Roca

Registrar: Mr. Hans Holthuis

Decision of: 11 February 2004

PROSECUTOR

v.

DARIO KORDIĆ

**DECISION ON APPELLANT'S NOTICE AND
SUPPLEMENTAL NOTICE OF PROSECUTION'S NON-
COMPLIANCE WITH ITS DISCLOSURE OBLIGATION
UNDER RULE 68 OF THE RULES**

The Office of the Prosecutor:

Mr. Norman Farrell

Counsel for the Accused:

Mr. Mitko Naumovski
Mr. Turner T. Smith, Jr
Mr. Stephen M. Sayers

A. Introduction

1. The appellant Dario Kordić (“Kordić” or “Appellant”) filed his Notice of Appeal against the Trial Chamber Judgement on 12 March 2001.¹ On 3 April 2001, Kordić filed a motion to suspend the schedule for the filing of the appellant’s brief or otherwise for an extension of time for the filing of this brief² because of the Prosecution’s alleged failure to disclose all exculpatory evidence to the Appellant pursuant to Rule 68 of the Rules of Procedure and Evidence (“Rules”). Following the “Decision on Motions to Extend Time for Filing Appellant’s Briefs” of 11 May 2001 (“11 May Decision”) and the “Decision on Second Motions to Extend Time for Filing Appellant’s Briefs” of 2 July 2001 (“2 July Decision”), Kordić filed his appellant’s brief on 9 August 2001.³

2. On 5 March 2003 the Prosecution filed a notice of its completion of Rule 68 reviews and disclosure, submitting a list of material that was disclosed to Kordić and Čerkez.⁴ On 7 March 2003, the Prosecution filed a further notice regarding Rule 68 reviews and disclosure, submitting that additional material that was omitted from its previous notice was disclosed to the Appellant.⁵

3. On 10 March 2003 the Appellant filed a notice concerning the non-compliance of the Prosecution with its obligations under Rule 68 of the Rules (“Appellant’s Notice”).⁶ The Appellant notes, *inter alia*, that although the Prosecution declared to the Appeals Chamber that it has fulfilled its disclosure obligation under Rule 68, it failed to disclose (i) exculpatory testimony given by Blaškić in both open and closed sessions despite being specifically ordered to do so,⁷ and (ii) confidential submissions of the parties in the Blaškić Appeal, despite of the fact that this material constitutes exculpatory material that must also be disclosed.⁸

B. Kordić’s arguments regarding non-compliance with Rule 68 of the Rules

4. In the Appellant’s Notice, the Appellant requests the Appeals Chamber to allow him to add arguments to his Appellant’s Brief in order to address “the importance and effect of the Prosecution’s non-disclosure of important ‘exculpatory’ material.”⁹ The Appellant submits, *inter*

¹ Accused Dario Kordić’s Notice of Appeal, 12 March 2001.

² Accused Dario Kordić’s Joinder in Mario Čerkez’s “Motion to Suspend Briefing Schedule, or Alternatively, for Extension of Time to File Appellate Brief”, 3 April 2001 (together “Motions for Extension of Time”).

³ Brief of Appellant Dario Kordić Volume I—Publicly Filed and Brief of Appellant Dario Kordić Volume II – Filed Under Seal, 9 August 2001 (together “Appellant’s Brief”).

⁴ Prosecution’s Notice of Completion of Pending Rule 68 Reviews and Disclosure, 5 March 2003.

⁵ Prosecution’s Further Notice Regarding Rule 68 and Disclosure, 7 March 2003.

⁶ Notice of Prosecution’s Non-Compliance with its Obligations under Rule 68 and Application for Permission to Submit Additional Arguments on the Effect of the Prosecution’s Rule 68 Violations, Pursuant to the Pre-Appeal Judge’s 11 May 2001 and 2 July 2001 Decisions, filed under seal on 10 March 2003.

⁷ Appellant’s Notice, paras 2-3.

⁸ Appellant’s Notice, paras 38-52.

⁹ Appellant’s Notice, pp 18-19.

alia, that closed session testimony of Blaškić was not disclosed to Kordić, although it was available four months before Kordić was obliged to file his Appellant's Brief.¹⁰ The Appellant argues that he should be allowed to add arguments to his Appellant's Brief following the Pre-Appeal Judge's suggestion in the 11 May Decision and in the 2 July Decision.

5. Kordić also argues that the Prosecution should be subject to appropriate sanctions as a result of the alleged serious breach of its disclosure obligations.¹¹

6. The Appellant supplemented the Appellant's Notice on 14 March 2003 ("Supplemental Notice").¹² In the Supplemental Notice, the Appellant informs the Appeals Chamber about additional alleged violations by the Prosecution of its disclosure obligations under Rule 68 of the Rules. The Appellant submits that the material in question was not disclosed during trial when it could have been useful and that such practice is not "as soon as practicable" as required by Rule 68 of the Rules.¹³

7. The Prosecution filed its response to the Appellant's Notice on 20 March 2003 ("Prosecution Response").¹⁴ In its discussion of the alleged non-disclosed material, the Prosecution distinguishes between the submissions of the parties in the Blaškić Appeal, the open session and the closed session testimonies of Blaškić.

8. The Prosecution submits that Rule 68 of the Rules does not cover submissions of the parties before the Tribunal, as such submissions cannot constitute exculpatory material within the meaning of Rule 68 since they contain arguments of a counsel. The Prosecution argues that it is the facts that the arguments are based upon that the Prosecution has to assess with regard to exculpatory evidence, and not the arguments themselves.¹⁵

9. The Prosecution submits, *inter alia*, that the Appellant was granted access to Blaškić's confidential appeal brief by an order of the Appeals Chamber¹⁶ and thus already has much of the material referred to in the Appellant's Notice as not being disclosed.

10. With regard to Blaškić's open session testimony, the Prosecution argues that although, in general, its obligation under Rule 68 of the Rules includes the open session testimony of witnesses

¹⁰ Appellant's Notice, para. 31.

¹¹ Appellant's Notice, p. 18.

¹² Supplemental Notice of Rule 68 Violation by the Prosecution, filed under seal on 14 March 2003.

¹³ Supplemental Notice, paras 19-20.

¹⁴ Prosecution's Response to Kordić's Allegations of the Prosecution's Non-Compliance with Rule 68, filed confidentially on 20 March 2003.

¹⁵ Prosecution Response, paras 6-7.

in other proceedings, the Appellant failed to show any prejudice as consequences of the alleged violation of Rule 68 in relation to the open session testimony given in the Blaškić case.¹⁷ The Prosecution submits that the public session testimony in the Blaškić Trial was open for the Appellant to use in his defence case, and that if he was not able to do so he should have included it in his Appeal Brief.¹⁸

11. With regard to Blaškić's closed session testimony, the Prosecution submits, *inter alia*, that it has not violated its obligations pursuant to Rule 68 of the Rules, and that, additionally, the Appellant did not demonstrate any prejudice resulting from the fact that he did not have access to this testimony.¹⁹ However, the Prosecution accepts that the Appellant – and Čerkez – should have full access to the material, subject to any concerns of Blaškić concerning protective measures.²⁰ The Prosecution submits that the Appellant's allegation that the Prosecution did not act in good faith is misleading since no order specifically addressed the disclosure of Blaškić's closed session testimony, contrary to the Appellant's claims.²¹

12. The Prosecution further submits, *inter alia*, that the appropriate remedy would be to allow the Appellant to renew his application to add arguments to his Appellant's Brief based only on reference to Blaškić's closed session trial testimony.²²

13. In its "Response to Kordić's Supplemental Notice of Rule 68 Violation by the Prosecution", filed confidentially on 24 March 2003 ("Response to Supplemental Notice"), the Prosecution submits that the Supplemental Notice should be dismissed, as "some of the material [...] was already made available to [Kordić] at trial and the remainder is not exculpatory and discloses no breach of the Prosecution's Rule 68 obligations".²³

14. The Appellant filed his Reply on 25 March 2003 ("Appellant's Reply").²⁴ The Appellant submits, *inter alia*, that prejudice was inflicted by the Prosecution's non-disclosure.²⁵ The Appellant argues that an accused has the right to be informed before or during trial of all exculpatory material

¹⁶ Prosecution Response, para. 9, note 3; see also Prosecutor v. Blaškić, Case No. IT-95-14-A, Decision on Appellants Dario Kordić and Mario Čerkez's Request for Assistance of the Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post Appeal Pleadings and Hearing Transcripts Filed in the Prosecutor v. Blaškić, 16 May 2002.

¹⁷ Prosecution Response, para. 14.

¹⁸ The Blaškić Trial concluded on 30 July 1999, and the Kordić Defence case commenced in April 2000, Prosecution Response, para. 19.

¹⁹ Prosecution Response, para. 23.

²⁰ Prosecution Response, para. 24.

²¹ Prosecution Response, para. 28.

²² Prosecution Response, para. 31.

²³ Response to Supplemental Notice, para. 27.

²⁴ Dario Kordić's Reply in Support of his Notice of Prosecution's Non-Compliance with its Obligations under Rule 68, filed confidentially on 25 March 2003.

²⁵ Appellant's Reply, Introduction, p. 1.

related to the charges against him, this right being part of the guarantee to be informed of the nature and cause of those charges and being fundamental in order to guarantee a fair trial.²⁶ Additionally, the Appellant notes that there is a time obligation for disclosure pursuant to Rule 68 of the Rules, as an accused must be assured that the Prosecution will fulfil its requirement to disclose any exculpatory material “as soon as practicable”.²⁷

15. The Appellant submits that both the open and the closed session testimonies of Blaškić contain exculpatory material regarding Kordić’s military power.²⁸ With regard to open session testimony of Blaškić, the Appellant argues, *inter alia*, that even if information on Kordić’s military power was in the open session testimony, without knowing what was stated in the closed session testimony, there was no possibility to use this information.²⁹ The Appellant further argues that parts of that testimony bore materially upon the credibility of Prosecution witnesses.³⁰

C. Discussion

16. Rule 68 of the Rules provides that:

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

17. Rule 68 of the Rules has an important function as it requires the Prosecution to disclose exculpatory material “because of its superior” – and sometimes even sole – “access to [this] material [...]”.³¹ The Prosecution’s obligation pursuant to Rule 68 of the Rules to disclose exculpatory material continues during the post-trial stage and proceedings before the Appeals Chamber.³²

18. The Appellant’s Notice seeks to introduce additional arguments to the Appellant’s Brief in order to address the importance and effect of non-disclosure of exculpatory material to the Appellant. The reason the issue was raised by the Appellant is the alleged failure of the Prosecution to fully comply with its disclosure obligation pursuant to Rule 68 of the Rules.

19. With regard to the question whether Prosecution submissions fall within the scope of Rule 68 of the Rules, the Appeals Chamber recalls that the Prosecution is required pursuant to Rule 68 of the Rules to disclose material “[...] which in any way tends to suggest the innocence or mitigate the

²⁶ Appellant’s Reply, para. 2.

²⁷ Appellant’s Reply, para. 4.

²⁸ Appellant’s Reply, paras 9-10 and 15.

²⁹ Appellant’s Reply, para. 19.

³⁰ Appellant’s Reply, para. 15.

³¹ 11 May Decision, para. 14 (see *supra* para. 1).

guilt of the accused [...].” As a general rule, this obligation does not extend to interpretations and arguments based on such material made by the Prosecution and Blaškić in their “submissions, filed under seal”, as requested by the Appellant.³³ However, in extraordinary cases in which evidence becomes exculpatory only in connection with such a submission, the Prosecution has the obligation to disclose this submission pursuant to Rule 68 of the Rules. In this respect, the Appeals Chamber also recalls Rule 70 (A) of the Rules:

Notwithstanding the provisions of Rules 66 and 67, reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under those Rules.

20. With respect to the open session testimony of Blaškić, the Appeals Chamber notes that such testimony given in other trials is generally encompassed by the Prosecution’s disclosure obligation pursuant to Rule 68 of the Rules. Consequently, the Prosecution has explained that it “did conduct its normal searches through the open and closed session material in related cases”.³⁴ However, the Appeals Chamber recalls that “the Prosecution may still be relieved of the obligations 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”.³⁵ If evidence in open session testimony in other trials becomes exculpatory only in conjunction with closed session testimony that was not disclosed, the exculpatory nature of such evidence given in open session is unknown to an appellant, and the Prosecution has the obligation to disclose the open session testimony given in other trials that can only be understood in context.

21. In relation to the closed session testimony of Blaškić, the Appeals Chamber notes that the Prosecution submits that Kordić should be allowed to renew his application to add arguments to his Appeal Brief based on specific references to this testimony.

22. In the 11 May Decision, the Pre-Appeal Judge held that “if, after having examined that material, the appellants believe that there are additional arguments or grounds of appeal available to them, it is open to them to make an application to add those arguments or grounds of appeal to their Appellant’s Briefs already filed.”³⁶

³² 11 May Decision, para. 7.

³³ Appellant’s Notice, para. 38.

³⁴ Prosecution’s Reply to Defence “Response to Prosecution’s Notice of Completion of Pending Rule 68 Reviews and Disclosure”, 14 March 2003, paras 13-14; Prosecution Response, para. 14.

³⁵ Prosecutor v. Blaškić, Case No. IT-95-14-A, Decision on the Appellant’s Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000, para. 38.

³⁶ 11 May Decision, para. 22.

23. In the 2 July Decision, the Pre-Appeal Judge acknowledged the circumstances of the present case, the Kupreškić case and the Blaškić case at the time Kordić had to file the Appellant's Brief. He also acknowledged that there was a possibility that further material would become available after the Appellant would file his Appellant's Brief, and he considered the possibility that supplements may have to be added to the Appellant's Brief.³⁷

D. Disposition

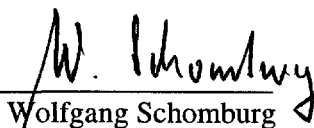
The Appeals Chamber

(i) **GRANTS** the Appellant's Notice in part and **ALLOWS** the Appellant to add arguments to his Appellant's Brief addressing the importance and effect of the alleged Prosecution's non-disclosure of exculpatory evidence no later than 23 February 2004, 12.00 hrs. The Prosecutor may respond to the Appellant's additional arguments no later than 27 February 2004, 12.00 hrs., if she so wishes. The Appellant may submit a reply by 5 March 2004, if he wishes to do so;

(ii) **DISMISSES** the remaining part of the Appellant's Notice.

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

Done this eleventh day of February 2004
At The Hague,
The Netherlands.


Wolfgang Schomburg
Presiding Judge

[Seal of the Tribunal]

³⁷ 2 July Decision, paras 12-13. A similar consideration was adopted in Prosecutor v. Blaškić, Case No. IT-95-14-A, Decision on Appellant's Supplemental Motion to Suspend Briefing Schedule, 5 December 2001, p. 3, where it was held that Blaškić would be given an opportunity to supplement his appellant's brief if additional material would become available.