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**UNITED
NATIONS**



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

Case No.: IT-95-14-A
Date: 26 September 2000
Original: English

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 BLAŠKIĆ

**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 Nobile
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 Blaškić (“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 Improperly Withheld Discovery Material, and Production by the Registrar of Trial Transcripts and Exhibits from other Lašva 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.

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 Lašva 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”).

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 Lašva Valley cases⁵ 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

⁴ Production Motion, p. 9.

⁵ The other Lašva Valley cases are the *Prosecutor v. Zoran Kupreškić and Others*, Case No.: IT-95-16-T; *Prosecutor v. Zlatko Aleksovski*, Case No.: IT-95-14/1-T; *Prosecutor v. Anto Furundžija*, Case No.: IT-95-17/1-T; and *Prosecutor v. Dario Kordić/Mario Čerkez*, Case No.: IT-95-14/2-T.

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.

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.

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 *Blaškić* 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 *Kordić/Čerkez* 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

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 Kordić and Mario Čerkez Dated 12 November 1998”, *The Prosecutor v. Tihomir Blaškić*, 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 Kordić and Mario Čerkez*, 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.

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 *Blaškić* Trial Chamber before they gave evidence before the Trial Chamber in the *Kordić/Čerkez* case. Following the giving of their testimony in the *Blaškić* 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 *Blaškić* 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.

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 *Kordić/Čerkez* case,¹⁴ the Appellant submits that, in that case, the Prosecution presented evidence that was exculpatory to the case of the Appellant.

¹³ The Appellant cites the *Opinion further to the Decision of the Trial Chamber Seized of the Case The Prosecutor v. Dario Kordić and Mario Čerkez Dated 12 November 1998* in *Prosecutor v. Tihomir Blaškić*, 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).

(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 *Tadić* 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

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. Duško Tadić*, 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).

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 Blaškić and Kordić 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 *Čelebići* 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 *Blaškić* 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 *Blaškić* witness given in a different proceeding at the Tribunal (at whatever time) which ‘in any way tends

¹⁸ Prosecution Response, para. 28.

¹⁹ *Prosecutor v. Zejnil Delalić et al.* (“the *Čelebići* case”), Decision on the Request of the Accused Hazim Delić Pursuant to Rule 68 for Exculpatory Information, Case No. IT-96-21-T, 24 June 1997, paras. 14-15.

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 *Blaškić* 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.

²⁰ *Prosecutor v. Tihomir Blaškić*, 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.*

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

²² *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1-T, Judgement, para. 22.

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 *Kordić/Čerkez* case, who presented a version of the events in the Lašva Valley that the counsel considered to be somewhat different from what was described by their evidence given in the *Blaškić* 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

²³ Not to rely solely on a few domestic cases, it is nonetheless felt that this expression used therein is apt in this regard: *R. v. Banks* [1916] 2 K.B. 621 at 623 (*per* Avory J.). Also see *R. v. Brown (Winston)* [1998] A.C. 367 at 374, HL.

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

²⁴ *Prosecutor v. Duško Tadić*, 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.

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. Kordić shouldered criminal responsibility for the events in the Lašva 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

²⁶ Production Motion, Annex B.

and prosecutions conducted by the Tribunal".²⁷ The Appeals Chamber recalls an early decision in the *Čelebići* 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.

²⁷ Production Motion, p.1.

²⁸ *Prosecutor v. Zejnir Delalić 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 Blaškić*, Case No.: IT-95-14-AR108bis, 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.

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.

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.

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 Lašva 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 *Kupreškić, Aleksovski, Furundžija* and *Kordić/Čerkez* trials concerning events in the Lašva 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

³³ Production Motion, p. 7.

³⁴ Production Motion Reply, p. 13.

(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

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

³⁵ Motion to Suspend or Extend, p. 3.

³⁶ Prosecution Response, para. 50.

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 CORRIGENDUM (“THE ADDITIONAL 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

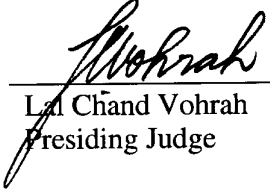
if so, to specify, within 14 days of the motion, which documents he will submit under Rule 115 and why the documents are admissible under the rule;

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


Lal Chand Vohrah
Presiding Judge

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

[Seal of the Tribunal]