filed on: 30/08/06
A771-A755
MC

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-95-17-A

Date: 30 August 2006

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Andrésia Vaz, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: **Mr. Hans Holthuis**

Decision of: **30 August 2006**

THE PROSECUTOR

v.

MIROSLAV BRALO

DECISION ON MOTIONS FOR ACCESS TO *EX PARTE* PORTIONS OF THE RECORD ON APPEAL AND FOR DISCLOSURE OF MITIGATING MATERIAL

The Office of the Prosecutor:

Mr. Peter Kremer Q.C.
Mr. Xavier Tracol

Counsel for the Appellant:

Mr. Jonathan Cooper
Ms. V. C. Lindsay

INTRODUCTION

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 "Tribunal", respectively) is seized of several confidential motions filed by Miroslav Bralo ("Appellant")[1] and by the Office of the Prosecutor ("Prosecution")[2] pertaining to the issues of the Appellant's access to *ex parte* documents in his case as well as the Prosecution's disclosure obligations under Rules 66 and 68 of the Rules of Procedure and Evidence of the Tribunal ("Rules").

2. The Appellant generally seeks a comprehensive review by the Appeals Chamber of all *ex parte* documents filed in his case, as well as access to all such documents in two forms: "by schedule identifying the title of each document with date of filing and the legal basis relied upon to justify the proceedings as *ex parte*" and "by provision of the documents themselves" in their original or redacted form.[3] He equally invites the Appeals Chamber to promulgate guidelines for parties and trial chambers concerning *ex parte* materials.[4] Furthermore, in his Motion for Disclosure, the Appellant requests that the Appeal Chamber compel the Prosecution to comply with its obligations under Rules 66 and 68 of the Rules "to supply material obtained from the accused and potentially mitigating material".[5]

3. The Prosecution filed its confidential Consolidated Response on 30 June 2006,[6] arguing that both the Request for Access and the Motion for Disclosure should be rejected. The Appellant filed his confidential Consolidated Reply on 3 July 2006,[7] specifying the outstanding issues in light of the Consolidated Response and suggesting an alternative approach to disclosure, through which the Appeals Chamber would "deal with this matter as if [these] paragraphs stood as a separate Motion

---

[1] Request for Review of Access to *Ex Parte* Portions of the Record on Appeal, 20 June 2006 ("Request for Access"); Motion to Compel Disclosure of Mitigating Material under Rules 66 and 68, 21 June 2006 ("Motion for Disclosure").
[2] Prosecution's Motion to Strike, 10 July 2006 ("Motion to Strike"); Prosecution's Motion to Reject Miroslav Bralo's Response to Prosecution's Notice to Lift the *Ex Parte* Status of the Prosecution's Further Submissions Concerning Rule 68 Filed on 18 October 2005 (RP D 836 to 833), 31 July 2006 ("Motion to Reject").
[3] Request for Access, paras. 1, 13, 22 and 23.
[4] *Ibid.*, para. 24.
[5] Motion for Disclosure, paras 1 and 26.
[6] Prosecution's Consolidated Response to Miroslav Bralo's Confidential "Motion to Compel Disclosure of Mitigating Material under Rules 66 and 68" and "Request for Review of Access to *Ex Parte* Portions of the Record on Appeal", 30 June 2006 ("Consolidated Response").
[7] Reply of Miroslav Bralo to Prosecution's Consolidated Response to Motions for Access to Record on Appeal and Disclosure, 3 July 2006 ("Consolidated Reply").

for Disclosure pursuant to Rule 75".[8] In its Motion to Strike, the Prosecution requests the Appeals Chamber to strike the paragraphs in the Consolidated Reply suggesting an alternative form of relief as being outside the scope of a reply and thus denying the Prosecution an opportunity to respond.[9] The Appellant responded that he was "simply offer[ing] an efficient way of dealing with an issue which may or may not arise in due course", while the Prosecution could be heard "when and if it arises".[10] The Appeals Chamber recalls that a reply should be limited to arguments contained in the respective response and finds that including into the Consolidated Reply an alternative request containing completely new submissions of law was improper.[11] Consequently, the Prosecution Motion to Strike should be granted.

PROCEDURAL BACKGROUND

4. The Appeals Chamber recalls that the Appellant pleaded guilty to all eight counts of the Indictment and Trial Chamber I ("Trial Chamber") accepted the guilty pleas and entered a conviction for each of the eight counts charged.[12] The Sentencing Judgement in the present case was delivered on 7 December 2005.[13] The Appellant filed his Notice of Appeal on 5 January 2006[14] and its Appellant's Brief on 30 March 2006.[15] The Prosecution filed its Respondent's Brief on 2 May 2006.[16] The Appellant replied on 19 May 2006.[17] The Appeals Chamber also notes that the extent of the Appellant's cooperation with the Tribunal was one of the issues addressed by the

[8] Consolidated Reply, paras 21-25.
[9] Motion to Strike, paras 1-3.
[10] Miroslav Bralo's Response to Prosecution's Motion to Strike, filed confidentially on 20 July 2006, para. 2.
[11] *Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence Pursuant to Rule 115, 5 May 2006, para. 8; *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Decision on Prosecution's Motion to Strike Portion of Reply, 30 September 2002, p. 3. *Cf.* generally, Practice Direction on Practice Direction on Formal Requirements for Appeals from Judgement, 4 July 2005, para. 6. *Cf.* also *Prosecutor v. Blagoje Simić*, Case No. IT-95-9-A, Decision on Prosecution's Motion to Strike Parts of the Brief in Reply, 27 September 2004, p. 3; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Prosecution's Motion to Strike New Argument Alleging Errors by Trial Chamber Raised for First Time in Appellant's Reply Brief, 28 January 2005, p. 3; *Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61-A, Judgement on Sentencing Appeal, 20 July 2005, para. 145.
[12] *Prosecutor v. Miroslav Bralo,* Case No. IT-95-17, T. 19 July 2005, p. 44.
[13] *The Prosecutor v. Miroslav Bralo,* Case No. IT-95-17-S, Sentencing Judgement, 7 December 2005 ("Trial Judgement").
[14] Notice of Appeal Against Sentence on Behalf of Miroslav Bralo, 5 January 2006 ("Notice of Appeal").
[15] Appeal Brief on Behalf of Miroslav Bralo filed confidentially on 30 March 2006 and publicly 26 May 2006 ("Appellant's Brief").
[16] Respondent's Brief to the "Appeal Brief on Behalf of Miroslav Bralo", 2 May 2006 ("Respondent's Brief").
[17] Reply Brief on Behalf of Miroslav Bralo filed confidentially on 19 May 2006 and publicly on 26 May 2006.

parties during the sentencing proceedings,[18] and that the Trial Chamber's finding on the absence of any "substantial" cooperation is currently on appeal.[19]

5. For the purposes of the present appeal, the Registry certified the Trial Record consisting of, *inter alia*, documents D1161 to D1, on 26 January 2006.[20] On 2 May 2006, following a request from the Appellant,[21] a decision was issued granting him access to certain documents which were confidential and/or originally filed *ex parte* in the index range of D182 to D1, and which had not previously been disclosed to the Appellant.[22] These documents, in redacted form where applicable, were communicated to the Appellant by the Registry on 8 – 10 May 2006.

6. In accordance with its submissions in the Consolidated Response,[23] the Prosecution filed the partly confidential "Prosecution's Notice to Lift the *Ex Parte* Status of the Prosecution's Further Submissions Concerning Rule 68 Filed on 18 October 2005 (RP D836 to 833)" on 12 July 2006 ("Notice to Lift"). The Appellant further filed the confidential "Miroslav Bralo's Response to Prosecution's Notice" on 24 July 2006 ("Response to the Notice to Lift") to which the Prosecution objected, requesting the Appeals Chamber to reject it as being invalidly filed or, in the alternative, allow the Prosecution to reply to it within four days from the date of the relevant decision.[24] On 10 August 2006, the Appellant responded to the Motion to Reject stating that it was legitimate for him to react to the Notice to Lift.[25]

7. The Appeals Chamber agrees with the Prosecution that the Notice to Lift was not filed in the form of a motion seeking any relief and thus there is no legal basis for the Appellant to file a response thereto. His respective submissions should have been presented as a separate Motion to which the Prosecution would have responded and the Appellant could then reply. However, in the interests of judicial economy and pursuant to paragraph 19 of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the International Tribunal,[26]

---

[18] *See,* Trial Judgement, paras 43-45 and 73-81.
[19] Notice of Appeal, para. 1.2(2); Appellant's Brief, paras 50-81.
[20] Certificate on the Trial Record, 26 January 2006.
[21] Motion of Miroslav Bralo for Access to Certified Trial Record, 20 March 2006.
[22] Decision on Motion of Miroslav Bralo for Access to Certified Trial Record, 2 May 2006 ("2 May 2006 Decision"). With respect to the documents originally filed *ex parte* which it ordered to be disclosed, the Appeals Chamber either lifted the *ex parte* status or ordered the Prosecution to disclose redacted versions.
[23] Consolidated Response, para. 21.
[24] Motion to Reject, para. 3.
[25] Appellant's Response to Prosecution's Motion to Reject a Filing, 10 August 2006.
[26] IT/155/Rev. 3, 16 September 2005.

and because the relief sought by the Response to the Notice to Lift[27] simply reiterates that sought in the Request for Access and the Motion for Disclosure, the Appeals Chamber will exceptionally consider the Response to the Notice to Lift as validly filed. Moreover, in light of the Appeals Chamber's conclusions below,[28] the Prosecution is in no way prejudiced by the lack of a response to these arguments.

REQUEST FOR ACCESS TO *EX PARTE* MATERIAL IN BRALO CASE

Submissions of the parties

8. The Request for Access is based on Articles 20, 21 and 22 of the Statute of the Tribunal ("Statute") and on Rules 109 and 110 of the Rules.[29] The Appellant argues that, at the time of his earlier application for access to documents D182-D1, he was unaware of the existence of other *ex parte* material on the record[30] and thus currently seeks "a comprehensive review of access to all filings in the case, howsoever filed",[31] since the "review" carried out in the context of the 2 May 2006 Decision "was only partial".[32]

9. While the Appellant concedes that use of *ex parte* procedure may be appropriate in exceptional circumstances, he suggests that it should always be subject to a clear protocol to be defined by the Appeals Chamber.[33] In this sense, the Appellant suggests that the party applying for *ex parte* filings should set out the conditions justifying the need for such status. The excluded party should be entitled to a continuous review of the appropriateness of maintaining the *ex parte* status of such documents with a view to subsequent modification if necessary, without having to trigger the review itself.[34] He adds that, in any case, non-disclosure of the identity of the *ex parte* documents (*i.e.* their titles and dates of filing) would only rarely be justified and could only occur as a last resort.[35]

---

[27] Response to the Notice to Lift, para. 27.
[28] *See infra,* paras 19 and 34.
[29] Request for Access, paras 2-6.
[30] *Ibid.*, para. 12.
[31] *Ibid.*, paras 13, 23.
[32] *Ibid.*, para. 18.
[33] *Ibid.*, para. 17.
[34] *Ibid.*, paras 14, 17.
[35] *Ibid.*, para. 16.

10. The Appellant further argues that he "has an interest in seeing all material in the Trial Record on principle" because it "is by definition relevant to his case."[36] To illustrate the necessity of a review of all *ex parte* documents on the appeal record with a view to their subsequent disclosure, the Appellant takes the example of documents D782-D837 relevant to his role in relation to the *Blaškić* Review Proceedings,[37] for which he submits the maintenance of *ex parte* status is no longer justified. In this regard, he notes that the confidentiality of these proceedings was lifted in December 2005 and therefore invites the Appeals Chamber to review "whether a claim to any form of confidentiality now continues to apply to the *ex parte* proceedings themselves, or any document filed in the course of those proceedings" and to order disclosure.[38]

11. Finally, the Appellant invites the Appeals Chamber to issue guidelines for parties and Trial Chambers concerning "the manner in which pre-trial and sentence phase decisions as to confidentiality can continue to be subject to proper review during the appeal phase", so that parties excluded from service of *ex parte* documents are not prejudiced on account of their ignorance that there exists material to be reviewed.[39]

12. In its Consolidated Response, the Prosecution submits that the Request for Access should be dismissed because (a) it seeks to re-litigate an issue which concerns the merits of the present appeal and is fully briefed;[40] (b) it improperly seeks to reconsider, in part, the 2 May 2006 Decision insofar as the Request for Access encompasses documents requested in the previous motion and would require the Appeals Chamber to review its prior decision which is *res judicata*;[41] (c) the Appellant failed to present any relevant arguments justifying his request for access to the *ex parte* filings and his general claims do not "identify expressly and precisely the legitimate forensic purpose for which access is sought" to the *ex parte* material and are a mere fishing expedition, the assertion of "an interest in seeing all material in the Trial Record on principle" being insufficient;[42] and (d) the

---

[36] *Id.*
[37] Case No. IT-95-14-R.
[38] Request for Access, paras 19-22.
[39] *Ibid.*, para. 24.
[40] Consolidated Response, paras 9-11 with reference to the question of the Prosecutor's use of the Bralo's Factual Basis in other cases qualified as evidence of co-operation.
[41] *Ibid.*, paras 9, 12-13. In this regard, the Prosecution also notes that although the Trial Record certified for this appeal on 26 January 2006 refers to documents D1161 to D1, the Appellant only sought access to documents D182 to D1 while he should have by then realized that other documents had not been disclosed to him.
[42] *Ibid.*, paras 9, 14-18 with reference to *The Prosecutor v. Rasim Delić,* Case No. IT-04-83-PT, Order on Defence Motions for Access to All Confidential Material in *Prosecutor v Blaškić* and *Prosecutor v Kordić and Čerkez*, 7 December 2005, p. 7 and to *The Prosecutor v. Blagoje Simić,* Case No. IT-95-9-A, Decision on Defence Motion by

Request for Access has been rendered moot by the Appeals Chamber's recent decision in *Blaškić* Review Proceedings releasing a public redacted version of the relevant filings.[43]

13. Finally, the Prosecution submits that "[i]t is unnecessary to promulgate guidelines since the Appellant can obtain access to *ex parte* and confidential material upon meeting the requirements established by the jurisprudence."[44] It adds that, in the proceedings before the Tribunal, no notice to the other party of *ex parte* filings is required since the mere "knowledge by a party that the other party has filed *ex parte* material may suffice to cause prejudice to the party which filed it".[45] In any event, in the instant case, the Appellant had notice of the *ex parte* filing of 18 October 2005 and "thus has no basis for his general complaint about the *ex parte* process."[46]

14. In his Consolidated Reply, the Appellant admits that the Consolidated Response has been helpful for him but maintains that the arguments raised in both his Request for Access and Motion for Disclosure are still outstanding.[47] He also underlines that the Request for Access does not seek reconsideration of the 2 May 2006 Decision, which would stay unaffected by the present claim.[48] Finally, he claims that "the haphazard approach to disclosure in this case [...] demonstrate[s] precisely why a clear, predictable and authoritative regime should be set out" and reiterates his request for respective guidelines with respect to the *ex parte* procedures.[49]

Discussion

15. The Appeals Chamber notes that Rules 66(C) and 68(iv) expressly provide for *ex parte* filing of documents in possession of the Prosecution, "the disclosure of which may prejudice further or ongoing investigations, or for any other reasons may be contrary to the public interest or affect the security interests of any State". Under these circumstances, the Prosecution is required to provide the Chamber seized with such applications (and the Chamber only) with the information that is sought to be kept confidential and *ex parte*. Various other provisions of the Rules allow for *ex parte*

Franko Simatović for Access to Transcripts, Exhibits, Documentary Evidence and Motions Filed by the Parties in the *Simić et al* Case, 13 April 2005, p. 4.

[43] *Ibid.*, paras 9, 19-22 (in particular, with respect to documents D836-D783). The Prosecution has additionally informed the Appellant and the Appeals Chamber of his intention to lift the *ex parte* status of document D836-D833 "which will fully detail the use of any materials provided by Bralo in the *Blaškić* review proceedings" (*Ibid.*, para. 21).

[44] *Ibid.*, para. 22.

[45] *Ibid.*, para. 17.

[46] *Ibid.*, para. 10 with reference to the Notice of Appeal and Appellant's Brief (paras 70-80) and para. 17 with reference to T. 20 October 2005, pp 55-67.

[47] Consolidated Reply, paras 2, 11.

[48] *Ibid.*, para. 7.

proceedings by implication.[50] Given the variety of circumstances which may give rise to the need for *ex parte* status, the Appeals Chamber agrees that it is "neither possible nor appropriate to define the circumstances in which such [proceedings] are appropriate by any limiting definition"[51].

16. As a preliminary matter, with respect to the Appellant's request for guidelines concerning review of access to *ex parte* materials,[52] the Appeals Chamber considers that it is not appropriate for it to promulgate a practice that would be applicable in all cases. The endorsement by the Appeals Chamber of a practice in one appeal is always given in the light of the circumstances of the given appeal.[53] In general, the Appeals Chamber has no powers of legislation. Moreover, the current jurisprudence of the Appeals Chamber on access to *ex parte* material is consistent and clear.[54] Therefore, the Appeals Chamber declines to consider the Appellant's proposal any further.

17. The Appeals Chamber recalls that a party is always entitled to seek material from any source, including from another case before the Tribunal, to assist in the preparation of its case if the material sought has been identified or described by its general nature and if a legitimate forensic

---

[49] *Ibid.*, paras 12-13.

[50] For instance, under Rule 47, a Prosecution's application for review of an indictment before an arrest warrant may be issued is *ex parte* by necessity; Rule 50 provides for an ordinarily *ex parte* procedure for the Prosecution to seek leave to amend the indictment before the case is assigned to a Trial Chamber; pursuant to Rule 54*bis*, hearing a State's submissions in relation to national security interests concerning the issue of a subpoena is *in camera* and *ex parte*; Rule 69 allows the Trial Chamber to consult the Tribunal's Victims and Witnesses Section, on the *ex parte* basis, for the purposes of determination of the appropriate protective measures; in the same logic, applications by either party for protective measures are determined by a Trial Chamber on the basis of certain *ex parte* material; Rule 77 permits an *ex parte* notice of conduct of a person who may be in contempt of the Tribunal; Rule 108*bis* allows for an *ex parte* appeal hearing of an impugned decision affecting a State, unless otherwise decided in the interests of justice. These examples are surely not exhaustive. *See, e.g.*, *Prosecutor v. Ramush Haradinaj*, Case No. IT-04-84-PT, [*Confidential*] Decision on Prosecution's Motion for Exceptional Protective measures for a Potential Witness, 3 May 2006, p. 3; *Prosecutor v. Milan Milutinović et al.*, Case No IT-99-37-I, Decision on Application by Dragoljub Ojdanić for Disclosure of *Ex Parte* Submissions, 8 November 2002 ("*Milutinović* 8 November 2002 Decision"), paras 22-23; *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-PT, Decision on Second Motion by Prosecution for Protective Measures, 27 October 2000, para. 14; *Prosecutor v. Blagoje Simić et al.*, Case No IT-95-9-PT, Decision on (1) Application by Stevan Todorović to Re-Open the Decision of 27 July 1999, (2) Motion by ICRC to Re-Open Scheduling Order of 18 November 1999, and (3) Conditions for Access to Material, 28 February 2000 ("*Simić* 28 February 2000 Decision"), paras 38-42; *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 20 May 1999, para. 11; *Prosecutor v. Momir Talić*, Case No. IT-99-36-PT, Decision on Motion for release, 10 December 1999, para. 9; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-AR108*bis*, Judgment on the Request of the Republic of Croatia for Review of Decision of Trial Chamber II of 18 July 1997, 29 October 1997 ("*Blaškić* 29 October 1997 Decision"), para. 68.

[51] *Milutinović* 8 November 2002 Decision, para. 23; *Simić* 28 February 2000 Decision, para. 41.

[52] Request, paras 14-16, 24.

[53] *Prosecutor v. Tihomir Blaškić*, Case No IT-95-14-A, Decision on Prosecution's Motion for Clarification of the Appeals Chamber's Decision Dated 4 December 2002 on Paško Ljubičić's Motion for Access to Confidential Material, Transcripts and Exhibits in the Blaškić Case, 8 March 2004, para. 39; *Prosecutor v. Tihomir Blaškić*, Case No IT-95-14-A, Decision on "Prosecution's preliminary Response and Motion for Clarification Regarding Decision on Joint Motion of Hadžihasanović, Alagić and Kubura of 24 January 2003", 23 May 2003, para. 28.

[54] *See* para 15 *supra* and para. 17 *infra*.

purpose for such access has been shown.[55] However, in general, *ex parte* material, being of a higher degree of confidentiality, by nature contains information which has not been disclosed *inter partes* because of security interests of a State, other public interests, or privacy interests of a person or institution.[56] Consequently, the party on whose behalf *ex parte* status has been granted enjoys a protected degree of trust that the *ex parte* material will not be disclosed.[57]

18. With respect to the instant case, the Appeals Chamber notes that the *ex parte* document D836-D782, specifically referred to by the Appellant,[58] has already been disclosed to him in its redacted form. As noted above, the Prosecution filed its Notice to Lift containing the redacted *inter partes* confidential version of document D836-D833,[59] while pages D832-D783 correspond to the confidential Request for Review or Reconsideration filed in the *Blaškić* Review Proceedings of 29 July 2005 ("*Blaškić* Request"), a public redacted version of which was filed on 10 July 2006. After having received a copy of this public document, the Appellant claims that the Prosecution should provide him, on a confidential basis, with a fuller version of the *Blaškić* Request revealing all references to the Appellant contained therein on the basis that such references are relevant to the issue of quality and quantity of his cooperation provided to the Tribunal.[60] The Appeals Chamber also notes that, while the Prosecution made seven references to the Appellant in the *Blaškić* Request,[61] the public redacted version of 10 July 2006 contains only four such references, paragraphs 63, 65 and 76 being redacted. Finally, the Appeals Chamber notes in this respect that the

---

[55] *Prosecutor v. Blagoje Simić,* Case No It-95-9-A, Decision on Defence Motion by Franko Simatović for Access to Transcripts, Exhibits, Documentary Evidence and Motion Filed by the Parties in the Simić et al. Case, 13 April 2005 ("*Simić* 13 April 2005 Decision"), p. 3; *Momir Nikolić v. Prosecutor,* Case No IT-02-60/1-A, Decision on Emergency Motion for Access to Confidential Document, 4 February 2005, p. 4; *Prosecutor v. Tihomir Blaškić,* Case No IT-95-14-A, Decision on Dario Kordić and Mario Čerkez's Request for Access to Tihomir Blaškić's Fourth Rule 115 Motion and Associated Documents, 28 January 2004, p. 4; *Prosecutor v. Mladen Naletilić, aka "Tuta", Vinko Martinović, aka "Stela",* Case No IT-98-34-A, Decision on Joint Defence Motion by Enver Hadžihasanović and Amir Kubura for Access to All Confidential Material, Filings, Transcripts and Exhibits in the Naletilić and Martinović Case, 7 November 2003, p. 3; *Prosecutor v Miroslav Kvočka et al.,* Case No. IT-98-30/1-A, Decision on Momčilo Gruban's Motion for Access to Material, 13 January 2003 ("*Kvočka* 13 January 2003 Decision"), para. 5; *Milutinović* 8 November 2002 Decision, para. 18; *Prosecutor v Tihomir 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 ("*Blaškić* 16 May 2002 Decision"), para. 14.

[56] 2 May 2006 Decision, p. 4; *Simić* 13 April 2005 Decision, p. 4; *Blaškić* 16 May 2002 Decision, para. 22.

[57] 2 May 2006 Decision, p. 4; *Simić* 13 April 2005 Decision, p. 4.

[58] Request for Access, para. 19.

[59] The document in question fully corresponds to the Prosecution's *ex parte* filing of 18 October 2005. The only redaction in this document concerns footnote 2 and, according to the Prosecution, remains necessary in terms of protection of certain witnesses who are not relevant to the present case (Notice to Lift, para. 3). In this regard, the Appeals Chamber considers the existing redaction justified.

[60] Response to the Notice to Lift, paras 15-17.

Prosecution has explicitly stated that, "[w]ith respect to any redactions, the Prosecution affirms that none of them contains any material requiring disclosure under either Rule 66 or Rule 68 or any information or evidence having any bearing on mitigation in this case" and added that the redacted paragraphs were available to the Appeals Chamber.[62]

19. The Appeals Chamber recalls that the protective measures in question were ordered in the *Blaškić* Review Proceedings.[63] Consequently, pursuant to Rule 75(G) of the Rules, the Appellant should bring any motion for variation of protective measures before the *Blaškić* Appeals Chamber. The Appeals Chamber in the present case has no jurisdiction to decide on the Appellant's respective request and therefore finds that it should be dismissed.

20. With regard to the rest of the *ex parte* filings in this case,[64] the Appeals Chamber notes that these documents are part of the Trial Record certified for the purposes of the present appeal and are indexed as follows: D194-D190, D200-D196, D204-D202, D208-D206, D211-D210, D216-D213, D222-D224, D234-D231, D239, D255, D371-D353, D410-409 and D488-D463 with their respective translations and transmission sheets. The Appeals Chamber further notes that, while the Appellant has not been put on notice of the respective filings, he could identify their existence by reviewing page indexes of the documents available to him and identifying the ones missing, which he has not done for the purposes of his Request for Access. In its current submissions, the Prosecution has not expressed its position as to further maintaining the *ex parte* status of these specific filings and is directed to do so, within ten days of the date of the present decision, in order to assist the Appeals Chamber in its decision on the Appellant's request to the documents listed above.[65] In the event that the Prosecution does not oppose the lifting of the *ex parte* status of all or some of these documents, it is invited to identify any Rule 70 material among them, as well as to apply for redactions where necessary.

---

[61] Confidential Annex to the Notice to Lift, para. 3 with reference to paras 57(b), 61-63, 65, 76 and 177 of the *Blaškić* Request.
[62] Consolidated Response, para. 20. The Appeals Chamber also notes that para. 65 of the *Blaškić* Request appears to be an almost *verbatim* repetition of para. 63.
[63] *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-R, Decision on Prosecution's Proposed Public Redacted Version of its Request for Review or Reconsideration, 29 June 2006, The Appeals Chamber in *Blaškić* Review Proceedings has specifically ordered, *inter alia,* that paragraphs 63 and 76 of the *Blaškić* be redacted as proposed by the Prosecution (*Ibid.*, pp 8-9).
[64] Provided that access to documents D182-D1 has already been dealt with by 2 May 2006 Decision.
[65] The Appeals Chamber notes, however, that the Prosecution does not control the access which a party may have to material available within the Tribunal. *See, e.g., Prosecutor v. Enver Hadžihasanović et al.,* Case No IT-01-47-PT, Decision on Motion by Mario Čerkez for Access to Confidential Supporting Material, 10 October 2001, para. 13;

MOTION FOR DISCLOSURE

Submissions of the parties

21. On the basis of Articles 20 and 21 of the Statute and Rules 66, 68, 68*bis* and 107 of the Rules,[66] the Appellant seeks an order from the Appeals Chamber directing the Prosecution to comply with its obligations under Rule 66 and Rule 68 of the Rules and, in particular, (a) to identify material obtained from the Appellant which the Prosecutor has used or intends to use in any other proceedings as well as the cases in which such use occurred or is intended to occur and the reasons for such use or reference;[67] and (b) to declare that the Prosecution is unaware of any other material capable of being relevant to the sentence.[68]

22. The Appellant particularly focuses his Motion for Disclosure on two categories of documents relevant to his cooperation with the Prosecution: (a) those provided by the Appellant in 1997, that, he claims, were used at least in two other cases before the Tribunal;[69] and (b) documents of 2005, which may be used in the *Blaškić* Review Proceedings.[70]

23. The Appellant further makes submissions relevant to the merits of his case, mainly reiterating his arguments contained in his Appellant's Brief.[71] In this sense, while he argues that "the correctness of the Trial Chamber's various approaches is a matter to be determined in Appeal", he submits that "the Appeal Chamber must be in possession of the information necessary to make an effective evaluation of his co-operation."[72]

Prosecutor v. Radoslav Brđanin and Momir Talić, Case No. IT-99-36-PT, Decision on Motion by Momir Talić for Access to Confidential Documents, 31 July 2000, para. 6.

[66] Motion for Disclosure, paras 1-9.

[67] *Ibid.*, paras 1, 10-22. This request was already included in the Appellant's Brief, and according to the Appellant, the Prosecution has not responded (Motion, paras 20-21 with reference to the Appellant's Brief, paras 60 and 80).

[68] *Ibid.*, paras 1, 25.

[69] The Appellant refers to his Defence Motion for Access to Excerpts of Confidential Testimony filed before the Trial Chamber on 1 February 2005 and the Trial Chamber's respective Decision on Access to Confidential Testimony and Documents of 7 March 2005 granting him access to the requested confidential material from cases *Prosecutor v. Tihomir Blaškić* (IT-95-14), *Prosecutor v. Zlatko Aleksovski* (IT-95-14/1), *Prosecutor v. Anto Furundžija* (IT-95-17/1), *Prosecutor v. Zoran Kupreškić et al.* (IT-95-16). Studying these excerpts allowed the Appellant to identify that such documents had been used by the Prosecutor at least in one other trial; "[s]ubsequent research revealed use of the documents by the Prosecutor in public proceedings in one further trial". The Appellant does not identify or specify any further the results of his research. (Motion for Dislosure, para. 12).

[70] *Ibid.*, para. 11.

[71] *Ibid.*, paras 16-20. The Appeals Chamber will not address these arguments at the pre-appeal stage.

[72] *Ibid.*, para. 19.

24. The Appellant finally argues that the Prosecution failed to comply with its obligations under Rules 68 and 112(B) of the Rules, notably since there has been no indication that any particular materials in relation to his case were placed on the Electronic Disclosure System ("EDS") as stated in the Respondent's Brief.[73]

25. In its Consolidated Response, the Prosecution claims that the relief sought is premature insofar as the specific issue of the alleged use of the information provided by the Appellant to the Prosecution is part of the present appeal on merits and is fully briefed by the parties.[74] It adds that the Motion for Disclosure is moot both with regard to the documents of 1997, since the Appellant has received all of the information that he requests,[75] and with respect to the *Blaškić* Review Proceedings in light of its Notice to Lift and the filing of the public version of the *Blaškić* Request.[76]

26. The Prosecution further refers to its declaration at the sentencing stage and reiterates that it "knows of no other material falling under the ambit of Rule 68 which has come into its actual knowledge since the 18 October 2005 declaration was made".[77] Accordingly, the Appellant's request for a declaration pursuant to Rules 68 and 112 is "unmeritorious" and "unnecessary".[78]

27. In his Consolidated Reply, the Appellant maintains that he is not aware of any disclosure which objectively addresses the issues raised in the Motion for Disclosure with respect to the documents of 1997, notably on the question why the documents were used in the particular context.[79] Raising the fact that the Prosecution, in its Response, "has slightly re-cast the Declaration of compliance" under Rule 112(B), the Appellant submits that the Prosecution was required to make "a positive statement that [it] has considered the materials available to it, and has concluded that there is no material which is disclosable, other that that already specifically disclosed".[80]

28. Finally, as an "alternative approach to disclosure" and in the event that, in light of the Prosecution's Consolidated Response, the Appeals Chamber were to decide that Rules 66 and 68

---

[73] *Ibid.*, paras 23-24 with reference to the Respondent's Brief, para. 4.2.
[74] Consolidated Response, para. 4.
[75] *Ibid.*, para. 5 with reference to the Appellant's Brief, para. 59, footnotes 59 and 60.
[76] *Id.*
[77] *Ibid.*, para. 6. with a reference to *The Prosecutor v. Miroslav Bralo,* Case No. IT-95-17-S, Prosecution's Declaration Concerning Rule 68, 18 October 2005.
[78] *Id.*
[79] Consolidated Reply, para. 19.
[80] *Ibid.*, para. 20 with reference to the Consolidated Response, para. 6.

are not applicable and the documents sought are not required to be disclosed, the Appellant seeks access to such documents under Rule 75(G)(ii) of the Rules.[81]

Discussion

29. The Appeals Chamber recalls that the Prosecution has a positive and continuous obligation[82] under Rule 68 of the Rules to, "as soon as practicable, disclose to the Defence any material which in [its] actual knowledge [...] may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence". The application of this provision is not confined to the trial process and continues throughout the proceedings on the relevant case before the Tribunal.[83]

30. Determining what material meets Rule 68 disclosure requirements falls within the Prosecution's discretion and its initial assessment of such exculpatory material must be done in good faith.[84] However, Rule 68(i) does not impose an obligation on the Prosecution to search for materials which he does not have knowledge of, nor does it entitle the Defence to embark on a fishing expedition to obtain exculpatory material.[85] It does not confer on the Accused a general right of access to the

---

[81] *Ibid.*, paras 21-22.

[82] *Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR73.7, Decision on Interlocutory Appeal Regarding the Role of the Prosecutor's Electronic Disclosure Suite in Discharging Disclosure Obligations, 30 June 2006 ("*Karemera* 30 June 2006 Decision"), para. 9; *Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-AR73 & ICTR-98-41-AR73(B), Decision on Interlocutory Appeals of Decision on Witness Protection Orders, 6 October 2005 ("*Bagosora* 6 October 2005 Decision"), para. 44; *Prosecutor v. Tihomir Blaškić, Case No IT-95-14-A,* [confidential] Decision on Prosecution's Application to Seek Guidance from the Appeals Chamber regarding Redaction of the Statement of "Witness Two" for the purposes of Disclosure to Paško Ljubičić under Rule 68, 30 March 2004 ("*Blaškić* 30 March 2004 Decision"), para. 32; *Prosecutor v. Tihomir 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 ("*Blaškić* 26 September 2000 Decision"), paras 29-32.

[83] *Bagosora* 6 October 2005 Decision, para. 44; *Prosecutor v. Tihomir Blaškić,* Case No IT-95-14-A, [confidential] Decision on Prosecution's Application to Seek Guidance from the Appeals Chamber regarding Redaction of the Statement of "Witness Two" for the Purposes of Disclosure to Dario Kordić under Rule 68, 4 March 2004 ("*Blaškić* 4 March 2004 Decision"), para. 45; *Blaškić* 26 September 2000 Decision, para. 32.

[84] *Prosecutor v. Juvénal Kajelijeli, Case No. ICTR-98-44A-A*, Judgement, 23 May 2005 ("*Kajelijeli* Appeal Judgement"), para. 262; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Appeal Judgement, 17 December 2004 ("*Kordić* Appeal Judgement"), para. 183; *Prosecutor v. Radoslav Brđanin,* Case No. IT-99-36-A, Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials, 7 December 2004 ("*Brđanin* 7 December 2004 Decision"), p. 3; *Prosecutor v. Tihomir Blaškić,* Case No. IT-95-14-A, Appeal Judgement, 29 July 2004, para. 264; *Prosecutor v. Radislac Krstić*, Case No IT-98-33-A, Judgement, 19 April 2004 ("*Krstić* Appeal Judgement"), para. 190; *Blaškić* 4 March 2004 Decision, para. 44; *Blaškić* 30 March 2004 Decision, paras 31-32; *Blaškić* 26 September 2000 Decision, para. 45.

[85] *Cf. Kajelijeli* Appeal Judgement, paras 262-263; *Blaškić* Appeal Judgement, para. 268; *Prosecutor v. Enver Hadžihasanović et al.*, Case No. IT-01-47-AR73, Decision on Appeal from Refusal to Grant Access to Confidential Material in Another Case, 23 April 2002 ("*Hadžihasanović* 23 April 2002 Decision"), p. 3. *See also Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-50-T, Decision on Bicamumpaka's Motion for Disclosure of Exculpatory Evidence (MDR Files), 17 November 2004, paras 11-14; *Prosecutor v. Casimir Bizimungu et al.*, Case No. ICTR-99-

Prosecution's files.[86] Indeed, when an accused asks a Chamber to order the production of material, the accused's request "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".[87] At the same time, such request is not required to be "as specific as to precisely identify which documents should be disclosed".[88] The Appeals Chamber also notes that the Prosecution may 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".[89]

31. In case of failure to comply with disclosure obligations, the Appeals Chamber may decide *proprio motu,* or at the request of either party, to impose sanctions under Rule 68*bis*. In this respect, the Appeals Chamber notes that, if an accused wishes to show that the Prosecution is in breach of these obligations, he/she must identify specifically the materials sought, present a *prima facie* showing of its probable exculpatory nature, and prove the Prosecutor's custody or control of the materials requested.[90] However, the Appeals Chamber reiterates that the "general practice of the [...] Tribunal is to respect the Prosecution's function in the administration of justice, and the Prosecution's execution of that function in good faith".[91] Indeed, "[o]nly where the Defence can satisfy a Chamber that the Prosecution has failed to discharge its obligations should an order of the type sought to be contemplated".[92] Finally, even when the Defence satisfies the Chamber that the Prosecution has failed to comply with its Rule 68 obligations, the Chamber will still examine whether the Defence has actually been prejudiced by such failure before considering whether a remedy is appropriate.[93]

32. To ensure the effectiveness of these provisions in appeal proceedings, where the Prosecution is the Respondent, it must make a declaration under Rule 112(B) in its Respondent's brief stating that

---

50-T, Decision on Prosper Mugiraneza's Motion Pursuant to Rule 68 for Exculpatory Evidence Related to Witness GKI (TC), 14 September 2004, paras 8-12.

[86] *Cf. The Prosecutor v. Tihomir Blaškić*, Case No. IT-94-PT, Decision on the Production of Discovery Materials, 27 January 1997 ("*Blaškić* 29 October 1997 Decision"), paras 48-49; *Prosecutor v. Casimir Bizimungu et al.,* Case No. ICTR-99-50-T, Decision on Bicamumpaka's Request Pursuant to Rule 73 for Certification to Appeal the 1 December 2004 "Decision on the Motion of Bicamumpaka and Mugenzi for Disclosure of Relevant Material", 4 February 2005, para. 30; *Le Procureur c. André Rwamakuba et consorts, Affaire No. ICTR-98-44-T, Décision relative à la Requête de la Défense aux fins d'une Ordonnance obligeant le Procureur à divulguer certains éléments de preuve, Article 66(B) du Règlement de procédure et de preuve, 15 janvier 2004*, para. 13.

[87] *Blaškić* 26 September 2000 Decision, para. 40 ; *Blaškić* 29 October 1997 Decision, para. 32.

[88] *Blaškić* 26 September 2000 Decision, para. 40.

[89] *Eliézer Niyitegeka v. Prosecutor,* Case No ICTR-96-14-R, Decision on Request for Review, 30 June 2006, para. 51.

[90] *Kajelijeli* Appeal Judgement, para. 262; *Brđanin* 7 December 2004 Decision, p. 3.

[91] *Kordić* Appeal Judgement, para. 183 (footnotes omitted); *Blaškić* 26 September 2000 Decision, paras 32, 45.

[92] *Blaškić* 26 September 2000 Decision, para. 45.

"disclosure had been completed with respect to material available to the Prosecutor at the time of filing of the brief".

33. In the instant case, the Prosecution has declared in its Respondent's Brief:[94]

> Pursuant to Rule 112(B), the Prosecution informs the Appeals Chamber that disclosure has been made on a regular and consistent basis as required. As material is received sporadically and as it can take a period of time to process and to make accessible on the EDS, it is impossible to assert that disclosure has been actually completed with respect to all material available as of 2 May 2006. To the extent that material is in actual knowledge of the Prosecutor or has been identified as potentially relevant, it has been disclosed or steps have already been taken to place it on the EDS. The Prosecution will continue to ensure, on a regular basis, that collections of material will be assessed for relevance so as to make them accessible in electronic form, and to review and disclose any material within actual knowledge under Rule 68(i).

In its Consolidated Response, the Prosecution stated that it "knows of no other material falling under the ambit of Rule 68 which has come into its actual knowledge since the 18 October was made".[95]

34. The Appeals Chamber finds that, while the Prosecution's general declaration in its Respondent's Brief is deficient in the sense of Rule 112(B), since the Prosecution admits that it is not certain whether all material available to him has been reviewed and/or disclosed, this defect has been cured by its subsequent declaration above. Consequently, there is no need to order the Prosecution to make another "positive declaration" to this extent. Moreover, the Appeals Chamber recalls that "[t]his type of order is one that should only be made by a Chamber in very rare instances".[96] In the present case, the Appellant has provided no indication of any alleged failure of the Prosecution to comply with its obligations. In light of its present submissions, the Prosecution is aware of its continuing obligation under Rule 68 and, for lack of evidence to the contrary, the Appeals Chamber must assume that the Prosecution is acting in good faith.[97] Therefore, his request for a general order from the Appeals Chamber compelling the Prosecution to comply with its obligations under Rules 66 and 68 and to make a declaration under Rule 112(B) should be dismissed.

---

[93] *Kajelijeli* Appeal Judgement, para. 262; *Krstić* Appeal Judgement, para. 153.
[94] Respondent's Brief, para. 4.2.
[95] Consolidated Response, para. 6. With respect to both specific categories of documents requested by the Appellant, it also added that all necessary information either was provided to the Appellant at trial or will soon be communicated to him referring to its intention to file the Notice of Lift and the public redacted version of the *Blaškić* Request (*Ibid.*, para. 5). Finally, with respect to redactions in the *Blaškić* Request, the Prosecution has affirmed that "none of them contains any material requiring disclosure under either Rule 66 or Rule 68 or any information or evidence having any bearing on mitigation in this case" (*Ibid.*, para. 20).
[96] *Blaškić* 26 September 2000 Decision , para. 45.
[97] *Brđanin* 7 December 2004 Decision, p. 3; *Blaškić* 26 September 2000 Decision, para. 45. *See supra*, para. 31.

35. Finally, with respect to the issue of placing documents on the EDS, the Appeals Chamber recalls that Rule 68(ii) allows the Prosecution to do so "without prejudice to paragraph (i)". In this sense, the Practice Direction Establishing Restrictions on Dissemination of Material Disclosed to the Defence by the Prosecutor on the "Electronic Disclosure System", provides that the EDS is a system created "[i]n connection with the discharge of disclosure obligations" but "does not affect the Prosecutions obligations to disclose material under the Rules".[98] The Appeals Chamber of the International Criminal Tribunal for Rwanda has recently specified that the Prosecution's obligation under this provision "extends beyond simply making available its entire evidence collection in a searchable format", since it "cannot serve as a surrogate for the Prosecution's individualized consideration of the material in its possession".[99] The Appeals Chamber also found that the EDS does not make documents "reasonably accessible as a general matter", nor does it allow to assume that the Defence knows about all material included therein, to the extent that the Prosecution could be relieved of its Rule 68 obligation.[100] The Appeals Chamber also notes that the EDS database does not allow an accused on one case to access materials disclosed by the Prosecution to an accused in another case.[101] It has thus been suggested that the Prosecution should either "separate[] a special file for Rule 68 material or draw[] the attention of the Defence to such material in writing and permanently update[] the special file or the written notice".[102]

IV. DISPOSITION

36. In light of the findings above, the Appeals Chamber **DISMISSES**, in their entirety, the Motion for Disclosure and the Motion to Reject. The Appeals Chamber **GRANTS** the Motion to Strike.

37. As to the Request for Access, the Appeals Chamber **ORDERS** the Prosecution to state whether it is still necessary to maintain the *ex parte* status of the documents listed in paragraph 20 above. In

---

[98] IT/219/Rev.1, 6 November 2003, p. 2.
[99] *Karemera* 30 June 2006 Decision, para. 10.
[100] *Ibid.*, para. 15; *see* para. 30 *supra.*
[101] *Prosecutor v. Tihomir Blaškić,* Case No. IT-95-14-R, Confidential Decision on Motion for Extension of Time, 9 November 2005, p. 4.
[102] *Karemera* 30 June 2006 Decision, para. 15. The Appeals Chamber also recalls that there already exists a practice on putting the Defence on notice of disclosure through the EDS – *see, e.g., Prosecutor v. Vujadin Popović*, Case No IT-02-57-PT, Partly Confidential Prosecution's Notice of Filing Witness List, Exhibit List and Disclosure of Witness Statements and Exhibits, 19 August 2005; *Prosecutor v. Ljubiša Beara*, Case No. IT-02-58-PT, Partly Confidential Prosecution's Notice of Filing Witness List, Exhibit List and Disclosure of Witness Statements and Exhibits, 15 July 2005.

the event that the Prosecution does not oppose the lifting of the *ex parte* status of all or some of these documents, it is invited to identify any Rule 70 material among them and apply for redactions where applicable. The Request for Access is otherwise **DISMISSED**.

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

Done this 30th day of August 2006,
At The Hague,
The Netherlands.

Judge Andrésia Vaz
Presiding Judge

[Seal of the International Tribunal]