

IN THE APPEALS CHAMBER

Before:

Judge Theodor Meron, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Amin El Mahdi
Judge Inés Mónica Weinberg de Roca

Registrar:

Mr. Hans Holthuis

Decision of:

7 December 2004

PROSECUTOR

v.

RADOSLAV BRDJANIN

**DECISION ON APPELLANT'S MOTION FOR DISCLOSURE
PURSUANT TO RULE 68 AND MOTION FOR AN ORDER TO THE
REGISTRAR TO DISCLOSE CERTAIN MATERIALS**

The Office of the Prosecutor:

Mr. Mark J. McKeon

Counsel for the Accused:

Mr. John Ackerman

THE APPEALS CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("International Tribunal"),

NOTING the Judgement rendered in this case by Trial Chamber II on 1 September 2004;

NOTING the “Prosecution’s Notice of Appeal” filed on 30 September 2004;

NOTING Radoslav Brdjanin’s “Notice of Appeal” filed on 1 October 2004 (“Appellant ” and “Appellant’s Notice of Appeal” respectively);

BEING SEISED OF the “Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials” filed by the Appellant on 14 October 2004 (“Motion”), in which the Appellant requests the following:

A. An order addressed to the Prosecution

(i) for general compliance with its obligations laid down in Rule 68 of the Rules of Procedure and Evidence (“ Rules”),

(ii) to provide any material under Rule 68 arising from the testimony and exhibits in the case *Prosecutor v. Momcilo Krajisnik*¹ (“ *Krajisnik* case”),

(iii) to provide any material under Rule 68 from a recent document seizure in Pale, Bosnia and Herzegovina,

B. A continuing order to the Registrar to provide to counsel for the Appellant all testimony and exhibits from the *Krajisnik* case, together with the appropriate protective order for non-public materials;

NOTING the “Prosecution’s Response to Appellant’s ‘Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials’” filed on 26 October 2004 (“Response”), in which the Prosecution states that it is aware of and willing to abide by its obligation under Rule 68, that the correct addressee for an order to provide public and confidential testimony and exhibits from the *Krajisnik* case is not the Registrar but the Trial Chamber seised of the *Krajisnik* case, and that, therefore, the Motion should be denied ;²

NOTING that the Appellant did not file a reply to the Prosecution’s

Response ;

As to A (i)

CONSIDERING that the disclosure to the Defence of evidence which in any way tends to suggest the innocence or mitigate the guilt of the accused is one of the most onerous responsibilities of the Prosecution³ and that therefore the Prosecution's obligation to disclose under Rule 68 has been considered as important as the obligation to prosecute itself;⁴

CONSIDERING that the determination as to what material meets Rule 68 disclosure requirements falls within the Prosecution's discretion;⁵

CONSIDERING that the Prosecution's duty under Rule 68 is a continuing obligation which extends to the post-trial stage, including appeals;⁶

CONSIDERING that any submission made by the Appellant regarding a potential breach of Rule 68 must be accompanied by all *prima facie* proofs tending to show that it is likely that the evidence is exculpatory and is in the possession of the Prosecution;⁷

CONSIDERING that the Appellant has not made any submission to the effect that the Prosecution has failed to meet its obligation under Rule 68 and did not submit any proof that would support such a submission if it were made;

CONSIDERING that the Prosecution is expected to fulfil its duties in good faith and that an order of the type sought should only be contemplated where the Appellant can satisfy the Chamber that the Prosecution has failed to discharge its obligations under Rule 68;⁸

CONSIDERING the Prosecution's statement according to which it is aware of its continuing obligation under Rule 68 to disclose any exculpatory evidence⁹ and that, for lack of evidence to the contrary, the Appeals Chamber must assume that the Prosecution is acting in good faith;

As to A (ii)

NOTING that the *Krajisnik* case is continuing during the course of this appeal and that it is related to the Appellant's case and overlaps it

in part ;

CONSIDERING the duty of the Prosecution to disclose exculpatory material arising from related cases and that this duty is a continuous obligation without distinction as to the public or confidential character of the evidence concerned ;¹⁰

CONSIDERING, however, that the Prosecution may be relieved of its Rule 68 obligation if the existence of the relevant exculpatory evidence is known to the Defence and if this evidence is reasonably accessible,¹¹ *i.e.*, available to the Defence with the exercise of due diligence;¹²

CONSIDERING that the Registry posts an electronic version of all official transcripts of witness testimony, including those resulting from the *Krajisnik* case, on the computer website of the International Tribunal, which is easily accessible to the Defence and therefore available to the Defence with the exercise of due diligence;

CONSIDERING that, with regard to non-public material, the Prosecution has indicated that it is aware of its duty to disclose exculpatory material from related cases, including the *Krajisnik* case,¹³ and that the Appellant has not submitted any material which suggests that the Prosecution is neglecting this duty;

As to A (iii)

NOTING that, in its Response, the Prosecution stated that it recently obtained a collection of official Republika Srpska Police documents from the Public Security Station in Pale, which are currently being reviewed and processed by the Prosecution ;¹⁴

CONSIDERING that the Prosecution has expressed its awareness of its duty to disclose any exculpatory material of which it should gain knowledge while reviewing the aforementioned documents¹⁵ and that one document from this collection has already been disclosed;¹⁶

CONSIDERING that the Appellant did not claim, and did not submit any proof , that the Prosecution has failed to meet its obligation under Rule 68 with regard to the said documents;

As to B

CONSIDERING that Defence counsel may contact the Registry and

request certain public documents such as transcripts and that the Registrar may, where possible, grant the request;¹⁷

CONSIDERING that if such a request were made to the Registry, and the Registry did not 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;¹⁸

CONSIDERING, however, that such motion should provide information about the measures taken by the Defence to obtain the documents from the Registry and the problems arising from non-compliance;¹⁹

CONSIDERING that the Appellant failed to explain the measures he has taken to obtain the requested material from the Registry, and has not identified exactly what material he seeks and the purpose it would be used for;

CONSIDERING that, as far as non-public documents are concerned, Rule 75 (G) 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;²⁰

FINDING that, as to the Appellant's first request as mentioned under "A", the Prosecution is acting in good faith regarding its obligation under Rule 68, and that, therefore, there is no need to issue an order for compliance with this obligation;

FINDING further that the Appellant's second request as mentioned under "B" is inadmissible as a request for any evidentiary material from a related case needs to be addressed either to the Registrar, or, in case of non-public evidence , to the concerned Trial Chamber;

HEREBY DISMISSES the motion.

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

Judge Theodor Meron
Presiding

Dated this 7th day of December, 2004,
At The Hague,
The Netherlands.

1 - Case No. IT-00-39-T.

2 - Response, paras. 4, 6, 11 and 12.

3 - See *Prosecutor v. Radoslav Brdjanin*, IT-99-36-T, Decision on Motion for Relief from Rule 68 Violations by the Prosecutor and for Sanctions to be Imposed Pursuant to Rule 68bis and Motion for Adjournment while Matters Affecting Justice and a Fair Trial Can be Resolved, 30 October 2002, para. 23.

4 - *Prosecutor v. Dario Kordic and Mario Cerkez*, IT-95-14/2-A, Decision on Motions to Extend Time For Filing Appellant's Briefs, para. 14.

5 - *Prosecutor v. Tihomir Blaskic*, IT-95-14-A, Appeal Judgement, 29 July 2004 ("*Blaskic* Appeal Judgement"), para. 264.

6 - *Prosecutor v. Tihomir Blaskic*, 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 ("*Blaskic* Decision of 26 September 2000"), para. 42.

7 - *Prosecutor v. Tihomir Blaskic*, IT-95-14-PT, Decision on the Production of Discovery Materials, 27 January 1997, para. 50.2.

8 - *Blaskic* Decision of 26 September 2000, para. 45.

9 - Response, para. 6.

10 - *Blaskic* Appeal Judgement, para 267.

11 - *Blaskic* Decision of 26 September 2000, para. 38.

12 - *Blaskic* Appeal Judgement, para 296.

13 - Response, para. 9.

14 - Response, para. 11.

15 - *Ibid.*

16 - Response, fn.11.

17 - *Blaskic* Decision of 26 September 2000, para. 54.

18 - *Ibid.*

19 - *Ibid.*

20 - *Ibid.*, para. 55.