

## **Guest Lecture Series of the Office of the Prosecutor**

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**“Prosecution disclosure obligations in the ICTY and ICTR”**

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## 1. INTRODUCTION

The right to have adequate facilities for the preparation of his defence is one of the fundamental rights of an accused (Article 14(3)(a) of the International Covenant on Civil and Political Rights, Article 21 of the ICTY Statute, Article 20 of the ICTR Statute, and Article 67.1 of the ICC Statute). It means that the accused or his defence counsel is granted access to the documents, records, etc. necessary for preparation of the defence.<sup>2</sup> Such access is to ensure advance knowledge of the prosecution case and the right of disclosure of evidence favouring the defence case.<sup>3</sup>

In the *ad hoc* Tribunals, as in any common-law jurisdiction, turning over to the defence of certain information by the Prosecution (Disclosure) is governed by rather complex technical rules.

There is no true equivalent to disclosure rules in civil-law jurisdictions. In those jurisdictions, these rules are unnecessary since the defence has access to the whole investigation dossier prior to trial. Apparently this makes preparation of the defence much easier.

<sup>2</sup> *Manfred Nowak*, U.N. Covenant on Civil and Political Rights: CCPR Commentary, Kehl am Rhein, Strasbourg; Arlington: Engel 1993, p. 256.

<sup>3</sup> *Stavros Stephanos*, The guarantees for accused persons under Article 6 of the European Convention on Human Rights: an analysis of the application of the Convention and a comparison with other instruments, Martinus Nijhoff Publishers, Dordrecht, 1993, p. 186.

In civil law jurisdictions, the nature of the material collected in course of investigation by investigative body, such as prosecutor or investigative judge, differs from the material collected by investigators in common law systems. In the former, like in the ICC, investigators have responsibility to investigate both incriminating and exonerating circumstances equally. As a result, the Prosecution dossier contains both inculpatory and exculpatory evidence. In contrast, in the *ad hoc* Tribunals, like in most common law jurisdictions, "the primary responsibility for investigating the charges against an accused, including seeking and gathering information related to those charges, lies with his or her defence counsel."<sup>4</sup>

In general, in the *ad hoc* Tribunals, the following material shall be made available by the Prosecution to the Defence:

- Copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused (Rule 66 (A)(i) of the ICTY and ICTR Rules);
- Copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial (Rule 66 (A)(ii) of the ICTY and ICTR Rules, Rule 76 of the ICC Rules);
- Exculpatory material (Rule 68 of the ICTY and ICTR Rules, Article 67.2 of the ICC Statute);
- Books, documents, photographs and tangible objects in the Prosecutor's custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial (Rule 66 (B) of the ICTY and ICTR Rules, Rule 77 of the ICC Rules).

An accused may also seek access to confidential material relevant to his case from another trial.

As *ad hoc* Tribunals' experience shows, prosecution's disclosure obligation shall be taken into account at the earliest stages of the proceedings. Investigative procedures should be designed with the Prosecutor's ultimate disclosure obligations in mind. In order to be able to comply with its disclosure obligation, the Prosecutor must be aware of what information and evidence has been collected in course of an investigation. The procedures governing collection and handling evidence shall be adhered to by all those involved in investigations. Any potentially disclosable material shall be specifically noted and recorded so that the burden of disclosure at the appropriate time can be lightened.

Since the Prosecutor's disclosure obligation is ongoing, the information obtained at any stage of the proceedings and even after the trial may have to be disclosed to the defence. Indeed, if the Prosecution discovers additional evidence or material, which should have been produced earlier pursuant to the Rules, it should promptly notify the Defence and the Trial Chamber of the existence of the additional evidence or material (sub-rule 67 (D) of the ICTY and ICTR Rules).

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<sup>4</sup> *Blagojević et al.*, Joint Decision on Motions Related to Production of Evidence, 12 December 2002, para. 26.

## 2. DISCLOSURE OF THE SUPPORTING MATERIAL AND STATEMENTS OF THE ACCUSED

Pursuant to Rule 66(A)(i) of the ICTY and ICTR Rules, within thirty days of the initial appearance of the accused, the Prosecutor shall make available to the defence copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused. Under ICTY Rules this material shall be disclosed in a language which the accused understands.

### Supporting material

“Supporting material” means the material, submitted to the confirming judge, upon which the charges are based. “Supporting material” does not include other material such as legal briefs.<sup>5</sup>

Pursuant to Rule 66(A)(i) of the ICTY and ICTR Rules, within 30 days of the initial appearance of the accused, the Prosecutor shall disclose to the Defence copies of the supporting material which accompanied the indictment when confirmation was sought.

Unlike *ad hoc* Tribunals’ Rules, under the ICC procedure, a Pre-Trial Chamber will hold a hearing to confirm charges. Accordingly, the ICC Prosecution is under obligation to disclose to the Defence the material which are intended for use for the purposes of the confirmation hearing *prior* to the hearing (Article 61.3 and Rule 121.2).

It is noteworthy that the *ad hoc* Tribunals’ Statutes and the Rules, as well as relevant provisions of the ICC law, do not require to have all collected material placed before the confirming judge (Pre-Trial Chamber in the ICC).

Pursuant to Article 19 of the ICTY Statute and Article 18 of the ICTR Statute, the evidence shall be sufficient to establish a *prima facie* case.

According to Article 61 (paragraphs 5 and 7) of the ICC Statute, the Prosecution is to submit “sufficient evidence to establish *substantial grounds to believe* that the person committed each of the crimes charged.”

When seeking confirmation of the indictment with multiple accused, the prosecution should indicate (in an *ex-parte* schedule) which of the supporting material it relies on for each particular accused. Subsequently only the material relevant to the accused in custody will be disclosed.<sup>6</sup>

### Statements of the accused

In January 1997, the Trial Chamber in the *Blaskić* case held that “prior statements” include “all the previous statements of the accused ... which appear in the Prosecutor’s file, whether collected by the Prosecution or originating from any other source” regardless of the form of the statement (in particular whether or not “taken under oath or signed and recognised by an accused”).<sup>7</sup> Later, in July 1998, the same Trial Chamber specified that prior statements of the accused “must be understood to refer to all statements made by the

<sup>5</sup> *Kordić & Čerkez*, Order on Motion to Compel Compliance by the Prosecutor with Rules 66(A) and 68, 26 February 1999.

<sup>6</sup> *Furundžija*, Order, 13 March 1998.

<sup>7</sup> *Blaskić*, Decision on the Production of Discovery Materials, 27 January 1997, para. 37.

accused during questioning in any type of judicial proceeding which may be in the possession of the Prosecutor, but only such statements.”<sup>8</sup> The prosecution is required to disclose all statements of the accused that it has in its possession irrespective of how they were obtained by the Prosecution.<sup>9</sup>

Pursuant to Rule 43(vi) of the ICTY Rules (Rule 43(iv) of the ICTR Rules), audio or video recordings of interviews of a suspect with the Prosecutor are to be transcribed if the suspect becomes an accused. Accordingly, the disclosure under Rule 66(A) (i) is not completed until the Prosecutor provides the Defence with such transcripts.<sup>10</sup>

### 3. DISCLOSURE RELATING TO PROSECUTION WITNESSES

In accordance with Rule 66(A)(ii) of the *ad hoc* Tribunals’ Rules and Rule 76 of the ICC Rules, within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge (no later than 60 days before the date set for trial, under the ICTR Rules), the Prosecution shall make available to the defence copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial, and copies of all written statements taken in accordance with Rule 92 *bis* (ICTY Rules). Copies of the statements of additional prosecution witnesses shall be made available to the defence when a decision is made to call those witnesses. Under ICTY Rules, as well as ICC Rules, the statements shall be disclosed in a language which the accused understands.

The Tribunals’ Appeals Chamber in the *Blaskić* case emphasised that “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.”<sup>11</sup>

Statements of prosecution witnesses, according to another Decision in the *Blaskić* case, include all statements of the prosecution witnesses “which appear in the Prosecutor’s file, whether collected by the Prosecution or originating from any other source” regardless of the form of the statement (in particular whether or not “taken under oath or signed”).<sup>12</sup>

The OTP of the ICC may adopt the policy of disclosure to the Defence a witness statement that was not signed by the witness due to time constraints. Indeed, it would not necessary to disclose an unsigned draft statement, which later culminated in finalised, signed versions, if they are identical in content. However, the facts recounted by the witness in unsigned statement which are either exculpatory or do not appear in the signed statement would have to be disclosed to the defence.

The OTP of the ICC may also provide in its policy guidelines that the facts recounted by the witness after the statement was signed,

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<sup>8</sup> *Blaskić*, Decision on the Defence Motion for Sanctions for the Prosecutor’s Failure to Comply with Rule (66)(A) of the Rules and the Decision of 27 January 1997 Compelling the Production of All Statements of the Accused, 15 July 1998. See also *Kordić & Čerkez*, Order on Motion to Compel Compliance by the Prosecutor with Rules 66(A) and 68, 26 February 1999.

<sup>9</sup> *Delalić et al.*, Decision on Motion by the accused Zejnil Delalić for the disclosure of evidence, 26 September 1996.

<sup>10</sup> *Čermak & Markač*, Decision relating to Prosecutor’s Disclosure Obligation, 26 May 2004, para. 4.

<sup>11</sup> *Blaskić*, Decision on the Appellant’s Motions for the Production of Material, Suspension of Extension of the Briefing Schedule, and Additional Filings, 26 September 2000, para. 15.

<sup>12</sup> *Blaskić*, Decision on the Production of Discovery Materials, 27 January 1997, para. 37.

which do not appear in the signed statement, shall be disclosed to the Defence.

Such disclosure can be done in a form, showing the date and name of investigator/lawyer who spoke to the witness, which contains the facts recounted by the witness in a conversation or unsigned statement which were either exculpatory or did not appear in the signed statement. It would also be indicated that this account was not checked by the witness.

Testimony in Tribunal's proceedings also constitutes a witness statement for the subsequent proceedings.<sup>13</sup>

### **Protection of victims and witnesses in disclosure. Delay of disclosure**

When conducting disclosure to the Defence, the Prosecutor shall take appropriate measures to protect the safety of victims and witnesses.

In accordance with Article 68 of the ICC Statute, where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof.

Further, pursuant to Rule 76.4 of the ICC Rules, pre-trial disclosure relating to the Prosecution witnesses "is subject to the protection and privacy of victims and witnesses."

According to the Tribunals' jurisprudence, in exceptional circumstances the prosecution may seek leave to delay a disclosure of unredacted (*i.e.*, with information identifying the witness) statements of the witnesses who may be in danger or at risk. However, the identity of the victim or witness shall be disclosed in sufficient time prior to trial to allow adequate time for preparation of the defence. The time allowed for preparation must be time before trial commences rather than before the witness gives evidence.<sup>14</sup>

The exceptional circumstances warranting the extraordinary measures of delayed disclosure are the extreme nature of the danger and risk witnesses and/or their families face should it become known that they will testify in these proceedings.<sup>15</sup> The greater the length of time between the disclosure of the identity of a witness and the time when the witness is to give evidence, the greater the potential for interference with that witness.<sup>16</sup>

<sup>13</sup> *Blaškić*, Decision on the Appellant's Motions for the Production of Material, Suspension of Extension of the Briefing Schedule, and Additional Filings, 26 September 2000; *Kupreškić et al.*, Decision on the Prosecutor's Request to Release Testimony Pursuant to Rule 66 of the Rules of Procedure and Evidence Given in Closed Session Under Rule 79 of the Rules, 29 July 1998, p. 3; *Furundžija*, Trial Chamber's Formal Complaint to the Prosecutor Concerning the Conduct of the Prosecution, 5 June 1998, para. 7.

<sup>14</sup> Rule 69 of the ICTY and ICTR Rules; *Milutinović et al.*, Decision on Prosecution's Motions for Protective Measures, 17 July 2003, p. 4; *Milošević*, First Decision on Prosecution Motion for Protective Measures for Sensitive Source Witnesses, 3 May 2002, para. 3.

<sup>15</sup> *Milošević*, First Decision on Prosecution Motion for Protective Measures for Sensitive Source Witnesses, 3 May 2002, para. 8.

<sup>16</sup> *Brđanin*, Decision on third motion by prosecution for protective measures, 8 November 2000, para. 13.

What time frame is reasonable for such delay of disclosure depends on the category of the witness. The ICTY practice with respect to the time is 30 days prior to the anticipated start of trial.<sup>17</sup>

#### 4. DISCLOSURE AND INSPECTION OF OTHER RELEVANT MATERIAL

According to Rule 66(B) of the ICTY and ICTR Rules, the Prosecutor shall, on request, permit the defence to inspect any material in the Prosecutor's custody or control, which are relevant to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.

Apparently Rule 66 (B) of the Tribunals' Rules was borrowed from United States' Federal Rules of Criminal Procedure (Rule 16(a)(1)(C)).

For this reason the Trial Chamber in *Delalic*, for instance, sought guidance in application of this US Rule in analysing the ICTY Rule 66 (B).<sup>18</sup>

The ICC Rules also incorporated this provision in Rule 77.

Neither Tribunals' Rule 66 nor ICC Rule 77 has any indication of whether "unused" witness statements, which are material to the defence, are to be disclosed under these provisions.

The Tribunals and ICC provisions, like the mentioned US Rule, list "books, documents, photographs and tangible objects" as subject to disclosure. The reason could be that in the US, from where the provision was borrowed, it is not a usual practice for investigators to take signed written statements from witnesses.

In this regard, the Tribunals' Appeals Chamber, in the *Rutaganda* case in June 2002, ruled that written witness statements should be considered as being included within the scope of documents to be disclosed under Rule 66(B).<sup>19</sup>

Rule 66 (B) requires a *prima facie* showing of materiality to the preparation of the defence of the evidence requested and that the requested evidence is in the custody or control of the Prosecution.<sup>20</sup>

The test of materiality can be defined as follows: (1) to be relevant or possibly relevant to an issue in the case; (2) to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use; (3) to hold out a real, as opposed to fanciful, prospect of providing a lead on evidence which goes to (1) or (2).<sup>21</sup>

In accordance with sub-rule 68(B) of the Tribunals' Rules, the Prosecutor shall make available to the defence, in electronic form, collections of relevant material held by

<sup>17</sup> *Milutinović et al.*, Decision on Prosecution's Motions for Protective Measures, 17 July 2003, p. 4; *Tadić*, Decision on the Prosecutor's Motion Requesting Protective Measures for Witness L, 14 November 1995, para. 21.

<sup>18</sup> *Delalić*, Decision on Motion by the accused Zejnil Delalić for the disclosure of evidence of 26 September 1996.

<sup>19</sup> *Rutaganda*, Decision ("Prosecution's Urgent Request for Clarification in Relation to the Applicability of Rule 66(B) to Appellate Proceedings and Request for Extension of the Page Limit Applicable to Motions"), 28 June 2002, p. 3.

<sup>20</sup> *Naletilić & Martinović*, Decision on Joint Motions for Order Allowing Defence Counsel to Inspect Documents in the Possession of the Prosecution, 16 September 2002, p.3; *Delalić et al.*, Decision on Motion by the accused Zejnil Delalić for the disclosure of evidence, 26 September 1996, para. 9.

<sup>21</sup> *Delalić et al.*, Decision on Motion by the accused Zejnil Delalić for the disclosure of evidence, 26 September 1996.

the Prosecutor, together with appropriate computer software with which the defence can search such collections electronically.

## 5. DISCLOSURE OF EXCULPATORY MATERIAL

Under Rule 68 (A) of the Tribunals' Rules, the Prosecutor shall, as soon as practicable, disclose to the defence any material which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence.

Similar provision is contained in Article 67.2 of the ICC Statute:

“The Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence.

The wording of Rule 68 is very broad. It includes information which *may* affect the credibility of prosecution evidence.

In the *Furundžija* case it was untimely disclosure of the documents related to the psychological treatment of one of the main Prosecution's witnesses that made the Trial Chamber to reopen the hearing.

The Trial Chamber emphasised that “the accused's defence has been conducted on the basis that the witness' memory was flawed. Any evidence relating to the medical, psychiatric or psychological treatment or counselling that this witness may have received is therefore clearly relevant and should have been disclosed to the Defence.”

The reference to material is not restricted to material in a form that would be admissible in evidence, but includes all information in any form which falls within the Rule 68(A) description.<sup>22</sup>

The fact that evidence is called *proprio motu* by a Trial Chamber does not relieve the Prosecution of its obligation under Rule 68 in relation to that evidence. Rule 68 applies to any material known to the Prosecution that either suggest the innocence or mitigates the guilt of the accused, or evidence that may affect the credibility of Prosecution evidence.<sup>23</sup>

In the *Krstić* case, two of the witnesses called by the Trial Chamber *proprio motu* were at the time the subject of separate Prosecution investigations, a fact which was disclosed to the Chamber, but not to the Defence.

It was opined in one of the ICTY Trial Chamber's decisions that the obligation to disclose exculpatory evidence is not intended to serve as means through which the

<sup>22</sup> *Kordić & Čerkez*, Decision on Motions to Extend Time for Filing Appellant's Briefs, 11 May 2001, para. 9; *Brđanin & Talić*, Decision on Motion by Momir Talić for Disclosure of Evidence, 27 June 2000, para. 8.

<sup>23</sup> *Krstić*, Appeals Chamber, Judgement, 19 April 2004, para. 204.

Prosecution is forced to replace the Defence in conducting investigations or gathering material that may assist the Defence.<sup>24</sup>

Such approach may not be applicable in the ICC where the Prosecution does have the obligation to investigate both incriminating and exonerating circumstances equally.

Rule 68(A) of the Tribunals' Rules do not require the Prosecution to identify the material being disclosed to the Defence as exculpatory.<sup>25</sup> However, as a matter of practice and in order to secure a fair and expeditious trial, the Prosecution should normally indicate which material it is disclosing as exculpatory.<sup>26</sup>

Under Rule 68, it is for the Prosecution to determine whether or not evidence is exculpatory. According to the Tribunals' jurisprudence, a Chamber does not intervene in the exercise of this discretion by the Prosecution, unless it is shown that the Prosecution abused its discretion.<sup>27</sup>

In order to make real use of the material, the Defence is entitled to be provided with the exculpatory material in its original form (not in the form of a summary), minus redactions the Prosecution deem appropriate (only the sections that contain the exculpatory material should be provided to the Defence, not the whole document). The redacted versions of exculpatory material that will be disclosed should however be "sufficiently cohesive, understandable and usable and not taken out of context."<sup>28</sup>

Rule 68 is a continuing obligation for the Prosecution. The terms "continuing obligation" should be understood to mean that the Prosecution must, on a continuous basis, search all material known to the Prosecutor, including all its files, in whatever form and in relation to all accused, for the existence of material which may suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence, and disclose the existence of such material completely to the defence.<sup>29</sup> Notwithstanding the completion of the trial and any subsequent appeal, the Prosecutor shall disclose to the other party any material referred to in Rule 68(A) of the ICTY Rules (Rule 68(E) of the ICTR Rules).<sup>30</sup> Similar provision is contained in Article 67.2 of the ICC Statute.

Testimony given in other trials is generally encompassed by the Prosecution's disclosure obligation pursuant to Rule 68. However, the Prosecution has no obligation to research publicly accessible material for the Defence. If exculpatory evidence is known and

<sup>24</sup> *Blagojević et al.*, Joint Decision on Motions Related to Production of Evidence, 12 December 2002, para. 26.

<sup>25</sup> *Krstić*, Appeals Chamber, Judgement, 19 April 2004, para. 190.

<sup>26</sup> *Krajišnik & Plavšić*, Decision on Motion from Momčilo Krajišnik to Compel Disclosure of Exculpatory Evidence Pursuant to Rule 68, 19 July 2001, p. 2.

<sup>27</sup> *Kvočka et al.*, Decision, 22 March 2004, p. 3; *Rutaganda*, Appeals Chamber, Decision on the Urgent Defence Motion for Disclosure and Admission of Additional Evidence and Scheduling Order, 12 December 2002; *Musema*, Appeals Chamber, Decision ("Defence Motion Under Rule 68 Requesting the Appeals Chamber to Order the Disclosure of Exculpatory Material and for Leave to File Supplementary Grounds of Appeal", 18 May 2001, p. 4; *Blaškić*, Appeals Chamber, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000, para. 39.

<sup>28</sup> *Blagojević et al.*, Joint Decision on Motions Related to Production of Evidence, 12 December 2002, para. 24; *Brđanin*, Decision on "Motion for Relief from Rule 68 Violations by the Prosecutor and for Sanctions to be Imposed pursuant to Rule 68 bis and Motion for Adjournment while Matters Affecting Justice and a Fair Trial can be Resolved", 30 October 2002, para. 26; *Blaškić*, Decision on the Defence Motion for "Sanctions for Prosecutor's Repeated Violations of Rule 68 of the Rules of Procedure and Evidence", 29 April 1998, para. 19.

<sup>29</sup> *Blagojević et al.*, Joint Decision on Motions Related to Production of Evidence, 12 December 2002, para. 29; *Blaškić*, Decision on the Defence Motion for Sanctions for the Prosecutor's Failure to Comply with Rule 66 (A) of the Rules and the Decision of 27 January 1997 Compelling the Production of all Statements of the Accused, 15 July 1998.

<sup>30</sup> *Blaškić*, Decision on the Appellant's Motions for the Production of Material, Suspension of Extension of the Briefing Schedule, and Additional Filings, 26 September 2000.

the evidence is accessible, the Prosecution may be relieved of its obligation to disclose the material under Rule 68.<sup>31</sup>

Information falling under Rule 68(A) of the ICTY Rules (Rule 68 of the ICTR Rules) containing in notes taken in preparation of a potential plea agreement shall be disclosed to a co-accused.<sup>32</sup>

Since favourable arrangements between the Prosecution and their witness may go to the credibility of Prosecution's evidence, the Prosecution shall provide to the Defence identity of those proposed witnesses who have entered into such agreements.

In the *Halilović* case, the Trial Chamber ordered the Prosecution to provide to the Defence "a list identifying those proposed witnesses who have entered into favourable arrangements, if any, that may go to the credibility of Prosecutions' evidence".<sup>33</sup>

Such disclosable arrangements may include, for instance, a proffer agreement in which a person is informed that the induced statement (proffer) cannot be used against him in any proceedings before the Tribunal; one of the conditions of the proffer is that the person shall respond truthfully to all questions.

As a general rule, interpretations and arguments made by the parties in their submissions, filed under seal, are not subject to disclosure under Rule 68(A) of the ICTY Rules (Rule 68 of the ICTR Rules). However, in extraordinary cases in which evidence becomes exculpatory only in connection with such a submission, the Prosecution has the obligation to disclose this submission pursuant to Rule 68.<sup>34</sup>

A Chamber may order the Prosecution to submit a signed report to certify that it is aware of its continuing obligations under Rule 68 if the Defence satisfies the Chamber that the Prosecution has failed to discharge its obligations.<sup>35</sup>

## 6. RESTRICTIONS ON DISCLOSURE

### Information provided to the OTP on a confidential basis

Under Rule 70 (B) of the *ad hoc* Tribunals' Rules, if the Prosecutor is in possession of information which has been provided to the Prosecutor on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information.

<sup>31</sup> *Kordić*, Decision on Appellant's Notice and Supplemental Notice of Prosecution's Non-Compliance With its Disclosure Obligation Under Rule 68 of the Rules, 11 February 2004, para. 20; *Blagojević et al.*, Joint Decision on Motions Related to Production of Evidence, 12 December 2002, para. 26; *Blaškić*, Decision on the Appellant's Motions for the Production of Material, Suspension of Extension of the Briefing Schedule, and Additional Filings, 26 September 2000, para. 38.

<sup>32</sup> *Blagojević & Jokić*, Decision on Vidoje Blagojević's Expedited Motion to Compel the Prosecution to Disclose its Notes From Plea Discussions with the Accused Nikolić & Request for an Expedited Open Session Hearing, 13 June 2003, p. 7.

<sup>33</sup> *Halilović*, Decision on Defence Motion for Identification of Suspects and other Categories Among its Proposed Witnesses, 14 November 2003, p. 3.

<sup>34</sup> *Kordić*, Decision on Appellant's Notice and Supplemental Notice of Prosecution's Non-Compliance With its Disclosure Obligation Under Rule 68 of the Rules, 11 February 2004, para. 19.

<sup>35</sup> *Kordić & Čerkez*, Decision on Motions to Extend Time for Filing Appellant's Briefs, 11 May 2001, para. 15; *Blaškić*, Decision on the Appellant's Motions for the Production of Material, Suspension of Extension of the Briefing Schedule, and Additional Filings, 26 September 2000.

According to Article 54.3 of the ICC Statute, the Prosecutor may “agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents; and take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence.

It was emphasised by the Appeals Chamber that the purpose of Rule 70(B) to (G) is to encourage States, organizations, and individuals to share sensitive information with the Tribunal. The Rule creates an incentive for such cooperation by permitting the sharing of information on a confidential basis and by guaranteeing information providers that the confidentiality of the information they offer and of the information's sources will be protected.<sup>36</sup>

Under Tribunals’ Rule 68(C), the Prosecutor shall take reasonable steps, if confidential information is provided to the Prosecutor by a person or entity under Rule 70 (B) and contains exculpatory material, to obtain the consent of the provider to disclosure of that material, or the fact of its existence, to the accused.

Similarly, according to Article 81.3 of the ICC Statute, where steps have been taken to ensure the confidentiality of information, in accordance with articles 54, 57, 64, 72 and 93, such information shall not be disclosed, except in accordance with those articles.

#### **OTP internal documents**

According to Rule 70(A) of the Tribunals’ Rules and Rule 81 of the ICC Rules, reports, memoranda, or other Prosecution internal documents are not subject to disclosure. It was emphasised that it is in the public interest that information related to the internal preparation of a case, including legal theories, strategies and investigations, shall be privileged and not subject to disclosure to the opposing party.<sup>37</sup> Under these Rules correspondence, handwritten questionnaires, and notes of meetings at the Office of the Prosecutor, should be excluded from inspection and disclosure.<sup>38</sup>

Notes taken by the Prosecution in preparation of a potential plea agreement do not have to be disclosed, although exculpatory information contained in the notes shall be disclosed to the co-accused.<sup>39</sup>

The OTP of the ICC may provide in its policy guidelines that the internal documents, containing exculpatory facts, themselves need not necessarily be provided to the Defence. Such disclosure can be done in a form, showing the date and name of investigator/lawyer who spoke to the witness, which contains the facts recounted by the witness in a conversation or unsigned statement which were exculpatory.

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<sup>36</sup> *Milošević*, Appeals Chamber, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2002, para. 19.

<sup>37</sup> *Blagojević & Jokić*, Decision on Vidoje Blagojević’s Expedited Motion to Compel the Prosecution to Disclose its Notes From Plea Discussions with the Accused Nikolić & Request for an Expedited Open Session Hearing, 13 June 2003, p. 6.

<sup>38</sup> *Nahimana et al.*, Decision on the Prosecutor’s Ex-Parte Application to Exclude Certain Documents from Defence Inspection of Microfiche Material, 25 October 2002.

<sup>39</sup> *Blagojević & Jokić*, Decision on Vidoje Blagojević’s Expedited Motion to Compel the Prosecution to Disclose its Notes From Plea Discussions with the Accused Nikolić & Request for an Expedited Open Session Hearing, 13 June 2003, p. 6.

### Prosecution's application under Rules 66(C), 68(C)(D)

Rule 66(C) of the *ad hoc* Tribunals' Rules, like Rule 81.2 of the ICC Rules, allow the Prosecutor to apply to the Trial Chamber sitting *in camera* to be relieved from the obligation to disclose material relevant to preparation of the Defence.

Pursuant to Rules 66(C) and 68(C)(D) of the Tribunals' Rules, the Prosecutor may apply to the Trial Chamber sitting *in camera* to be relieved from an obligation to disclose if such disclosure may:

- prejudice further or ongoing investigations (see also 81.2 of the ICC Rules),
- or for any other reasons may be contrary to the public interest
- or affect the security interests of any State

When making such application the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential.

## 7. TRANSLATION OF DISCLOSED MATERIAL

At the *pre-trial stage*, the following material shall be disclosed in a language the accused understands:<sup>40</sup>

- a copy of the supporting material which accompanied the indictment against the accused and all prior statements obtained by the Prosecutor from the accused irrespective of whether it will be offered at trial;
- statements of all witnesses (either in hard copy or in audio format) whom the Prosecutor intends to call to testify at trial and statements of additional Prosecution witnesses when a decision is made to call those witnesses;
- written statements taken in accordance with Rule 92 *bis*;
- material listed in Rule 66(B) which appeared in a language understood by the accused at the time it came under the Prosecution's custody or control.

The effective date of filing of the material listed above is the date of filing in one of the official languages of the Tribunal, but all statutory time-limits for responses in relation to this material shall be the date of filing of the translation in the language understood by the accused.<sup>41</sup>

In setting forth the principles applicable to translation of documents, a balance should be stricken between the right of an accused to a fair trial and considerations of judicial economy related to the organisation of the Tribunal and of the translation services. The additional work to be borne by the translation services would be considerable and

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<sup>40</sup> *Ljubičić*, Decision on the Defence Counsel's Request for Translation of all Documents, 20 November 2002, p. 31; *Muhimana*, Decision on Defence Motion to have all Prosecution and Procedural Documents Translated into Kinyarwanda, the Language of the Accused, and into French, the Language of his Counsel, 6 November 2001; *Naletilić & Martinović*, Decision on Defence's Motion Concerning Translation of all Documents, 18 October 2001; *Milošević*, Decision on Prosecution Motion for Permission to Disclose Witness Statements in English, 19 September 2001, p. 3; *Delalić et al.*, Decision on Defence Application for Forwarding the Documents in the Language of the Accused, 25 September 1996.

<sup>41</sup> *Ljubičić*, Decision on the Defence Counsel's Request for Translation of all Documents, 20 November 2002, p. 3; *Delalić et al.*, Decision on Defence Application for Forwarding the Documents in the Language of the Accused, 25 September 1996, para. 11.

would directly result in slowing the proceedings as well as substantially increasing Tribunal fees.<sup>42</sup>

During *the trial stage*, the Chamber may direct the Prosecutor to tender exhibits or the relevant parts of such exhibits (either in hard copy or in audio format) in a language understood by the accused.<sup>43</sup>

## 8. DISCLOSURE ON APPEAL

The Prosecution's obligation pursuant to Rule 68 of the Rules to disclose exculpatory material continues during the post-trial stage and proceedings before the Appeals Chamber.<sup>44</sup> Rule 66(B) is also applicable on appeal.<sup>45</sup> However, Rule 66(B) does not apply on appeal when the evidence requested by the Defence was available at the trial.<sup>46</sup>

## 9. ACCESS TO PROTECTED MATERIAL IN ANOTHER CASE

A party may seek access to confidential material in another case if it is able to describe the documents sought by their general nature as clearly as possible and if a legitimate forensic purpose for such access has been shown.<sup>47</sup>

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<sup>42</sup> *Muhimana*, Decision on Defence Motion to have all Prosecution and Procedural Documents Translated into Kinyarwanda, the Language of the Accused, and into French, the Language of his Counsel, 6 November 2001, para. 12; *Zarić*, Decision on Defence Application for Leave to use the Native Language of the Assigned Counsel in the Proceedings, 21 May 1998, para. 8; *Delalić et al.*, Decision on Defence Application for Forwarding the Documents in the Language of the Accused, 25 September 1996.

<sup>43</sup> *Ljubičić*, Decision on the Defence Counsel's Request for Translation of all Documents, 20 November 2002, p. 3.

<sup>44</sup> *Kordić*, Appeals Chamber, Decision on Appellant's Notice and Supplemental Notice of Prosecution's Non-Compliance with its Disclosure Obligation Under Rule 68 of the Rules, 11 February 2004, para. 17; *Rutaganda*, Appeals Chamber Decision on the Urgent Defence Motion for Disclosure and Admission of Additional Evidence and Scheduling Order, 12 December 2002; *Rutaganda*, Appeals Chamber, Decision ("Prosecution's Urgent Request for Clarification in Relation to the Applicability of Rule 66(B) to Appellate Proceedings and Request for Extension of the Page Limit Applicable to Motions"), 28 June 2002, p. 3.

<sup>45</sup> *Rutaganda*, Appeals Chamber, Decision on the Urgent Defence Motion for Disclosure and Admission of Additional Evidence and Scheduling Order, 12 December 2002; *Rutaganda*, Appeals Chamber, Decision ("Prosecution's Urgent Request for Clarification in Relation to the Applicability of Rule 66(B) to Appellate Proceedings and Request for Extension of the Page Limit Applicable to Motions"), 28 June 2002, p. 3; *Musema*, Appeals Chamber, Decision ("Defence Motion Under Rule 68 Requesting the Appeals Chamber to Order the Disclosure of Exculpatory Material and for Leave to File Supplementary Grounds of Appeal", 18 May 2001; *Blaškić* Appeals Chamber, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000, para. 32.

<sup>46</sup> *Rutaganda*, Appeals Chamber, Decision on the Urgent Defence Motion for Disclosure and Admission of Additional Evidence and Scheduling Order, 12 December 2002; *Rutaganda*, Appeals Chamber, Decision ("Prosecution's Urgent Request for Clarification in Relation to the Applicability of Rule 66(B) to Appellate Proceedings and Request for Extension of the Page Limit Applicable to Motions"), 28 June 2002, p. 3; *Musema*, Appeals Chamber, Decision ("Defence Motion Under Rule 68 Requesting the Appeals Chamber to Order the Disclosure of Exculpatory Material and for Leave to File Supplementary Grounds of Appeal", 18 May 2001; *Blaškić*, Appeals Chamber, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000, para. 32.

<sup>47</sup> *Blaškić*, Appeals Chamber, Decision on Joint Motion of Enver Hadzihasanovic, Mehmed Alagić and Amir Kubura for Access to All Confidential Material, Transcripts and Exhibits in the case Prosecutor v. Tihomir Blaškić, 24 January 2003, p. 4; *Kvočka et al*, Appeals Chamber, Decision on Momčilo Gruban's Motion for Access to Material, 13 January 2003, para. 5; *Kordić*, Appeals Chamber, Order on Paško Ljubičić's Motion for Access to Confidential Supporting Material, Transcripts and Exhibits in the Kordic and Cerkez Case, 19 July 2002, p. 4; *Blaškić*, Appeals Chamber, Decision on Appellant's Dario Kordić and Mario Cerkez Request for

Access to confidential material may be granted whenever the Chamber is satisfied that the party seeking access has established that such material may be of material assistance to his case.<sup>48</sup>

The relevance of the material sought by a party may be determined by showing the existence of a nexus between the applicant's case and the cases from which such material is sought, i.e. if the cases stem from events alleged to have occurred in the same geographic area and at the same time. It is sufficient that access to the material sought is likely to assist the applicant's case materially, or that there is at least a good chance that it would.<sup>49</sup>

The material, to which the access may be granted, may include all confidential pleadings (such as appellate briefs and motions for additional evidence) and confidential decisions issued at all stages of another case.<sup>50</sup>

The use of trial record in other proceedings before the Tribunal is subject to existing protective measures imposed by the Chambers after having considered the legitimate concerns of the witnesses prior to their testimony. Upon request the existing protective measures can be varied pursuant to Rule 75.<sup>51</sup>

If the non-public material falls under Rule 70, the Prosecution must indicate the precise sub-paragraph of Rule 70 by which it asserts the material is covered. If there is any material covered by Rule 70(C), the Prosecutor should be given time to seek the consent of the providers of the Rule 70(C) related information for its disclosure.<sup>52</sup>

Accused's access to material from another trial relevant to his case is *not* a matter of disclosure. It is for the Registry to provide the material to which access has been granted to a party, and not for either party to do so.<sup>53</sup>

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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, para. 14.

<sup>48</sup> *Blaškić*, Appeals Chamber, Decision on Appellant's Dario Kordić and Mario Čerkez 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, para. 14; *Hadžihasanović et al*, Decision on Appeal from Refusal to Grant Access to Confidential Material in Another Case, 23 April 2002, p. 3.

<sup>49</sup> *Blaškić*, Appeals Chamber, 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, para. 15.

<sup>50</sup> *Blaškić*, Appeals Chamber, 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. 21; *Blaškić*, Appeals Chamber, Decision on Paško Ljubičić's Motion for Access to Confidential Material, Transcripts and Exhibits, 4 December 2003, p. 9.

<sup>51</sup> *Blaškić*, Appeals Chamber, 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. 34.

<sup>52</sup> *Blaškić*, Appeals Chamber 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, para. 26.

<sup>53</sup> *Kordić*, Appeals Chamber, Order on Paško Ljubičić's Motion for Access to Confidential Supporting Material, Transcripts and Exhibits in the Kordić and Čerkez Case, 19 July 2002, p. 4; *Blaškić*, Appeals Chamber, 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. 35.