



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

Case No. IT-99-36-T
Date: 23 May 2002
Original: English

IN TRIAL CHAMBER II

Before: Judge Carmel Agius, Presiding
Judge Ivana Janu
Judge Chikako Taya

Registrar: Mr. Hans Holthuis

Decision of: 23 May 2002

PROSECUTOR

v.

RADOSLAV BRĐANIN
And
MOMIR TALIĆ

**PUBLIC VERSION OF THE CONFIDENTIAL DECISION ON
THE ALLEGED ILLEGALITY OF RULE 70 OF 6 MAY 2002**

The Office of the Prosecutor:

Ms. Joanna Korner
Mr. Andrew Cayley

Counsel for the Accused:

Mr. John Ackerman and Mr. Milan Trbojević, for Radoslav Brđanin
Mr. Xavier de Roux and Ms. Natacha Fauveau-Ivanović, for Momir Talić

TRIAL CHAMBER II (“the Trial 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 (“Tribunal”) is seised of the confidential “Motion for the issuance of a redacted version of the Chamber’s confidential decision on the alleged illegality of Rule 70 dated 6 May 2002”, filed on behalf of the Accused Radoslav Brđanin on 13 May 2002. A redacted version of the “Confidential decision on the alleged illegality of Rule 70”, of 6 May 2002, follows.

THE REDACTED DECISION OF 6 MAY 2002:

TRIAL CHAMBER II (“the Trial 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 (“Tribunal”) is seised of the confidential “Amended motion regarding Rule 70, its use and disclosure thereunder” and “Confidential Annex A” thereto, filed on behalf of the Accused Radoslav Brđanin on 19 March 2002 (“Brđanin’s Motion”) and of the “Rule 70 Submissions” and “Confidential Annex” thereto, filed on behalf of the Accused Momir Talić on 2 April 2002 (“Talić’s Motion”).

I. INTRODUCTION

1. On 21 January 2002 Talić filed [redacted] a “Request to obtain access to information” pursuant to which he applied for the Trial Chamber to order a specified [redacted] Organisation to provide him with all the information and documents in its possession relevant to the events in Bosnia and Herzegovina, Croatia and the Federal Republic of Yugoslavia, or, in the alternative, to order the Prosecution to disclose to him the information provided by the [redacted] Organisation pursuant to Rule 70 of the Rules of Procedure and Evidence (“the Rules”). The Prosecution responded [redacted] on 4 February 2002.¹ The Trial Chamber issued a [redacted] decision on 8 March 2002 rejecting Talić’s application on the basis, *inter alia*, that Talić had provided no indication that he had approached the [redacted] Organisation and his request had been denied.² Further, the Trial Chamber noted that the Prosecution may not disclose the information provided to

¹ Prosecution’s response to “Request to obtain access to information” filed by the Accused Momir Talić, 4 February 2002.

² Decision on the request by the Accused Momir Talić to obtain access to information, 8 March 2002.

it pursuant to Rule 70(B) without the consent of the provider and that “the Trial Chamber has no power to compel (the Prosecution) to do so”.³

2. On 6 March 2002, Brđanin filed [redacted] a “Motion for the issuance of a subpoena *duces tecum* and/ or other appropriate relief”, where Brđanin stated that he had approached the said [redacted] Organisation but had received no answer to his request for information and documents. Brđanin requested the Trial Chamber to issue a subpoena *duces tecum* pursuant to Rule 54, addressed to the [redacted] Organisation, for it to produce, for Brđanin’s inspection, all documents in its possession referring to the events [redacted] between April and December 1992. The motion made reference to the power of the Trial Chamber to issue subpoenas to order the production of documents and asserted that the material sought was of “high potential relevance for the defence in the current case”.⁴ As in the case of Talić, the relief requested was not confined to information provided to the Prosecution pursuant to Rule 70.

3. On 8 March 2002 Brđanin filed a [redacted] “Motion to hold in abeyance motion for the issuance of a subpoena *duces tecum* and/ or other appropriate relief” where he indicated that he had received a letter from the [redacted] Organisation dated 5 March 2002 which stated that [redacted] the [redacted] Organisation was obliged to take further legal advice on the issue of Brđanin’s request for access to its information and documents, and would, therefore, respond as soon as possible. In response to Brđanin’s motion, the Trial Chamber issued a [redacted] decision on 12 March 2002, whereby it stayed the motion for a subpoena until further order.⁵

4. On 15 March 2002, Brđanin filed a “Motion regarding Rule 70, its use and disclosure thereunder”. This motion was wrongly filed publicly, and was therefore substituted on 19 March with the [redacted] Motion presently under consideration.⁶ The Prosecution responded [redacted] to Brđanin’s Motion on 28 March 2002 (“Prosecution’s response”).⁷ Talić filed his Motion on 2 April 2002.

5. On 12 April 2002, pursuant to a prompt by the Presiding Judge, Brđanin informed the Trial Chamber in private session that negotiations between himself and the [redacted] Organisation were

³ *Ibid.*

⁴ [redacted]. Motion for the issuance of a subpoena *duces tecum* and/ or other appropriate relief, 6 March 2002, par 6.

⁵ Decision on motion to hold in abeyance motion for the issuance of a subpoena *duces tecum* and/or other appropriate relief, 12 March 2002.

⁶ Amended motion regarding Rule 70, its use and disclosure thereunder and [redacted] Annex A to amended motion regarding Rule 70, its use and disclosure thereunder, 19 March 2002.

⁷ Prosecution’s response to [redacted] “Amended motion regarding Rule 70, its use and disclosure thereunder” filed by the Accused Radoslav Brđanin on 19 March 2002, 28 March 2002.

underway.⁸ On 26 April 2002, Brđanin reiterated that the position remained the same although in his opinion a definitive reply from the [redacted] Organisation was overdue.⁹ Talić expressed the same view in respect of his negotiations with the said [redacted] Organisation.¹⁰ In the course of the hearing of 17 April 2002 the parties made additional submissions on Rule 70.¹¹

II. SUBMISSIONS

6. In his Motion, Brđanin argued that Rule 70 infringed the equality of arms principle, insofar as Rule 70(F) required the Defence first to acquire the specific information and only then to seek leave from the Trial Chamber's to give confidential treatment pursuant to Rule 70 to that specific information, whilst the Prosecution did not need to apply to the Trial Chamber's and could promise the providers of the information confidential treatment of the material as a matter of course. In this respect, the relief requested was a determination that Rule 70(F) was in conflict with the Statute of the Tribunal ("the Statute") and the equality of arms principle enshrined therein, and, further, an order granting the Defence the same Rule 70(B) access to information "as is enjoyed by the Prosecutor without requiring specific approval as to specific information".¹²

7. In addition, Brđanin argued that Rule 70 did not relieve the Prosecution of its obligation to disclose pursuant to Rule 68, as it only mentioned Rules 66 and 67. Brđanin contended that in the instant case, among the documents disclosed to the Defence and provided to the Prosecution by the [redacted] Organisation pursuant to Rule 70 were documents containing exculpatory information and information which directly contradicted the testimony of witnesses that had already given evidence in the case, which were required to be disclosed under Rule 68. Six examples of these documents were included in "[redacted] Annex A". Brđanin further submitted that if Rule 70 were interpreted to encompass exculpatory material subject to Rule 68 obligations, then Rule 70 would be contrary to Article 21 of the Statute.

8. Moreover, Brđanin argued that Rule 70 opened the door for significant abuse by the Prosecution insofar as the Prosecution could, pursuant to it, seek to obtain information that it did not wish to disclose to the Defence under Rules 66(B) or 68. According to him, it was probable that

⁸ Unofficial transcript ("T") 4206.

⁹ T 5063.

¹⁰ T 5064.

¹¹ [redacted].

¹² Amended motion regarding Rule 70, its use and disclosure thereunder and [redacted] Annex A, 19 March 2002, par 18(G).

the Prosecution, pursuant to Rule 70, had obtained documents material to the preparation of the Defence and otherwise required to be disclosed under Rule 66. Furthermore, should the Prosecution seek to disclose exculpatory material or material covered by a Defence request for reciprocal disclosure, the provider of the information could deny permission, whereupon the Prosecution would be unable to disclose the said material. It was Brđanin's submission that it was apparent in the instant case that the spirit of the rule was being violated insofar as the rule was originally aimed at information that had in and of itself no evidentiary value but which would be used to generate new evidence. However, the Prosecution was actually using Rule 70 to obtain evidentiary material which would not be disclosed to the Defence or the Chamber unless it was incriminating, in which case permission was sought and obtained from the provider.

9. In his motion, Brđanin requested the following additional relief; i) that the Prosecution disclose to the Trial Chamber *in camera* "the existence, nature and extent" of all the material received pursuant to Rule 70 in the instant case; ii) that the Prosecution go through the Rule 70 material in its possession and supply the Trial Chamber *in camera* with any material that would arguably need to be disclosed to the Defence pursuant to Rules 66(B) and/ or 68, upon which, if the Trial Chamber were to be satisfied that such material were to be subject to Rules 66(B) and/ or 68, it should order the Prosecution to request the providers of Rule 70 material to allow it to disclose such information, and those requests should be disclosed to the Defence. The Trial Chamber should also, if it considered that the material could be used to confront witnesses, adjourn proceedings pending an answer from the providers of Rule 70 material to the request for disclosure. Should the Rule 70 provider deny permission to the Prosecution to disclose material that in the Trial Chamber's view was highly relevant and/ or exculpatory, the Trial Chamber should dismiss the case and release the Accused; iii) in future the Prosecution must immediately notify *in camera* the appropriate Trial Chamber of the content and source of any material received pursuant to Rule 70 which constituted material subject to Rule 68 as to any matter pending before the Tribunal.

10. The Prosecution responded that Rule 70 did not violate the equality of arms principle because the Defence could approach a person or entity that had provided information to the Prosecution pursuant to Rule 70 and apply too for confidential treatment of the material pursuant to that Rule, as "once [Rule 70] is invoked, all its provisions apply".¹³ Further, the Prosecution noted that "whilst counsel for Brđanin has approached the provider, he has yet to found an application on the basis of Rule 70".¹⁴ The Prosecution responded orally in the course of the hearing of 17 April

¹³ Prosecution's response to [redacted] "Amended motion regarding Rule 70, its use and disclosure thereunder" filed by the Accused Radoslav Brđanin on 19 March 2002, 28 March 2002, par 10.

¹⁴ *Ibid*, par 10.

2002 that the Defence had the same rights as the Prosecution to approach the [redacted] Organisation for the production of witnesses.¹⁵

11. The Prosecution contended that Rule 70 expressly relieved the Prosecution of its obligation under Rules 66 and 67.¹⁶ In this connection, the Prosecution assured that there was no Rule 70 material in the Prosecution's possession that exonerated Brđanin or Talić in respect of the crimes charged in the Indictment, "nor is there any information which materially contradicts the account given by any witness thus far".¹⁷ According to the Prosecution, the six examples cited by Brđanin did in fact not support his position, and though they might "suggest non-material contradiction of the precise recollection by witnesses" there was no basis for the contention that those documents should have been the subject of Rule 68 obligations.¹⁸

12. In its response the Prosecution described the course of conduct that it would follow in the event that the Prosecution was in possession of material provided pursuant to Rule 70 "which completely exonerates either accused, or materially contradicts the testimony of a witness".¹⁹ The Prosecution would either; (1) apply for disclosure of that material under Rule 70(C), or (2) withdraw the Prosecution evidence materially contradicted, or (3) withdraw the charges for which an Accused was exonerated.²⁰

13. Finally, the Prosecution argued that the relief sought by Brđanin would "completely debilitate the Rule 70 regime", and would have the effect that "no government or organisation would continue to co-operate with the Tribunal under Rule 70 of the Rules" which would hinder the Prosecutor's duty to investigate and would jeopardise her mandate. Further, the Prosecution argued that "Brđanin's remedy lies in his defence counsel going to the Rule 70 provider, obtaining what material he needs and then availing himself of the provisions of Rule 70".²¹

¹⁵ T 4495.

¹⁶ The Prosecution's understanding was that Brđanin agreed with this position, insofar as Brđanin had argued that Rule 70 did not relieve the Prosecution of its obligations under Rule 68, because only Rules 66 and 67 were expressly mentioned in Rule 70. Prosecution's response to [redacted] "Amended motion regarding Rule 70, its use and disclosure thereunder" filed by the Accused Radoslav Brđanin on 19 March 2002, 28 March 2002, par 12.

¹⁷ *Ibid*, par 13.

¹⁸ Rule 68 provides that the Prosecutor shall, as soon as practicable, disclose to the defence the existence of material known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence. The Presiding Judge in the course of the hearing of 17 April 2002 drew the Prosecution's attention to its declaration in the Prosecution's response that it held no exculpatory material for either Accused. Notwithstanding the Prosecution's agreement with this, the Prosecution added a caveat that it had no exculpatory material for either of the Accused on what the Prosecution itself could deduce was material or relevant to the defence being run (T 4500).

¹⁹ Prosecution's response to [redacted] "Amended motion regarding Rule 70, its use and disclosure thereunder" filed by the Accused Radoslav Brđanin on 19 March 2002, 28 March 2002, par 13.

²⁰ *Ibid*, par 13.

²¹ *Ibid*, par 14.

14. Talić argued that Rule 70 was contrary to the Statute -particularly to Articles 20 and 21, and specifically to Article 21(4)(e)-, and to the rights of the Accused recognised by “the general principles of human rights” as found in Article 10 of the Universal Declaration of Human Rights and Article 14 of the International Covenant on Civil and Political Rights, insofar as Rule 70(C) prevented the Chamber from ordering either party to produce additional evidence received from the person or entity providing the initial information.²² This meant that exculpatory material could remain in the entity’s possession, and that, even if the existence of such exculpatory material could be established, the Accused and the Chamber would be unable to obtain it. Talić further argued that if in this context the Chamber “ha(d) a doubt”, it would nevertheless be prevented from calling the person or entity providing the initial information to give evidence.²³ This, together with Rule 70(D), prevented the Chamber from exercising its role as arbiter between the parties. Insofar as this was the case, the Defence was no longer on an equal footing with the Prosecution. Finally, Talić argued that Rule 70(F) was unsuccessful in redressing the inequality of arms created by the rest of Rule 70.

15. Talić requested that Rule 70 be considered void and therefore that the Prosecution be prevented from invoking it.

III. DISCUSSION

16. Rule 70 provides:

Matters not Subject to Disclosure

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

(B) 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 and shall in any event not be given in evidence without prior disclosure to the accused.

²² Rule 70 submissions and [redacted] Annex, 2 April 2002.

²³ *Ibid.*

(C) If, after obtaining the consent of the person or entity providing information under this Rule, the Prosecutor elects to present as evidence any testimony, document or other material so provided, the Trial Chamber, notwithstanding Rule 98, may not order either party to produce additional evidence received from the person or entity providing the initial information, nor may the Trial Chamber for the purpose of obtaining such additional evidence itself summon that person or a representative of that entity as a witness or order their attendance. A Trial Chamber may not use its power to order the attendance of witnesses or to require production of documents in order to compel the production of such additional evidence.

(D) If the Prosecutor calls a witness to introduce in evidence any information provided under this Rule, the Trial Chamber may not compel that witness to answer any question relating to the information or its origin, if the witness declines to answer on grounds of confidentiality.

(E) The right of the accused to challenge the evidence presented by the Prosecution shall remain unaffected subject only to the limitations contained in paragraphs (C) and (D).

(F) The Trial Chamber may order upon an application by the accused or defence counsel that, in the interests of justice, the provisions of this Rule shall apply *mutatis mutandis* to specific information in the possession of the accused.

(G) Nothing in paragraph (C) or (D) above shall affect a Trial Chamber's power under Rule 89 (D) to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

17. The rationale behind Rule 70 was discussed in the "Decision of Trial Chamber I on the Prosecutor's motion for video deposition and protective measures" in *Prosecutor v Blaskic*.²⁴ This decision explained that "the exceptions to the obligation to disclose contained in sub-rules 70(B) to (E) were introduced into the Rules to permit the use, as and when appropriate, of certain information which, in the absence of explicit provisions, would either not have been provided to the Prosecutor or have been unusable on account of its confidential nature or its origin".²⁵ Trial Chamber I referred to the exception to the obligation to disclose in terms of an "exceptional but strictly delineated right", which had "moreover been recognised *mutatis mutandis* for the accused by Sub-rule 70(F) when it was amended in July 1997".²⁶

18. The Trial Chamber is of the opinion that while it has the paramount duty to respect internationally recognised standards regarding the rights of the accused at all stages of its proceedings, particularly those contained in Article 14 of the International Covenant on Civil and Political Rights which was the source of Article 21 of the Statute, it also has a duty to take into consideration the unique legal framework and equally unique situation of the Tribunal. Particularly

²⁴ *Prosecutor v Blaskic*, Case No IT-95-14-T, Decision of Trial Chamber I on the Prosecutor's motion for video deposition and protective measures, 11 November 1997, par 10.

²⁵ *Ibid*, par 10.

²⁶ *Ibid*, par 10.

in this context this Trial Chamber recognises the continued necessity for Rule 70 in proceedings before the Tribunal. It is indeed almost impossible to envisage this Tribunal, of which the Prosecution is an integral organ, being able to fulfil its functions without having provisions like Rule 66(C) and 70 in place. This is all the more so when one remembers that special entities as well as States can be potentially important sources of information for the Tribunal. The function of Rule 70 in proceedings before the Tribunal is akin to the concept of public interest immunity available in some systems of law. This public interest immunity has been used to protect the identity of informers for their own safety as well as to ensure that the authorities have a continuous supply of information from these sources.²⁷ In addition such immunity is regularly extended when disclosing certain information to the defence might jeopardise the security of police or military operations.

19. Within the context of the Statute and *raison d'être* of this Tribunal, the entitlement to disclosure of relevant evidence is, therefore, not an absolute right. There may be competing interests which must be weighed up against the rights of the accused, and which may make it necessary in some cases to withhold certain material from the defence, so as to safeguard an important public interest. However, it is the belief of this Trial Chamber that only such measures restricting the rights of the accused, which are strictly necessary, ought to be adopted.²⁸ Thus, for example, the public interest immunity discussed above is excluded where its application would deny to the accused the opportunity to establish his or her innocence.²⁹ This is of paramount importance because it must be emphasised that the exception to disclose found in paragraphs 70 (B) to (E) applies **only** to information provided on a confidential basis which has been used **solely** for the purpose of generating new evidence and, in any event, **does not** relieve the Prosecution of the obligation, pursuant to Rule 68, to disclose to the Defence “the existence of material known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence”.

20. Therefore, addressing one of the points raised by Brđanin, it is clear from a literal reading of Rule 70, which is entitled “matters not subject to disclosure”, that it does not relieve the Prosecution from disclosing material that it would otherwise be required to disclose pursuant to Rule 68.³⁰ The Trial Chamber takes note of the course of conduct proposed by the Prosecution in the event that it

²⁷ *R v Hennessey* (1978) 68 Crim App 419, 425.

²⁸ *Vide* along these lines *Rowe and Davis v United Kingdom* (2000) 30 EHRR 1, par 61.

²⁹ *Vide* along these lines *Marks v Beyfus* (1890) 25 QBD 494, at 498, 500; *D v NSPCC* [1978] AC 171, at 218, 232.

³⁰ Rule 70(A) contemplates that notwithstanding the provisions of Rules 66 and 67, reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation of preparation of the case, are not subject to disclosure or notification under those Rules.

was in possession of material provided pursuant to Rule 70, which amounted to exculpatory material. However, the Trial Chamber emphasises that the exception to disclosure envisaged in Rule 70 does not encompass material subject to Rule 68. Accordingly, Brđanin's request for relief that in the future the Prosecution must immediately notify the appropriate Trial Chamber of the content and source of any material received pursuant to Rule 70 which constitutes material subject to Rule 68 as to any matter pending before the Tribunal, does not arise for consideration, because the relative duty to disclose Rule 68 material is already provided for by the Rules.

21. As stated, a very important limitation on the exception to disclosure contained in the provisions of Rule 70(B) to (E) is that it only applies to the initial information provided "on a confidential basis and which has been used solely for the purpose of generating new evidence".³¹ Pursuant to Rule 70(C) and (D), a party to proceedings may seek to introduce the initial information in evidence during trial. Under those circumstances, Rule 70(B) requires the party seeking to introduce the initial information in evidence to disclose it. In addition, the initial information may have generated new evidence. Such new evidence, however, does not come within the purview of Rule 70. New evidence so obtained **does not** enjoy confidential treatment pursuant to Rule 70(B), and therefore the party in its possession must comply with the obligation to disclose contained in Rules 66 and 67. The limitations posed by Rule 70(B) to (E) on the powers of the Trial Chamber do not apply in the case of such new evidence. In effect, therefore, if the Prosecution seeks to introduce the initial information into evidence, it will need to disclose it. If the Prosecutor does not seek to present it as evidence, given that Rule 70 does not affect the Prosecution's duty to disclose material that is the subject of Rule 68, the Prosecution will have to disclose to the Defence such exculpatory material if it exists within the initial information obtained pursuant to Rule 70.

22. The concept of equality of arms essentially requires that the accused be given procedural rights equal to those of the Prosecution in the course of criminal proceedings. This concept is inherent in the concept of a fair trial.³² It is also equally important and inherent in the concept of equality of arms that each party be afforded a reasonable opportunity to present his or her case under conditions that do not place him at an appreciable disadvantage *vis-à-vis* his opponent.³³ Indeed the concept of equality of arms could be exemplified having regard to the right to call witnesses as between the Prosecution and the Defence, as well as the duty of the Prosecution to disclose relevant material to the Defence. However this duty is generally held to be limited by the principle that the admissibility of evidence is generally a matter for the courts to assess

³¹ Rule 70(B).

³² *Vide Foucher v France* (1997) 25 EHRR 234, par 34.

³³ *Vide Bulut v Austria* (1996) 24 EHRR 84, pars 47-50.

themselves.³⁴ The conclusion is that therefore the overall “fairness” test applies keeping in mind the very special and unique nature of the provisions of Rule 70 and the ultimate remedy that is always at the disposal of the Trial Chamber pursuant to paragraph G of the Rule.

23. The Trial Chamber, basing itself on the internationally accepted application of the principle of equality of arms does not perceive any conflict between what is contained in Rule 70(B) to (E) and the said principle. In the first place, the limitations on the examination of witnesses and the production of evidence found in Rule 70(C) to (D) apply equally to “either party”. Further, pursuant to Rule 70(F), the accused can also obtain confidential treatment of specific information in his possession, and thus render all the provisions in Rule 70 applicable to such information.

24. Talić has, however, in addition submitted that independently of the equality of arms argument, Rule 70(C) in itself violates Articles 20 and 21 of the Statute in that it prevents the Chamber from ordering “either party to produce additional evidence received from the person of entity providing the initial information”. Talić complains that exculpatory material could remain in the entity’s possession and that, even if the existence of such exculpatory material could be established, the accused and the Chamber would be unable to obtain it. The Chamber itself would be unable to do anything about it because it is specifically prevented from asking for additional evidence. According to Talić, as a result of this the Chamber is simultaneously prevented from being able to exercise its role as arbiter between the parties.

25. The Trial Chamber does not agree with these submissions by Talić and, in addition, fails to follow the logic of his argument. Given the special need for a provision like that of Rule 70 in the context of the unique situation of this Tribunal and the type of entities that there may be, apart from the equal applicability of Rule 70(C) between the parties, Rule 70(G) provides the ultimate remedy should the need arise for its application. Further, in accordance with Rule 87(A), the Prosecution has the burden to establish the Accused’s guilt beyond reasonable doubt. The Trial Chamber believes that it is relevant to point out that the disparity that exists is not between the way the parties are treated under Rule 70 but in the fact that there may be instances where persons and entities such as those contemplated under the same Rule cannot be considered to be equal to or at the same level with other informers or witnesses. Immunity may be one explanation, while others may not be *a priori* excluded.

³⁴ *Vide Edwards v United Kingdom* (1992) 15 EHRR 417.

26. In view of the foregoing, it would appear that the only difference in treatment stems from the requirement in Rule 70 (F) that the accused is required to apply to the Trial Chamber to obtain confidential treatment pursuant to Rule 70 of specific information, whilst the Prosecution need not apply. The Trial Chamber does not find that this disparity of treatment amounts to an infringement of the equality of arms principle, because it logically corresponds to the different roles of the Prosecution and of the Defence and their respective duties to disclose material to the opposing party. Thus, though “(t)he principle of equality of arms has been given a liberal interpretation in its application to the Tribunal’s procedures, in recognition of the peculiar difficulties under which both parties have to operate in this Tribunal,”³⁵ the Prosecution is an organ of the Tribunal,³⁶ mandated by Article 16 of the Statute to “be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991”.³⁷ As already stated, it is therefore necessary for it to be able to guarantee confidentiality pursuant to Rule 70 of information provided to it as a matter of course, as part and parcel of the mandate bestowed upon it, and so as to enable it to properly carry out its mandate. In addition, the Trial Chamber reiterates the exceptional and limited type of information Rule 70(B) applies to, which makes more sense considering the special investigative role of the Prosecutor than that of the accused, who in addition **does not** have the same duty to disclose material to the Prosecution except in the case contemplated under Rule 67(C). Moreover, the requirement that the Defence apply to the Trial Chamber does not place the Defence at a “distinct disadvantage”.³⁸ The application to the Trial Chamber can be made confidentially and *ex parte*, to ensure that there is no prejudice to the Defence. In addition, the requirement that the information must already be “in the possession of the accused” is not to be interpreted literally, but should allow the Defence to make an application in advance of material that they may seek to receive confidentially pursuant to Rule 70(B).

27. Pursuant to Rule 70(G) the Trial Chamber retains control of proceedings and, contrary to Talić’s contention, is able to exercise its role as final arbiter between the parties. The public interest served in ensuring that information given in confidence to one of the parties remains confidential finds its limitation in the obligation imposed on this Tribunal by Articles 20 and 21 of the Statute to ensure a fair trial. A fair trial is one which is fair to both the accused who is on trial and to the Prosecution which acts on behalf of the international community, including the victims of the

³⁵ *Prosecutor v Tadić*, Case IT-94-1-A, Judgement [on Conviction Appeal], 15 July 1999, par 52; *Prosecutor v Kordić and Čerkez*, Case IT-95-14/2-A, Decision on application by Mario Čerkez for extension of time to file his respondent’s brief, 11 September 2001, par 7.

³⁶ Article 11 of the Statute.

³⁷ Article 16(1) of the Statute.

offences charged.³⁹ The decision on whether evidence that is relevant should nevertheless not be permitted rests upon the Trial Chamber and is part of its power to control its proceedings in such a way as to ensure that a trial is conducted fairly. The Trial Chamber has the ultimate responsibility to undertake a balancing exercise, and has the power under Rule 89(D) read in conjunction with Rule 70(G) to exclude evidence if it finds that its probative value is substantially outweighed by the need to ensure a fair trial. This is indeed the ultimate answer to the objections of Brđanin and Talić. The Trial Chamber is empowered under Rule 70(G) to examine a piece of evidence also *ex post*, possibly in the ensemble of the case looking at the proceedings as a whole to determining fairness.

IV. DISPOSITION

For the foregoing reasons,

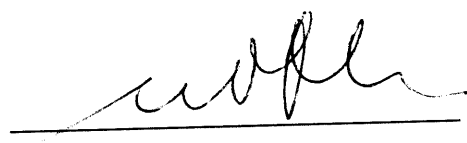
TRIAL CHAMBER II HEREBY dismisses the “Amended motion regarding Rule 70, its use and disclosure thereunder” and “[redacted] Annex A” thereto, filed by the Accused Radoslav Brđanin, and the “Rule 70 Submissions” and “[redacted] Annex” thereto, filed by the Accused Momir Talić.

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

Dated this 23rd day of May 2002,

At The Hague

The Netherlands



Carmel Agius

Presiding Judge

[Seal of the Tribunal]

³⁸ Amended motion regarding Rule 70, its use and disclosure thereunder and [redacted] Annex A, 19 March 2002, par 8.

³⁹ *Prosecutor v Aleksovski*, Case No IT-96-21-T, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 February 1999, par 25.