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UNITED NATIONS

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

Case No. IT-95-14-PT

Date: 27 January 1997

English
Original: French

IN THE TRIAL CHAMBER

Before: **Judge Claude Jorda, Presiding**
Judge Jules Deschênes
Judge Fouad Riad

Registrar: **Mr. Dominique Marro, Deputy Registrar**

Decision of: **27 January 1997**

THE PROSECUTOR

v.

TIHOMIR BLAŠKIĆ

DECISION ON THE PRODUCTION OF DISCOVERY MATERIALS

The Office of the Prosecutor:

Mr. Mark Harmon
Mr. Gregory Kehoe
Mr. Andrew Caley

Counsel for the Accused

Mr. Anto Nobilo
Mr. Russel Hayman
Mrs. Nela Pedišić

1. In its motion entitled "Motion to Compel the Production of Discovery Materials", dated 26 November 1996 (hereinafter "the Motion"), Defence counsel for General Blaškić (hereinafter "the accused") requested that Trial Chamber I (hereinafter "the Trial Chamber"), issue a decision compelling the Prosecution to produce information, documents and other items of potential evidentiary value. The Office of the Prosecutor (hereinafter "the Prosecutor"), in opposition to the Defence, responded to the Motion on 11 December 1996 (hereinafter "the Response"). The Defence replied to the opposition in a brief filed on 16 December 1996 (hereinafter "the Reply"). The Trial Chamber heard the parties at a hearing held on 19 December 1996.

The Trial Chamber would first analyse the claims of the parties and then all the disputed points of fact and law.

I) Analysis of the claims and arguments of the parties

2. The requests to compel discovery, generally within seven days as stated by the Defence, are presented in the Motion as follows:

1. "B. Statements of the Accused";
2. "C. Witness Statements";
3. "D. List of Prosecution Witnesses";
4. "E. Evidence Submitted to the Tribunal in Support of the Indictment Pursuant to Rule 47 of the Rules of Procedure and Evidence (hereinafter "the Rules")";
5. "F. Exculpatory Evidence";
6. "G. Lack of Evidence";
7. "H. Evidence Gathered and Provided to the Prosecution by BiH";
8. "I. Evidence In the Prosecutor's Possession Including Evidence Submitted to the Tribunal in Connection with the Indictment of Ivica Rajić";
9. "J. Evidence in the Prosecutor's Possession, including Evidence Submitted to the Tribunal in Connection with the Indictments of Marinić Zoran and of Kupreškić Zoran and others";
10. "K. Rule 61 Materials";

11. "L. Databases";

12. Discovery of materials covered in Sub-rule 66(B) of the Rules

The arguments of the parties in respect of each of the points included in the request should now be reviewed.

1. "B. Statements of the Accused":

3. In its Motion, the Defence bases its request that the Prosecution produce all the prior statements of the accused (both written and oral, in letter or computer form) which have been collected since the accused has been in the custody of the Tribunal on Sub-rule 66(A) of the Rules. Furthermore, in its Reply, it includes the statements taken not only by the Prosecution but also those from other sources.

In her Response, the Prosecutor claims that the term "statement" must be interpreted narrowly as the official statements given under oath or, at least, signed and recognised by the accused as an exact and precise interpretation. The Prosecutor asserts that she does not have such statements and, in addition, considers that all the written letters, notes, books, orders or other documents written by the accused or which he produced are not statements of the accused obtained by the Prosecutor. She therefore concludes that they are not covered by Sub-rule 66(A) and need not be disclosed to the Defence.

2. "C. Witness Statements":

4. Basing its argument on the same grounds, the Defence also requests the production of all the witness statements as well as the memoranda of interviews of those witnesses, whether or not collected by the Office of the Prosecutor. Should the Prosecutor fail to satisfy this obligation, the Defence demands that the witnesses in question not be permitted to testify before the Trial Chamber. In her Response, the Prosecutor considers that the Defence request goes further than the scope of application of Rule 66 but states, however, that, pursuant to the requirements of Rule 68, she is prepared to disclose to the Defence any information which might raise questions as to the credibility of a witness.

The Defence replies that if the Trial Chamber does not order the Prosecution to produce "as soon as possible" the items covered in Rule 68, it should, in the alternative, require discovery of the witness statements in the possession of the Prosecutor within ten days. It should further bar from appearing those witnesses whose statements, which the Prosecution also has in its possession, will have not been disclosed or about which the Prosecution will have learned subsequently.

3. "D. List of Prosecution Witnesses":

5. The Defence requests that the Prosecution produce the list of the witnesses which it intends to call at trial.

In her Response, the Prosecutor claims that she has produced the list as quickly as possible.

The Defence replies that the Prosecutor has not complied with her obligation as stipulated in Rule 67 of the Rules and requests that the Trial Chamber require that this list be produced within ten days and that, should a prosecution witness whose name does not appear on the list appear before the Trial Chamber, his testimony should not be admitted.

4. "E. Evidence Submitted in Support of the Indictment":

6. The Defence has requested production of all material submitted in support of both the initial and amended indictments. In its Reply, it states that that material has been provided and that it will attempt to resolve any issues which might remain directly with the Prosecution.

5. "Exculpatory Evidence":

7. Pursuant to the provisions of Rule 68 of the Rules, the Defence requests disclosure of the exculpatory evidence in the possession of the Prosecutor and discovery of the nature and location of all the exculpatory evidence known to the Prosecutor but not in her possession.

The Prosecutor recalls that on 14 and 18 November and 5 December 1996, she turned over potentially exculpatory evidence. In accordance with the *Delalić* decision,

she also asserts that, rather than presenting mere speculation, the accused must demonstrate a *prima facie* showing that the evidence is in the custody or control of the Prosecutor. The Prosecutor, however, states that she has complied and that she is prepared to comply in the future with the positive obligation stipulated in Rule 68.

Basing its arguments also on the *Delalić* decision[1], in its Reply, the Defence expands on the interpretation to be given to the obligation. In its opinion, the Prosecutor must turn over the required evidence, deny that she has it in her possession or admit that she does have it but refuses to disclose it on the grounds of its not being material to the Defence, a condition required in Sub-rule 66(B). In the case at hand, the Defence considers that the Prosecutor has the obligation to review her files to search for such material and that, should she not disclose it, appropriate sanctions should be imposed on her.

6. "G. Lack of Evidence":

8. The Defence requests the Prosecutor to acknowledge that she lacks evidence in respect of certain points of the indictment. Such a lack of inculpatory evidence constitutes exculpatory evidence.

The Prosecutor objects to the request and considers that the issue must be resolved on the merits.

7. "H. Evidence Gathered and Provided to the Prosecution by Bosnia and Herzegovina":

9. The Defence, pursuant to Rule 8 of the Rules, requests the right to review the evidence provided to the Prosecutor by Bosnia and Herzegovina in order to ensure that it has not been improperly obtained.

The Prosecutor considers that the purpose of this request is to circumvent the Defence's reciprocal discovery obligation, as set forth in Sub-rule 67(C), while providing it with access to information which she has collected. She asserts that this issue must be reviewed on the merits.

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[1] Decision on the application of the accused Zejnil Delalić for disclosure of evidence, *The Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić, Esad Landžo*, 26 September 1996, Case no. IT-96-21-T.

8. "I. Evidence in Connection with the Indictment of Ivica Rajić":

10. The Defence requests production of all materials submitted to the Tribunal in support of the indictment against Ivica Rajić. Whereas Ivica Rajić is accused of crimes allegedly committed in General Blaškić's zone of command, the indictment against him contains no counts relating to those crimes.

The Prosecutor states that this request conflicts with her power to assess the appropriateness of prosecution and the confidentiality of the evidence.

9. "J. Evidence in Connection with the Indictment of Zoran Marinić and Zoran Kupreškić".

11. The Defence requests production of all the materials in support of the indictments against Zoran Martinićand Zoran Kupreškić insofar as the materials might prove exculpatory as to the accused.

The Prosecutor objects to this request for the reasons already presented under Item 8.

10. "K. Rule 61 Materials":

12. The Defence requested the discovery of all the documents submitted or presented to the Trial Chamber in connection with the Rule 61 proceedings in this matter. It amended its request during the hearing of 19 December 1996 by relating it to the Rajić case which was also heard pursuant to Rule 61.

11. "L. Databases":

13. Basing its request on the provisions of Article 21 of the Statute, the Defence requests access to the Prosecutor's databases.

The Prosecutor objects to this request and *inter alia* refers to the risk of the Defence's having access to sensitive matters pertaining to other investigations.

In its Reply, the Defence proposes recourse to an ombudsman who would review the exculpatory material contained in the Prosecutor's databases.

12. Nullity of the provisions restricting the right of the accused to review the evidence against him and the disclosure of the materials indicated in Sub-rule 66(B).

14. The Defence requests that the Prosecutor be ordered to provide forthwith all the materials described in Sub-rule 66(B) of the Rules without a reciprocal discovery obligation being imposed. In respect of this, it states that the provisions of the Rules which provide for this obligation run contrary to customary international law and are hence void.

In her Response, the Prosecutor considers that the provisions are consistent with the proper administration of justice and the right to a fair trial.

II ANALYSIS

15. The Trial Chamber will first deal with points 1 to 11, that is, points B to L, above.

In this connection, during the hearings, the Trial Chamber noted the points of agreement on some questions and ruled at the bench on several contested points relating to other requests.

The Trial Chamber will first indicate the points of agreement and those on which it ruled.

It will then consider the points still pending.

Lastly, it will deal with point 12 of the Motion.

A. The motions which in the current case no longer present difficulties

The requests on which an agreement was noted by the Trial Chamber:

16. These are points E and K.

a) Evidence submitted to the Tribunal in support of the indictment (Point E):

17. The Trial Chamber notes that the Defence has stated that the discovery obligation has, to date, been satisfied although the Defence still reserves the right to review in detail the materials it has received[2]. It notes the intention demonstrated by the Prosecutor to meet her obligation in the future.

b) Rule 61 Materials (Point K):

[2] French version of the provisional transcripts of the hearing of 19 December 1996, p. 19, Case no. IT-95-14-T, *The Prosecutor v. Tihomir Blaškić.*

18. The Prosecutor, with the agreement of the Defence, recalls that no Rule 61 hearing was held in this case.

2. Motions on which the Trial Chamber ruled at the bench:

19. These concern points D, G, I and J.

a) List of Prosecution Witnesses (Point D):

20. Disclosure of the names of the prosecution witnesses is provided for in Sub-rule 67(A) which states on this matter:

Rule 67
Reciprocal Disclosure

(A) As early as reasonably practicable and in any event prior to the commencement of the trial:

(i) the Prosecutor shall notify the defence of the names of the witnesses that he intends to call in proof of the guilt of the accused and in rebuttal of any defence plea of which the Prosecutor has received notice in accordance with Sub-rule (ii) below;

21. The Defence recognises that, to date, the identify of over one hundred prosecution witnesses has been transmitted to it but that it has not actually received a list in support of the initial indictment and thus of the amended indictment of 22 November 1996.

The Prosecution intends to disclose to the accused as soon as possible a list of the witnesses it plans to call.

22. The Trial Chamber would note that the dispute concerns both the notion of a list and the moment when such a list must be disclosed.

The Trial Chamber notes that Sub-rule 67(A) does not refer to an official list. However, by stipulating that the Prosecution has the obligation to inform the Defence of the names of the prosecution witnesses "as early as reasonably practicable and in any event prior to the commencement of the trial", the Rules support the idea that all the names of the prosecution

witnesses must be disclosed at the same time in a comprehensive document which thus permits the Defence to have a clear and cohesive view of the Prosecution's strategy and to make the appropriate preparations.

The Trial Chamber therefore orders that all the names of the prosecution witnesses shall be disclosed by 1 February 1997 at the latest, unless there are additions or supplements which, in any case, shall be limited to any possible new developments in the investigation and which must never result in the rights of the Defence being circumvented.

b) Lack of Evidence (Point G):

23. The Defence contends that the lack of evidence may be considered as exculpatory and therefore be covered by the provisions of Rule 68 of the Rules which states:

Rule 68
Disclosure of Exculpatory Evidence

The Prosecutor shall, as soon as practicable, disclose to the defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate to the guilt of the accused or may affect the credibility of prosecution evidence.

In point F, the Defence raised the issue of disclosure of the exculpatory evidence as stipulated in Rule 68 of the Rules. This point will be considered below in view of the arguments developed by the parties at the hearing.

24. As relates more specifically to the question of knowing whether the lack of inculpatory evidence may be considered as part of the administration of exculpatory evidence as presented in Rule 68 of the Rules, the Defence requests that the Prosecution authorise it to raise this argument at trial, in particular, as regards the following points:

- the absence of any proof that the accused was physically present at the locations where attacks were carried out against civilians or property protected by the Geneva Conventions;

- the absence of any written or verbal orders or directives from the accused to commit acts which violate the Geneva Conventions;
- the absence of any electronic interception of messages demonstrating that the accused exercised his command and control powers or that he issued any orders or directives to attack persons or property protected by the Geneva Conventions.

25. The Trial Chamber need only note that the Prosecutor has no intention of agreeing with the Defence on this point. The Trial Chamber, in fact, concurs with the Prosecution's argument that the time and place to raise the possible question of the lack of evidence can only be at the trial on the merits. Possible evaluation of the exculpatory nature of this lack of evidence can take place at that time only. The Defence motion on this point therefore is, as such, denied.

c) Evidence in the Prosecutor's possession submitted to the Tribunal in connection with the Indictment of Ivica Rajić (Point I):

26. The Defence requests the production of all evidence transmitted to the Tribunal in support of the indictment of Ivica Rajić who has been charged with crimes allegedly committed within the accused's geographic zone of command. The Defence considers that the indictment of General Blaškić contains none of the crimes that Rajić is alleged to have committed and therefore draws the conclusion, which forms the basis of its request, that if the accused who is being prosecuted on the grounds of command responsibility is not charged with some of the crimes allegedly committed by Rajić in his geographic zone of command, it is entitled to demand the production of exculpatory evidence culled from that indictment. This would allow the Defence to demonstrate that the responsibility for other crimes alleged to have been committed in that same zone of command was mistakenly ascribed to the accused.

27. The Prosecution points out that the Prosecutor derives her sovereign and independent decision-making power in respect of prosecution and charges by the Tribunal from the Statute and the Rules. This power was exercised appropriately in the *Rajić case* and in the case at hand. The Prosecutor considers that the mere fact of not having ascribed to the accused crimes supposedly committed by Rajić does not

give the Defence the right to inspect the case-file on the accused or "to go fishing" through all the files in a search for potentially exculpatory evidence.

Furthermore, the Prosecution commits itself to disclosing to the Defence either at present or at trial all the exculpatory materials relative to the accused which might be found in the *Rajić* case-file.

28. The Trial Chamber concurs with the position of the Prosecutor and would point out her sovereign power of evaluation as to the appropriateness of initiating prosecution and issuing indictments which devolves on her by virtue of the Statute of the Tribunal. From this derives the principle of the independence of prosecution cases in respect of one another, conditional on the possibility, which always exists, of a joinder of crimes as provided for in Rule 48 of the Rules.

It is all the more impossible to grant to the Defence the right of inspection which it requests in the *Rajić case* - a right of inspection which, moreover, it interprets very broadly - because so doing would mean disclosing confidential information, not strictly required for General Blaškić's defence, which concerns another accused who is a fugitive from international justice and for whom the prosecutorial proceedings have not reached the same stage of development.

The Trial Chamber finds many provisions in the Rules which protect the confidentiality of certain information. In respect of protection of evidence, one need merely refer to the provisions of Sub-rule 66(C) and Rules 69 and 70. In such cases, the power to order disclosure always rests with the Trial Chamber.

29. Lastly, it should be emphasised that the objective which the Defence is seeking in its motion - not illegitimate in and of itself - may be reached by other means:

- first, by reminding the Prosecutor of her obligations in respect of disclosure of exculpatory evidence (Rule 68), obligations which must be satisfied under the authority and control of the Trial Chamber.

- next, by indicating that, at any stage of the proceedings, and, more specifically, at trial, the Defence may request that the Trial Chamber produce evidence taken from the *Rajić* proceedings which, in the Judges' view, might serve as exculpatory for the accused. This right however is subject to the two-fold condition that the production of the materials not be protected by confidentiality at the time of the request and that the Defence present a *prima facie* case which would allow the Trial Chamber to evaluate the exculpatory nature of the materials whose production is being requested.

d) Evidence in connection with the Indictments of Zoran Marinić and of Zoran Kupreškić (Point J):

30. As regards a request analogous to the previous one, the Trial Chamber opts for the same solution; it reminds the Prosecutor of her obligations under Rule 68 and reserves for itself the right to raise the question at trial under the same conditions as those specified above.

B. Points still pending:

31. The hearings have brought out remaining points on which agreement has not been reached. These were identified in the initial Motion of the Defence as follows:

B. Statements of the Accused;
C. Witness Statements;
F. Exculpatory Evidence;
H. Evidence Gathered by Bosnia and Herzegovina;
L. Databases.

The legal character of the arguments between the parties permits the Trial Chamber to group together, first, points B and C and, second, points F and L.

The Trial Chamber will deal separately with point H and then review the request seeking the nullification of the provisions limiting the right of the accused to examine the inculpatory evidence and the disclosure of the documents referred to in Sub-rule 66(A).

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1. Statements of the Accused and the Witnesses

32. The disagreement revolves around the interpretation which should be given to Sub-rule 66(A) of the Rules:

Rule 66
Disclosure by the Prosecutor

> (A) The Prosecutor shall make available to the defence, as soon as practicable after the initial appearance of the accused, 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 or from prosecution witnesses. The final version of the statement of the accused or a witness audio-recorded at the time of the interview, as well as a translation into one of the working languages of the Tribunal, shall be provided to the defence.

The question is two-fold: it concerns both the source of the statements and their form.

- Must the statements (of the accused or the witnesses) come only from the Office of the Prosecutor and have been collected only by her?

- Must the statements be "official", that is, given under oath or at least "signed and recognised by the accused" (or the witnesses)?

33. In order to answer each of the questions, both parties referred to previous decisions rendered by the Tribunal in the *Tadic*[3] and *Delalic*[4] *cases.*

In this instance, the reference to the *Tadić case* is not relevant. The disagreement, in fact, concerned only one letter which, it is true, was not admitted as a statement of the accused, but by not admitting it, the Trial Chamber has merely endorsed the agreement of the parties.

The precedent set by the *Delalić case* however must be considered. Asked to render an opinion on an analogous disagreement concerning the interpretation of Sub-rule 66(A), Trial Chamber II stated on this specific point which is of interest to us that

[3] English version of the provisional transcript of the hearing of 24 October 1996, morning, p. 5673, Case no. IT-96-1-T.
[4] See Decision of 26 September 1996, Case no. IT-96-21-T, note 1.

"this part of the Rule [66] requires the Prosecution to disclose all statements of the accused that it has in its possession. This is a continuing obligation[5]."

34. A literal reading of the Rules does not permit a different interpretation because such would restrict the rights of the accused as expressly indicated in Article 21 of the Statute.

35. The reference to the legal standards in effect in developed legal systems - such as those of the United States or France - leads to the same conclusion, namely, that the accused must have access to his own statements no matter how the Prosecution has obtained them.

In this respect, it should be noted that Article 16 (a) (1) (A) of the United States Criminal Code whose wording is very similar to that of Rule 66, states:

> "Upon request of a defendant the government must disclose to the defendant and make available for inspection, copying, or photographing: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government."

Although in French criminal proceedings the issue does not arise in the same terms because an investigation (*instruction)* is conducted by a specialised judge seeking exculpatory or inculpatory material, the principle posited by the French Code of Criminal Procedure still remains full disclosure of all information at all times (See *inter alia* Article 114, paragraph 3 of that Code)[6].

36. The case-law of both those countries has not restricted the scope of the provisions which are highly protective of the rights of the accused.

37. The principles identified in support of the interpretation of Sub-rule 66(A) lead the Trial Chamber to the decision that all the previous statements of the accused

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[5] Id. p.5.

[6] Article 114, para. 3 of the CCP: "The information shall be made available to the attorneys four working days at the latest before each time the person being held in custody is questioned or after each time the *partie civile* (plaintiff) is questioned. After the first appearance of the person being detained or the first time the *partie civile* (plaintiff) is questioned, the information is also made available to the attorneys during working days, subject to the requirements of the proper operation of the investigating Chamber (...)." (unofficial translation).

which appear in the Prosecutor's file, whether collected by the Prosecution or originating from any other source, must be disclosed to the Defence immediately.

The same interpretation of Sub-rule 66(A) leads the Trial Chamber to draw no distinction between the form or forms which these statements may have. Moreover, nothing in the text permits the introduction of the distinctions suggested by the Prosecution between "the official statements taken under oath or signed and recognised by the accused" and the others.

38. Furthermore, the Trial Chamber considers that the same criteria as those identified in respect of the accused's previous statements must apply *mutatis mutandis* to the previous statements of the witnesses also indicated in Sub-rule 66(A).

39. Nonetheless, the Trial Chamber subjects its decision to two conditions:

- the first derives from Sub-rule 66(C) which permits the Prosecutor to apply to the Trial Chamber for relief from the obligation to disclose evidence which may prejudice further or ongoing investigations or be contrary to the public interest or affect the security interests of any State;

- the second is based on Sub-rule 70(A) which provides an exception from the disclosure obligation for reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case.

40. The Trial Chamber considers that this provision is applicable to the decision at hand.

It therefore finds that the notes of the investigators (stipulated in C1 of the Defence Motion of 26 November 1996) as well as the internal reports at the Office of the Prosecutor from any expert witness (stipulated in C4 of that same Motion) must fall within the scope of Sub-rule 70(A) and not be the subject of any disclosure or exchange. The books, articles, biographies or prior testimony of those same expert

witnesses (stipulated in C4 of the Motion) must be considered as public property and need not be disclosed.

41. Lastly, in respect of the request specified in C5 which covers "all reports, affidavits, or written statements prepared by any Tribunal investigator who will testify at trial ...", the Trial Chamber considers that the time is not ripe to rule on this point and reserves its decision for the trial on the merits.

2. Exculpatory Evidence (Points F and L):

Rule 68 of the Rules states:

Rule 68
Disclosure of Exculpatory Evidence

> The Prosecutor shall, as soon as practicable, disclose to the defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence.

As indicated above, on the basis of this Rule, the Defence asked for:

1) disclosure of all exculpatory evidence in the possession of the Prosecution;

2) disclosure of the nature and location of all exculpatory materials of which it has knowledge but which are not in its possession.

In its Motion, the Defence produces a detailed exhaustive list of 12 points, no. 1 sub-divided into 12 sub-points and no. 2 into 26 sub-points, that is, a total of 50 types of materials it considers potentially exculpatory for the accused.

In its Motion, the Defence asserts that it knows of the existence of, or has reasons to believe that the Prosecutor possesses, exculpatory evidence which she has not disclosed.

44. It should be first noted that, in respect of the facts, the Defence claims that several of its specific motions were either ignored or specifically rejected by the

Prosecution; the Prosecution, however, refers to several instances of disclosure which it made, specifically, in November and December 1996.

45. The general problem stemming from this disagreement gives rise to several questions:

- Does the Prosecution have in its possession all or some of the materials listed by the Defence? Does it have the obligation to respond to the Defence? Must it specify that the materials it would admit to possessing might be considered exculpatory for the accused? What would be the sanction imposed should it fail to honour its obligation?

- Does the Defence which does not base its Motion on Sub-rule 66(B) - which would entail the obligation of mutual disclosure as required by Sub-rule 67(C) - have a general and unilateral right to inspect the Prosecutor's file by demanding and obtaining extensive and unrestricted disclosure? If the Defence is not accorded such a right, can one determine which criteria permit the accused to gain knowledge of the materials which might wholly or partially exonerate him without prejudicing the rights which are inherent to prosecution?

46. These two questions and their corollaries cause the Trial Chamber to question the scope of Rule 68 of the Rules and the procedures for implementing its provisions.

47. There is no doubt that the obligation to disclose evidence which might exculpate the accused is the responsibility of the Prosecutor alone, if for no other reason than the fact that she is the one in possession of the materials.

Seen from this perspective, in respect of all the materials mentioned by the Defence, the Prosecutor must state:

- whether the materials are in fact in her possession;
- whether the materials contain exculpatory evidence;
- whether she believes that although she does possess exculpatory materials, Sub-rule 66(C) or any other relevant provision require that their confidentiality be protected.

The Trial Chamber does not consider it sufficient that the Prosecutor declares that she "recognises her obligations under the Rule and has complied with them."[7]

Taking into account not only the fact that the trial will soon commence but also the material constraints with which the Prosecutor will be confronted, the Trial Chamber orders her to respond to the Defence as quickly as possible, by 14 February 1997 at the latest. If necessary, the Trial Chamber will exert its control over the proper application of this decision.

48. Does that mean, however, that a general right of access to the Prosecutor's files should be granted to the Defence? If the Trial Chamber ordered disclosure of all the requested documents and exhibits to the Defence without setting into place procedures for implementing the order, that general right would be the indirect result.

It is true that although Rule 68 places the burden of unrestricted obligation on the Prosecutor through the general nature of its wording - "disclose to the defence the existence of evidence known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused" -, as a corollary, it grants a right to the Defence which is itself unrestricted.

49. The Trial Chamber, however, chooses not to go down this path.

First, this is because the Statute and the Rules define the respective rights of the parties - the Prosecution and the accused - *inter alia* in respect of disclosure of the evidence for which the Tribunal must ensure balanced respect.

Next, because the Defence has confronted it with so broad a request and such a general "right of inspection," the Trial Chamber must only draw the parallel between Rule 68 and Sub-rule 66(B) of the Rules.

Rule 66
Disclosure by the Prosecutor

[7] Response of the Prosecutor, p. 15.

> (B) The Prosecutor shall on request, subject to Sub-rule (C), permit the defence to inspect any books, documents, photographs and tangible objects in his custody or control, which are material 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.

To be sure, the Defence has clearly stated that its request does not fall within the ambit of this rule and thus evades its discovery obligation to the Prosecutor which would derive through the application of Sub-rule 67(C).

Nevertheless, the border between the evidence referred to in Sub-rule 66(B), identified as "material to the preparation of the defence," and the evidence identified as that which "in any way tends to suggest the innocence or mitigate the guilt of the accused" is tenuous. There can be no doubt that the first necessarily includes the second.

The Trial Chamber would point out however that it has the responsibility of ensuring that the balance of the respective rights of the parties in this matter be honoured.

Thus, if the Trial Chamber notes that the Defence does not wish to honour the need for balanced reciprocal disclosure provided for in Sub-rules 66(B) and 67(C), it must then be particularly vigilant as to limiting the nature and extent of the request for exculpatory evidence from the Prosecutor's file because the accused has made such a scrutinising request compelling her to produce evidence.

As regards Sub-rule 66(B), like Trial Chamber II in the *Delalić* decision - to which, moreover, both parties have referred - which demanded that the Defence demonstrate the existence of the presumption of the Defence's need to obtain the various pieces of evidence, this Trial Chamber also considers that, after having previously shown that they were in the possession of the Prosecutor, the Defence must present a *prima facie* case which would make probable the exculpatory nature of the materials sought.

50. In conclusion, it is the decision of the Trial Chamber that:

1. The Prosecution alone is responsible for disclosing to the Defence the evidence which might exculpate the accused fully or partially. It is responsible for doing so under the control of the Trial Chamber which will duly respond to an established failure to comply, particularly at the trial.

2. If the Prosecution fulfils its above indicated obligations but the Defence considers that evidence other than that disclosed might prove exculpatory for the accused and is in the possession of the Office of the Prosecutor, it must submit to the Trial Chamber all *prima facie* proofs tending to make it likely that the evidence is exculpatory and is in the Prosecutor's possession. Should it not present this *prima facie* proof to the Trial Chamber, the Defence will not be granted its request to have the evidence disclosed. In addition, depending on the breadth of the request, the Defence risks having its request interpreted as being subject to Sub-rule 66(B) and thus being subject to the burden of its obligation under Sub-rule 67(C).

51. As regards the Defence motion in respect of the disclosure of the databases (Point L), the Trial Chamber notes a certain evolution in the arguments of the Defence. In its latest arguments, the Defence continues to request that the Office of the Prosecutor open access to the databases but concedes that the disclosure may be made under the authority of an ombudsman designated by the Trial Chamber.

In support of its argument, the Defence states that exculpatory evidence most likely appears on electronic media and that if it did not receive that material, a dangerous imbalance contrary to Article 21 of the Statute of the Tribunal would be created to its detriment.

The Prosecution responds that this is a request for the right "to rummage through (her) electronic database" and that the accused is thus seeking to obtain the benefit of Sub-rule 66(B) while at the same time attempting to avoid her concomitant obligation under Sub-rule 67(C).

52. The Trial Chamber would note that the disagreement is formulated in the same terms as those of the question which has just been dealt with regarding the exculpatory evidence: the legitimate concern of the Defence to have disclosed to it all

the potentially exculpatory evidence and the protection of the right to proceed with the prosecution.

It would note that the Defence is conscious that its request is extraordinary by the fact that it is also requesting the designation of an ombudsman.

The position of the Trial Chamber is the same as the one it adopted regarding the exculpatory evidence, and it considers that there is no need for such a designation.

3. Evidence Gathered and Provided to the Prosecution by BiH

53. The dispute between the parties centres on how reliable the evidence gathered and provided to the Prosecution by Bosnia and Herzegovina should be considered. Referring to what happened in the *Tadić case* during the testimony of Witness "L", the Defence expresses its concern that the evidence which that country submitted was wholly or partly obtained by completely fabricated or coercive means or are the result of some other abuse.

54. The Trial Chamber considers that at this stage of the proceedings the Defence is not in a position to ascribe such intrigues to Bosnia and Herzegovina.

It agrees with the Prosecutor that the review of the questions regarding coercion, invention or misconduct in respect of evidence submitted to the Prosecutor by the Government of Bosnia and Herzegovina must take place during the trial on the merits.

4. Nullification of the provisions restricting the right of the accused to review the evidence against him and the disclosure of the materials indicated in Sub-rule 66(B).

55. As regards the request seeking nullification of the provisions restricting the right of the accused to review the evidence against him and the disclosure of the materials indicated in Sub-rule 66(B), the three Judges of the Trial Chamber consider that in this case they are neither qualified nor competent to rule on whether the

provisions of the Rules of Procedure and Evidence conform to international customary law.

III DISPOSITION

FOR THE FOREGOING REASONS,

56. Trial Chamber I

Ruling in public and *inter partes*,

PURSUANT to Rules 66 and following of the Rules,

NOTES the agreement of the parties on Points E and K indicated in the Motion of the Defence,

ORDERS the Prosecutor to disclose to the Defence the list of the names of the witnesses which she intends to call at trial (Point D) by 1 February 1997 at the latest;

REJECTS, as the case stands, the requests in respect of the lack of evidence (Point G) and of the evidence in the Prosecutor's possession relating to the indictment of Rajić (Point I) as well as to the evidence relating to the other indictments of Marinić and Kuprešić (Point J);

ORDERS the Prosecutor to disclose to the Defence all the previous statements of the accused and the witnesses (Points B and C) except, however, for the notes of interviews of the investigators, internal reports in the Office of the Prosecutor and previous statements from any expert witness, as well as books, articles and biographies of those same witnesses;

REJECTS, as the case stands, the request for disclosure of all reports, affidavits or written statements from any investigator of the Tribunal who will testify at trial;

REMINDS the Prosecutor of her obligation pursuant Rule 68 of the Rules in respect of exculpatory evidence, whether in document or written form or included in the databases, and orders that for all evidence mentioned by the Defence the Prosecutor shall state whether or not she in fact has that evidence or whether the evidence

contains exculpatory material or whether she considers that although she does have exculpatory evidence, its confidentiality must be protected, as provided for in Sub-rule 66(C) or any other relevant provision (Points F and L); orders the Prosecutor to respect these obligations by 14 February 1997 at the latest;

STATES that there is no reason to designate an ombudsman (Point L);

REJECTS, as the case stands, the request in respect of evidence gathered and provided to the Prosecutor by Bosnia and Herzegovina (Point H);

STATES that there is no reason to rule on whether the provisions of the Rules of Procedure and Evidence conform to customary international law.

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

Done this twenty-seventh day of January 1997
At The Hague
The Netherlands

[signed]

Claude Jorda
Trial Chamber I