



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: 25 August 1997
English

Original: French

IN THE TRIAL CHAMBER

Before: Judge Claude Jorda, Presiding
Judge Fouad Riad
Judge Mohamed Shahabuddeen

Registrar: Mr. Jean-Jacques Heintz, Deputy Registrar

Decision of: 25 August 1997

THE PROSECUTOR

v.

TIHOMIR BLAŠKIĆ

**DECISION ON THE DEFENCE MOTION TO PRECLUDE TESTIMONY
OF CERTAIN PROSECUTION WITNESSES BASED UPON THE PROSECUTION'S
VIOLATION OF THE TRIBUNAL'S ORDER COMPELLING THE PRODUCTION
OF DISCOVERY MATERIALS**

The Office of the Prosecutor:

Mr. Mark Harmon
Mr. Gregory Kehoe
Mr. Andrew Cayley

Defence Counsel:

Mr. Anto Nobilo
Mr. Russell Hayman

I. Background

1. On 25 June 1997, the Defence submitted to the Trial Chamber a Motion to preclude testimony of 53 Prosecution witnesses based upon the Prosecution's failure to comply with the Tribunal's Decision of 27 January 1997 compelling the production of discovery materials (hereinafter the "Motion"). The Prosecutor responded to the Motion on 16 July 1997, and submitted an additional response on 18 July 1997.

The Trial Chamber heard the parties *in camera* on Monday, 28 July 1997. At the conclusion of the hearing, the parties modified their positions.

2. The Defence, noting that the Prosecution had submitted to it diaries kept at the time by witnesses P4 and P5, requests:

- 1) the Prosecutor to submit both to the Trial Chamber and to the Defence maps (witness P3) and radio logs (witnesses P7 to P14), documents which the Defence considers to be "prior statements";
- 2) the relief provided by the Trial Chamber for the prejudice suffered because of the tardy disclosure of the diary of witnesses P4 and P5;
- 3) the exclusion of the testimony of witnesses P24 and P25 because it was not in a position to review their prior statements before questioning them on account of the Prosecution's failure to act in a timely manner;
- 4) the Prosecutor to give a minimum of 14 days' notice before the hearing of the remaining witnesses;
- 5) the Prosecutor to submit each Friday a schedule containing the names of the witnesses to be called during the following week;
- 6) the imposition of sanctions on the Prosecutor for failure to comply with discovery obligations.

3. The Prosecutor argued as follows:

- 1) the Prosecutor acted in good faith in attempting to meet her discovery obligations;

- 2) assuming that the Prosecutor failed to honour some of her discovery obligations, it is the burden of the Defence to show that they have been prejudiced from that failure;
- 3) certain documents (diary, maps, and radio logs) requested by the Defence are not “statements” within the meaning of Sub-rule 66(A) of the Rules of Procedure and Evidence (hereinafter “the Rules”);
- 4) the Defence should be subject to the same obligation to disclose the list of witnesses it plans to call;
- 5) most of the witnesses, and witnesses P24 and P25 in particular, will not be called to testify before November 1997.

4. In the light of its Decision of 27 January 1997, the Trial Chamber will consider whether the Prosecutor has complied with her obligations and, if not, what sanctions, if any, might be imposed.

II. The notion of “prior statements” in respect of the disclosure of certain documents

5. In its Motion, the Defence bases itself solely on Article 21(4)(b) and (e) of the Statute of the Tribunal (hereinafter “the Statute”) and Sub-rules 66(A) and 67(A)(i) of the Rules in order to obtain the discovery of various sorts of documents: maps, personal diaries and radio logs.

6. The Statute guarantees to the accused a minimum number of rights, *inter alia* “to have adequate time and facilities for the preparation of his defence [...]” (Article 21(4)(b)) and “to examine or have examined the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him” (Article 21(4)(e)).

Under Sub-rule 66(A), which deals with the parties’ discovery obligations, the Prosecutor’s discovery obligation includes *inter alia* the obligation to communicate “all prior statements obtained by the Prosecutor from the accused or from the Prosecution witnesses” (paragraph 37 of the Decision of 27 January 1997).

7. In its Decision, the Trial Chamber interpreted this to mean “all previous statements of the accused which appear in the Prosecutor’s file, whether collected by the Prosecution or originating from any other source [...]”, and to mean also that there is no need “to draw [any] distinction between the form or forms which these statements may have”(paragraph 37 of the Decision of 27 January 1997).

8. The Trial Chamber notes, however, that Sub-rule 66(B) of the Rules provides a course of action which would have permitted the Defence, at its request, “to inspect any 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 [...]” This course of action is subject to reciprocity pursuant to Sub-rule 67(C). The Defence did not avail itself of this procedure.

The Trial Chamber must therefore consider the admissibility of the Defence’s requests in light of the provisions of Sub-rule 66(A).

A. Witness P3 (maps)

9. The Defence asserts that during the hearing it learned that the witness had submitted to the Prosecution 10 maps bearing hand-written notes which he had made. Although the witness provided a copy of these maps during his meeting with the Defence counsel, the Defence considers that, because it did not have sufficient time to do so, it was unable to ask all the relevant questions.

10. The Trial Chamber considers that, even with the hand-written notes, the maps were not a “prior statement” within the meaning of Sub-Rule 66(A) and, for that reason, rejects the Defence’s request on this point.

B. Witnesses P4 and P5 (personal diary)

11. The Defence learned during interviews with those witnesses that they had kept a personal diary while they were serving in Bosnia. In its Motion, the Defence asked the Prosecution to disclose those documents, which was done. During the hearing, the

Defence claimed to have suffered a prejudice because the documents were submitted late, and, in this case, that it was unable to question the witnesses in a manner most favourable to the accused.

12. The Trial Chamber considers that a diary cannot be construed as a “prior statement” within the meaning of Sub-rule 66(A) and, for that reason, the Prosecution was not required to disclose them. Furthermore, the prejudice which the Defence alleged has in no way been demonstrated.

C. Witnesses P7 to P14 (radio log)

13. The Defence learned that in the course of their interviews with the Prosecutor these witnesses were able to refresh their memory of certain events by consulting a radio log which their unit kept during its active service in Bosnia and Herzegovina.

14. The Trial Chamber notes that the radio log does not belong to the witnesses and that its content was not an integral part of their statements. According to the Prosecution, the witnesses, in fact, restricted their use of the log to refreshing their memory, an assertion which the Defence did not challenge. The Trial Chamber considers that the radio log cannot be interpreted as a “prior statement” within the meaning of Sub-rule 66(A). The Prosecutor is not required to produce a copy of the log to the Defence.

III. Discovery obligation and timely discovery

15. As regards witnesses P24 and P25, the Prosecutor admitted her responsibility for late discovery but emphasised her good faith - which the Defence did not challenge - in attempting to comply with her discovery obligations. Among other things, she explained that she was compelled to review 511,614 pages of information in her possession. She also indicated that the two witnesses would not be called to appear before November.

16. The Trial Chamber notes that the statements of the witnesses were disclosed to the Defence, and finds that this was done in sufficient time for it to prepare its cross-examination.

17. The Trial Chamber rejects the Defence request on that point.

IV. Lists of witnesses who will appear and appearance of witnesses

A. Lists of Witnesses

18. The Defence considers that the Prosecutor should submit every Friday a schedule with the lists of the witnesses to be called the following week. The Prosecutor requested that a reciprocal disclosure obligation be imposed on the Defence.

19. Taking account of Sub-Rule 67(A) of the Rules and with a view to ensuring that the conduct of the proceedings is as speedy as is consistent with a fair hearing, the Trial Chamber directs the Prosecutor to indicate to it and to the Defence within a minimum of two working days in advance the list of the witnesses it intends to call during the following days.

B. Appearance of the witnesses

20. During the hearing, the Trial Chamber decided that one or several of the witnesses P11 to P14 may appear before the Chamber from this day forth. The Trial Chamber notes that the other witnesses will appear, at the earliest, within a time period which is satisfactory to the Defence and which will guarantee its rights.

V. DISPOSITION**21. FOR THE FOREGOING REASONS,**

Trial Chamber I,

Ruling in public and *inter partes*,

PURSUANT to Article 21(4) (b) and (e) of the Statute and Rules 66 and 67 of the Rules of Procedure and Evidence,

CONSIDERING the Motion of the Defence dated 25 June 1997 to preclude testimony of certain Prosecution witnesses based upon the Prosecutor's violation of the Tribunal's Order requiring the production of discovery materials;

CONSIDERING the Prosecutor's opposition to the Motion dated 16 July 1997 and her addendum of 18 July 1997,

CONSIDERING the modification of the parties' claims at the hearing of 28 July 1997;

REJECTS the requests relating to the disclosure of maps (witness P3) and radio logs (witnesses P7 to P14) ;

NOTES the Prosecutor's submission to the Defence of the personal diaries of witnesses P4 and P5 and notes that the prejudice alleged by the Defence because of the tardy disclosure of those documents has not been demonstrated and therefore **STATES** that no relief on that point is required;

REJECTS, the Defence request in respect of witnesses P24 and P25;

ORDERS the Prosecutor to indicate to the Chamber and to the Defence within a minimum of two working days prior to the date scheduled for their appearance the list of the witnesses' names whom it intends to call the following week.

AUTHORISES, however, the appearance before the Trial Chamber of one or several of the witnesses P11 to P14 from this day forth.

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

Done this twenty-fifth day of August 1997

At The Hague

The Netherlands

Claude Jorda,

Presiding Judge, Trial Chamber I

[SEAL OF THE TRIBUNAL]