



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-T

Date: 13 November 1997

English

Original: French

IN THE TRIAL CHAMBER

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

Registry: Mr. Jean-Jacques Heintz, Deputy Registrar

Decision of: 11 November 1997

THE PROSECUTOR

v.

TIHOMIR BLAŠKIĆ

**DECISION OF TRIAL CHAMBER I
ON THE PROSECUTOR'S MOTION
FOR VIDEO DEPOSITION AND
PROTECTIVE MEASURES**

The Office of the Prosecutor:

**Mr. Mark Harmon
Mr. Andrew Cayley
Mr. Gregory Kehoe
Mr. William Fenrick**

Counsel for the Accused:

**Mr. Anto Nobile
Mr. Russell Hayman**

I. Procedural background

1. On 10 June 1997, the Prosecutor submitted to the Trial Chamber a motion “for video deposition and protective measures for Witness A” (hereafter the “motion”). The Defence responded to the request with an opposition dated 17 June 1997. The Prosecutor on 4 July 1997 submitted a supplemental brief in support of her motion and a declaration by one of the members of her Office in support of her supplemental brief. The brief was accompanied by a letter from the Government of the country of which A is a national (hereafter “Government concerned”) containing conditions for the witness to be heard. On 1 August 1997 the Defence responded to the Prosecutor’s Brief with a supplemental brief.

The Prosecutor, on 20 August 1997, responded to the Defence’s brief with a “Prosecutor’s reply to defence supplemental brief in opposition to the motion for video deposition”.

2. In her initial motion, the Prosecutor asked the Trial Chamber to order the taking of a video deposition and the imposition of limited protective measures in relation to Witness A’s testimony, pursuant to Rules 54, 70, 71, 75 and 79 of the Rules of Procedure and Evidence (hereafter “Rules”).

3. The Prosecutor emphasised that the Government concerned would not waive its immunity or give its consent for A to testify unless the Chamber approved the procedure being requested.

4. The Defence, for its part, considered that the Prosecution had been unable to establish “exceptional circumstances” in the sense of Rule 71 which would warrant that A depose by video rather than testify in person in court. The Defence went on to state that the Prosecution had not demonstrated that the protective measures it was seeking for this witness were justified under Rule 70(B) or any other rule. The Defence asked that, if he was to testify at the trial, it might conduct a full cross-examination of Witness A and have access to all the material used directly or indirectly by him to prepare his testimony.

5. The Chamber heard the parties and a representative of the Government concerned in court on 23 June 1997. It noted that there was no longer any disagreement between the parties in respect to holding a closed hearing, rather than a video conference, during which A would testify. However, for the Prosecution, A’s questioning would remain subject to the conditions laid down by the Government concerned, namely:

a. Witness A’s testimony must be presented to the Tribunal during a closed session and in the presence of representatives of the Government concerned;

b. The counsel for the Prosecution would restrict the questions of his direct examination to those submitted prior to the hearing to the Government concerned and the Defence;

c. The Defence’s cross-examination and any re-direct examination by the Prosecution would be restricted to the matters raised during the Prosecutor’s direct examination;

d. The provisions of Rule 70 would apply to Witness A’s testimony. With the consent of the counsel representing the Government concerned, Witness A might decline to answer questions on grounds of confidentiality pursuant to Rule 70(D) or if they were outside the scope of those submitted in advance by the Prosecution.

e. If the Trial Chamber asked that the testimony taken in closed session be presented in open court the Government concerned would like to revise the transcripts to expunge any classified information deemed to be sensitive and any matters other than the substantive questions and answers. Thus, no transcript or similar written document would be made public without the prior written consent of the Government concerned.

The Defence objected to the conditions thus set on the grounds that they would constitute an unjustified and unjustifiable infringement of its rights. The Defence argued in particular that the information which the Prosecutor wished to move into evidence pursuant to Rule 70, had not been obtained within the purview of that rule; that the Prosecutor had obtained that information outside its purview; and that she had sought to use that rule to restrict the Defence's fundamental right to cross-examine Witness A.

6. The Chamber noted that the conditions set by the Prosecution at the request of the Government concerned impacted on the manner in which this hearing was to be conducted, in particular with regard to the limits on cross-examination and to the faculty Witness A would be granted to decline from answering on the grounds of confidentiality.

7. The form of the hearing depended expressly on Rule 70 and raised the issue of whether the conditions for its application, and in particular the conditions in Sub-rule 70(B), were satisfied in this instance.

8. Should they be satisfied, then the issue would be whether the provisions in Sub-rule 70(D) must apply *ipso facto* with all the ensuing consequences for the rights of the accused at the time of cross-examination or whether, on the contrary, these provisions relative to, as the title indicates, "matters not subject to disclosure" must be construed especially strictly in order to leave the accused the faculty of exercising as fully as possible the rights acknowledged him by the Statute. Thus, the Chamber, the guarantor of balance between the rights of the parties, would be exercising control on the basis of the powers vested in it when the witness appears

9. To be able to address these questions in this case, the Chamber would review, first, the conditions for Rule 70 to apply, and, secondly, the exercise of the rights of the accused in the context of Rule 70 in relation to direct examination and cross-examination, to any documents which might be produced during the deposition, and to an open hearing and the right to a fair trial.

II. The conditions for Rule 70 to apply

10. The Chamber points out that, as its title indicates, Rule 70 deals with matters not subject to disclosure pursuant to Rules 66, 67 or 68. The Chamber would like to underscore 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. This exceptional but strictly delineated right has moreover been recognised *mutatis mutandis* for the accused by Sub-rule 70(F) when it was amended in July 1997.

11. The obligations in Rule 70 vary depending on the stage of the proceedings. Sub-rule (B) bears on the pre-trial stage, whereas (C) and (D) relate to the production of evidence at trial.

12. The “information under this Rule” mentioned in (D) refers to the information as described in (B). The latter requires that the following conditions be met:

- The information must be in the Prosecutor’s possession;
- It must have been provided confidentially and be used solely for the purpose of generating new evidence.

A. The information under Rule 70(B) must be in the Prosecutor’s possession

13. The Chamber notes that the information provided by Witness A has been transmitted to the Prosecution and that thereby the first condition of Sub-rule 70(B) has been met.

B. The condition of confidentiality in Rule 70(B)

14. In regard to the condition of confidentiality, the Chamber considers that, contrary to the Defence’s argument, Sub-rule 70(B) does not suggest that it is the Prosecutor who is seeking that the information gathered be kept confidential but rather that it is the person or entity who has provided it who is stipulating a condition to that effect. This is also why Rule 70(B) makes no reference whatsoever to a request for information being kept confidential prior to the witness’ questioning.

15. In addition, the Defence argument that the publication of a book written by the witness means that nothing confidential is involved is not warranted either if the initial information includes access to cables and other documents not included in the book published. The Chamber notes that, according to the declaration by a member of the Office of the Prosecutor, the content and precision of the information the witness was privy to went beyond the contents of the book written by the witness and that confidential, classified information was involved. In this respect, it is neither for the Chamber nor the parties to determine whether the information in the possession of the Prosecutor is confidential or not; the person or entity having the information is the sole judge of what was deemed to be confidential and what must be kept so in whole or in part.

Thus, nothing supports the Defence’s argument on this point. To the contrary, the Prosecutor’s argument that she could not know how she would use the information prior to even gathering it under Rule 70, seems well-founded.

16. The Chamber considers in the case in hand that the information has been obtained under Rule 70 and that the condition of confidentiality is satisfied.

C. Use of confidential information solely for the purpose of generating new evidence

17. The Prosecutor argues that the information she has received confidentially under Sub-rule 70(B) could be used as evidence under Sub-rules 70(C) and (D) whether or not it has been used solely for the purpose of generating new evidence as contemplated under (B). In other words, it is sufficient that the first of the two conditions in Sub-rule 70(B) be satisfied

for Sub-rules 70(C) and (D) to apply; whether or not the second condition is met is immaterial.

18. The Defence argues for its part that Sub-rules 70(C) and (D) apply only to the initial information which has been provided confidentially and used solely for the purpose of generating new evidence, and that the two conditions in Sub-rule 70(B) have not been fulfilled in this instance.

The Defence feels that by requiring the information to meet this twofold condition the intention of the drafters of the Rules had been to apply to the initial information alone the provisions restricting the rights of the Defence.

19. In the case in hand, the Chamber considers that the fact that the Prosecutor had reportedly spoken to Witness A before speaking to the holder of the information is irrelevant, and, all the more so, insofar as Witness A is the author of the information in question. The Chamber notes that the initial information (including access to confidential documents) has enabled the Prosecutor to obtain from Witness A information which Witness A might otherwise have been unwilling or unable to provide. Therefore, the initial information has been used "solely for the purpose of generating new evidence" in the sense of Sub-rule 70(B).

20. Thus, even if the Defence is correct in construing that Sub-rules 70(C) and (D) relate only to initial information provided confidentially and used solely for the purpose of generating new evidence, the Chamber considers that the information involved meets this twofold condition and that Sub-rules 70(C) and (D) accordingly apply to that information.

21. It is for this reason that there is no need for the Chamber to consider any further the question of interpretation raised. Conversely, the issue is what should be understood by "initial information" to ascertain the rules governing its production at trial.

D. Definition of initial information

22. The Chamber notes that the initial information referred to in Rule 70 is information which has been provided confidentially and has permitted or permits further investigation. It might include "any testimony, document or other material" as suggested by Sub-rule 70(C). The initial information might become evidence if it is introduced as such at the trial or it might generate new evidence. In the latter case, in principle new evidence would not be entitled to protection under Rule 70, as the latter's provisions protect the initial information and its origin but not any new evidence collected. The only reservation relates to the closeness of the new evidence collected to the initial information or its origin. If the connection is so close that, in particular, it would permit the origin of the initial information to be identified and thus jeopardise the principle of confidentiality in Sub-rule 70(B), the evidence collected must be entitled to the same protection as the initial information. It is for the Chamber to ensure this within the strict bounds of the requisite respect of the rights of the defence.

23. In conclusion, the Chamber considers that the conditions in Sub-rule 70(B) have been satisfied and it grants the Prosecution's motion for Witness A to appear as stated in Sub-rule 70(D). The witness could thus provide as evidence the confidential information in the Prosecutor's possession which his Government's authorities will have authorised him to disclose. Lastly, subject to what follows below, the witness might invoke grounds of confidentiality under (D) if the parties' questions relate to an area deemed sensitive.

III. The exercise of the rights of the accused under Rule 70 and the Chamber's powers

24. The Chamber will now address in turn the form of the examination and cross-examination, the issue of any documents which might be produced during the examination, the disclosure of the proceedings, and the overall control it plans to apply.

A. Conduct of direct examination and cross-examination

1. General limits to the cross-examination

25. One of the Prosecution's conditions, set at the request of the Government concerned, that Witness A testify before the Chamber, restricts the scope of the Defence cross-examination: "The Defence's cross-examination and any Prosecution re-direct examination will be limited to matters raised as a part of the Prosecution's direct examination". Furthermore, applying Sub-rule 70(D) enables Witness A to decline to answer certain questions on grounds of confidentiality, which constitutes an additional restriction on the cross-examination.

The Defence argues that granting such a motion to limit the cross-examination would be a patent infringement of the provisions of Article 21 of the Statute relative to the rights of the accused. It further notes that there is no rule stipulating that the Defence's right to cross-examine witnesses could be limited to matters raised by the Prosecution.

26. The Prosecutor's argumentation is based on the overall equilibrium laid down in Rule 70 in that the limitation on cross-examination is imposed not only on the Defence but on both parties and the Chamber. The fact is that the questions which the Prosecutor wishes to put to Witness A must be submitted in advance to the Government concerned and the Defence would be entitled to question Witness A freely within the confines as laid down by the scope of the direct examination.

27. The Chamber notes that, to a large extent, the Prosecution, even should it feel so inclined, holds no sway over the conditions under which it must conduct its direct examination. The first of the restrictions laid down relates to the confidential nature of the questions involved, which is at the very foundation of the Prosecution's motion. This confidentiality serves primarily to protect the higher interests of the origin of the information, in this instance the national security of the Government concerned. Thus, the Chamber considers that if the Defence's ability to react is reduced, the Prosecution's ability to act is reduced to a similar degree.

28. Incidentally, the Chamber points out that national procedures vary and that all do not leave the field wide open for cross-examination. Far from it, it is frequent for limits of this kind to be set, while sometimes they are tempered by the fact that the questions regarded as relevant by the judge could be asked even when appearing to the party having conducted the direct examination to lie outside the latter's scope.

29. The Chamber considers in effect that, in accordance with Sub-rule 70(E), within the bounds of the direct examination, the cross-examination must be allowed to be exercised fully. In this instance, the Prosecution chose to present a witness and has the initiative in

respect of questions. The Chamber is of the view that, within that framework, the Judges must exercise fully their control pursuant to the Statute and the Rules.

30. Finally, the Chamber decides that the Defence's cross-examination must be limited to the scope of the direct examination, and that it would be for the Chamber to rule, as and when appropriate, on the relevance of the matters raised. The limits on cross-examination are imposed in the same way to the Prosecution's re-direct examination.

2. Prior submission of the Prosecution's questions to the Government concerned

31. For the reasons outlined above, the Chamber grants the Prosecution's motion, based on the request from the Government concerned, that the Prosecution's questions be submitted for approval to that Government, prior to hearing the witness; this will limit to a certain extent the scope of direct examination and by extension the scope of cross-examination.

3. Presence of representative of the Government concerned

32. The Chamber also accedes to the Prosecution's request for a representative of the said Government to be present when Witness A is heard. However, should the representative want to make any recommendations to the witness, he must address the Chamber and give his grounds for intervening. Naturally, each of the parties could comment on this point.

B. Documents possibly produced

33. The Defence argues that during his direct examination Witness A will be referring to classified documents and recalling certain events when reading them. The Defence holds that if Witness A examines such documents before or during his testimony, it must be also allowed to examine them for use during its cross-examination.

34. For the Chamber, this is not an issue. The material before it indicates clearly that the documents in question are in the possession of their owner, in this instance a Government, which must at all events give its consent for their disclosure as required under Sub-rule 70(B).

Lastly, on grounds of confidentiality, the witness can, pursuant to Sub-rule 70(D), decline to answer questions bearing on such documents.

C. Disclosure of proceedings

35. Consistent with the provisions of Rule 79, when the Chamber orders a closed session, the press and the public can not attend the hearing of a witness, and the transcripts of such hearings are regarded as confidential in their entirety and are not subject to disclosure.

Thus, the Chamber dismisses the request from the Government - taken up by the Prosecution - to allow it to revise the transcripts, since they would not be made public in any event.

The parties may, however, as is the practice, make recommendations to the Chamber relative to expunging transcripts.

D. Chamber's overall control over the respect of the rights of the Defence

36. Rule 70's provisions must be construed in the light of Article 21(4)(e) of the Statute and of Sub-rule 70(G). The testimony, documents and other material provided pursuant to Sub-rule 70(B), where a person or entity having information has consented to its total or partial disclosure, must be subject to a comprehensive and full cross-examination by the Defence under the Chamber's control. While the entity or person having the information, documents, or other material remains in control of consent to disclose, the Chamber reserves the right to exclude any or all evidence if its production would not insure a fair trial for the accused.

37. The limitations in Sub-rule 70(D), in particular on cross-examination, must be confined strictly. Indeed, the choice of questions lies with the Prosecution; and the Chamber recalls that the cross-examination must be conducted within the limits of the matters raised. Nonetheless, pursuant to the provisions of the Statute and of the Rules referred to above, the Chamber will be exercising strict control when the witness is heard, and may well exclude all or part of the testimony if it concludes that there is a gross disparity in the treatment of the parties to the trial.

IV. DISPOSITION

38. FOR THE FOREGOING REASONS

Trial Chamber I,

adjudicating in the presence of the parties and with the unanimity of its members,

DECIDES to grant the motion from the Prosecution, in that its aim is to allow Witness A to come and testify before the Chamber, under the following conditions:

- Witness A shall be heard at a closed session;
- classified documents the provision of which was sought by the Defence shall not be provided to it unless the Government concerned should decide to provide them on its own initiative;
- the scope of the Defence cross-examination shall be restricted to the scope of the direct examination, the Chamber reserving for itself the right to rule in any dispute in this respect;
- in accordance with Sub-rule 70(D), Witness A may decline to answer a question about the information involved or about its origin on grounds of confidentiality;
- a representative of the Government concerned may be present in the courtroom at the time of Witness A's deposition,

STATES that there are no grounds for authorising the Government concerned to revise the transcripts of Witness A's deposition,

REJECTS moreover the additional motions of the Defence,

RECALLS that the Statute of the Tribunal as well as the latter's Rules of Procedure and Evidence guarantee the accused a fair trial and that the provisions of Sub-rule 70(G), in particular, enable the Chamber to exclude any evidence whose probative value would be substantially outweighed by the needs of a fair trial.

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

Done this thirteenth day of 13 November 1997,
At The Hague,
The Netherlands

(Signed)

Judge Claude Jorda
Presiding Judge, Trial Chamber I

(Seal of the Tribunal)