



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

Case No. IT-95-14-T

Date: 15 July 1998

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: 15 July 1998

THE PROSECUTOR

v.

TIHOMIR BLAŠKIĆ

**DECISION ON THE DEFENCE MOTION
TO COMPEL THE DISCLOSURE OF RULE 66 AND 68 MATERIAL
RELATING TO STATEMENTS MADE BY A PERSON KNOWN AS "X"**

Office of the Prosecutor

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

Defence Counsel:

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

1. On 22 May 1998, the Defence filed a confidential motion “to compel disclosure of Rule 66 and 68 materials [of the Rules of Procedure and Evidence]” (hereinafter “the Rules”) relating to a person known as “X”. The Defence attached to its Motion an exchange of letters with the Prosecutor dated 24 March 1998 (attachment A) and 8 April 1998 (attachment B) respectively, presenting the views of the parties on that issue. The Prosecutor filed her response to the Defence motion on 17 June 1998.

The Trial Chamber will first analyse the claims of the parties and then rule on the contested points of fact and law.

I. CLAIMS OF THE PARTIES

2. The letter from the Defence to the Prosecutor dated 24 March 1998 concerns the statements of “X” presented indirectly through other witnesses. The Defence submits that, following the admission of those hearsay statements, it is appropriate to consider “X” as a witness in the present case. The Defence therefore concludes that, in accordance with Sub-rule 66(A) of the Rules, the Prosecutor is obligated to disclose to it all statements made by “X” in her possession, and, in particular, certain documents allegedly provided by “X” to SFOR (hereinafter “statements of X”).

In its letter, the Defence also advances that Rule 68 of the Rules obligates the Prosecutor to disclose to it the existence of any information which undermines the credibility of the Prosecution evidence presented in respect of “X”.

3. In its response to the letter from the Defence dated 8 April 1998, the Office of the Prosecutor states that it disagrees with the conclusions of the Defence “*that the introduction of hearsay evidence, which the Trial Chamber has ruled is admissible, triggers a concomitant obligation under Rule 66(A) to produce all statements of the hearsay declarant*”¹. In fact, Sub-rule 66(A) imposes such an obligation solely in respect of witnesses whom the Prosecutor intends to call to testify at trial, which is not the case with “X”.

¹ Letter from the Prosecutor, 8 April 1998, attachment B to the Motion.

The Prosecutor does promise, however, to disclose to the Defence, in accordance with Rule 68, any evidence which may adversely affect the credibility of the prosecution evidence presented through the witnesses who made the hearsay statements.

4. In its Motion, filed on 22 May 1998, the Defence reiterates its requests in respect of the statements of "X".

Moreover, in respect of the argument based on Sub-rule 66(A) of the Rules, the Defence objects to the Prosecutor's application of the latest version of the Rules². According to the Defence, the application to the case of the new Sub-rule 66(A)(ii), which limits the scope of the obligation to disclose the statements of prosecution witnesses, is inconsistent with Sub-rule 6(C) of the Rules, which states that the amendments to the Rules "*shall not operate to prejudice the rights of the accused in any pending case*". The Defence adds that the position of the Prosecutor tends to authorise it to use hearsay testimony in order to avoid calling "X" himself and having "X" cross-examined by the Defence.

5. In her response dated 17 June 1998, the Prosecutor asserts that she is not in possession of the statements requested by the Defence, pursuant to Sub-rule 66(A) of the Rules, and also recalls her commitment to fulfil her obligations under Rule 68 of the Rules.

II. DISCUSSION

6. The Trial Chamber will successively consider the two arguments raised by the Defence in support of its claim, that is, first, the Prosecutor's obligation, in accordance with Sub-rule 66(A) of the Rules, to disclose prior witness statements and, second, the constraints imposed by Rule 68 in respect of exculpatory evidence.

² Sub-rule 66(A)(ii) as adopted during the plenary sessions of 20 October and 12 November 1997.

A. The argument based on Sub-rule 66(A) of the Rules

7. The Trial Chamber must rule on the applicability of Sub-rule 66(A) to the statements of “X” within the meaning ascribed by the Defence. First, the Trial Chamber wishes to examine the Defence argument contesting the applicability of the current version of that provision, pursuant to Sub-rule 6(C) of the Rules. Sub-rule 6(C) states:

“An amendment [to the Rules] shall enter into force immediately, but shall not operate to prejudice the rights of the accused in any pending case.”

The Defence deduces therefrom that amendments to the Rules may be applied to pending cases only insofar as they do not limit the rights of the accused in any way. The Defence specifies that the relevant provisions of the previous version of Sub-rule 66(A) required the disclosure of “*all prior statements obtained by the Prosecutor*”³, whereas the current version restricts that disclosure obligation to “*copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial; copies of the statements of additional prosecution witnesses shall be made available to the defence when a decision is made to call those witnesses*”⁴.

8. The Trial Chamber is of the opinion that that amendment does not constitute a restriction of the rights of the Defence to obtain discovery of witness statements but rather a clarification of the spirit of the rule which is the source of that obligation. Trial Chamber II had already upheld such an interpretation of Sub-rule 66(A) in its previous wording, when it asserted:

“[...] once the Prosecution makes a determination that it intends to call an individual as a witness at trial, it is obliged to disclose, “as soon as practicable”, any statement taken prior to the time that the witness testifies at trial. This obligation is also continuing, and as the

³ Sub-rule 66(A) of the Rules as of 25 July 1997 in its relevant section: “*The Prosecutor shall make available to the defence, as soon as practicable after the 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.*”

⁴ Sub-rule 66(A)(ii) of the Rules as amended during the plenary sessions of 20 October and 12 November 1997: [the Prosecutor shall make available to the Defence] “*no later than sixty days before the date set for trial, copies of the statements of all witnesses the Prosecutor intends to call to testify at trial; copies of the statements of additional Prosecution witnesses shall be made available to the Defence when a decision is made to call those witnesses*”.

Prosecution decides on each witness, it must disclose the prior statements of that witness.”⁵

The Defence must be allowed to be in a position to prepare its cross-examination, in order for the Judges to have all the information which will enable them to evaluate a particular piece of evidence. At issue is certainly not an absolute right of the accused to be informed of the statements of all individuals interviewed by the Prosecutor, regardless of whether or not they are used as evidence at trial.

The Trial Chamber finds, consequently, that the application of the amended version of Sub-rule 66(A)(ii) of the Rules to the present case does not infringe on the rights of the accused and cannot as such be considered to be a violation of Sub-rule 6(C). It is therefore appropriate to examine the statements of “X” in the light of the latest version of Sub-rule 66(A).

9. Sub-rule 66(A)(ii) clearly states that the prior statements of all witnesses whom the Prosecutor intends to call to testify⁶, must be disclosed to the Defence. The clarity of that provision is all the more evident, since the same Rule indicates, moreover, that the statements of additional prosecution witnesses shall be made available to the Defence when a decision is made to call those witnesses⁷.

10. The statements of “X” were presented by third parties and constitute hearsay evidence which may be admitted in accordance with the Trial Chamber Decision on the admissibility of hearsay evidence⁸. In the said Decision, the Trial Chamber underscores the distinction between the witness who appears at trial and the initial declarant whose words are being reported. In the case in point, it cannot be contested that “X” belongs to the second category and can be considered to be a witness, within the meaning of Sub-rule 66(A), only when the Prosecution decides to call on “X” to testify at trial. Sub-rule 66(A)(ii) of the Rules requiring

⁵ Decision on the motion by the accused Delalic for the disclosure of evidence, IT-96-21-T, 26 September 1996, paragraph 4, no emphasis in original text.

⁶ No emphasis in original text.

⁷ No emphasis in original text.

⁸ Trial Chamber Decision on the standing objection of the Defence to the admission of hearsay with no inquiry as to its foundation and its reliability, *The Prosecutor v. Tihomir Blaskić*, IT-95-14-T, 21 January 1998.

disclosure of witness statements to the Defence can be applied only in that one possible instance.

11. The Trial Chamber is convinced that, in view of the foregoing, the Defence's argument based on Sub-rule 66(A) of the Rules is inadmissible.

12. The Trial Chamber notes the concern expressed by the Defence regarding the credibility of the statements of "X", but, in the spirit of its decision on hearsay evidence⁹, recalls that all the evidence required to evaluate such credibility will be taken into consideration by the Judges when they determine what weight to give to the said statements, and, in particular, the fact that they are the results of hearsay testimony and that, and such, they were not the subject of cross-examination.

B. The argument based on Rule 68 of the Rules

13. The Defence also then examined the obligations imposed upon the Prosecutor by Rule 68 of the Rules, which stipulates:

"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."

14. The Trial Chamber deems that that duty of the Prosecutor remains constant and notes that the Prosecution itself acknowledges, in the case in point, that it is under that obligation. However, as the Trial Chamber has previously asserted,

*"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"*¹⁰.

⁹ Above-mentioned Decision of 21 January 1998.

¹⁰ Trial Chamber Decision on motion to compel the production of discovery materials, *The Prosecutor v. Tihomir Blaskić*, IT-95-14-T, 27 January 1997, para. 47.

As regards the statements of "X" specifically referred to by the Defence Motion, the Prosecution asserts in its response that it is not in possession of written statements of "X", and the Trial Chamber moreover has no evidence which might prove otherwise.

15. The Trial Chamber notes moreover that exhibits have been tendered and argued at trial during the testimony of the witnesses in question. The Defence has had ample time to comment on the credibility and probative value of those testimonies and documents.

III. DISPOSITION

FOR THE FOREGOING REASONS

The Trial Chamber,

RULING *inter partes* and unanimously,

REJECTS the Defence Motion “to compel the disclosure of Rule 66 and 68 materials [of the Rules of Procedure and Evidence]” relating to the statements of a person known as “X”,

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

Done this fifteenth day of July 1998

At The Hague

The Netherlands

(Signed)

Claude Jorda
Presiding Judge Trial Chamber I

(Seal of the Tribunal)