



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-05-87-T
Date: 15 January 2007
Original: English

IN THE TRIAL CHAMBER

Before: Judge Iain Bonomy, Presiding
Judge Ali Nawaz Chowhan
Judge Tsvetana Kamenova
Judge Janet Nosworthy, Reserve Judge

Registrar: Mr. Hans Holthuis

Decision of: 15 January 2007

PROSECUTOR

v.

**MILAN MILUTINOVIĆ
NIKOLA ŠAINOVIĆ
DRAGOLJUB OJDANIĆ
NEBOJŠA PAVKOVIĆ
VLADIMIR LAZAREVIĆ
SRETEN LUKIĆ**

**DECISION ON RENEWED PROSECUTION MOTION FOR LEAVE TO AMEND ITS
RULE 65 TER LIST TO ADD MICHAEL PHILLIPS AND SHAUN BYRNES**

Office of the Prosecutor

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Mr. Toma Fila and Mr. Vladimir Petrović for Mr. Nikola Šainović
Mr. Tomislav Višnjić and Mr. Norman Sepenuk for Mr. Dragoljub Ojdanić
Mr. John Ackerman and Mr. Aleksandar Aleksić for Mr. Nebojša Pavković
Mr. Mihajlo Bakrač and Mr. Đuro Čepić for Mr. Vladimir Lazarević
Mr. Branko Lukić and Mr. Dragan Ivetić for Mr. Sreten Lukić

THIS 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 “Prosecution’s Renewed Motion for Leave to Amend its Rule 65 *ter* Witness List to Add Michael Phillips and Shaun Byrnes With Annex A”, filed on 15 December 2006 (“Motion”), and hereby renders its decision thereon.

Background and Arguments of Parties

1. In the Motion, the Prosecution seeks leave, pursuant to Rules 73 *bis* (F) and 89(C) of the Rules of Procedure and Evidence (“Rules”), to amend its revised witness list filed on 6 July 2006¹ by adding two Rule 70 witnesses, namely Michael Phillips and Shaun Byrnes.² This is a renewed application as the Trial Chamber had earlier denied the same request, without prejudice, because it was unable, due to the uncertainty as to the state of disclosure of the materials related to the two witnesses, to assess the extent with which Rule 66(A)(ii) had been complied and whether any prejudice would be caused to the Defence if the witnesses were added to the Prosecution’s witness list.³

2. In the Motion, the Prosecution makes submissions clarifying the state of disclosure with respect to the two Rule 70 witnesses. In short, the Prosecution asserts in the Motion that “no statement was taken with respect to either Mr. Phillips or Mr. Byrnes in the *Milošević* case. The Prosecution is in possession of interview notes for these witnesses; although, the Prosecution only has authority to disclose excerpts of these previous interview notes which were taken in the *Milošević* case. Those excerpts of the interview notes were disclosed on 21 September 2006.”⁴

3. The Chamber finds it useful to examine the state of disclosure more closely. The Prosecution has asserted that it has complied with its disclosure obligations for these witnesses under Rule 66(A)(ii) by disclosing interview notes prepared for the purposes of this case. It is not in possession of any witness statements for the two witnesses.⁵ Interview notes for Michael Phillips were submitted for governmental approval on 4 August 2006, while the notes for Shaun Byrnes were submitted on 9 October 2006. Once the approval was received, the Rule 65 *ter*

¹ Notice of Filing of Revised 65 *ter* Witness List, 6 July 2006.

² Motion, para. 1.

³ See Decision on Prosecution Motion to Amend Its Rule 65 *ter* Witness List, 8 December 2006, para. 34 and Decision on Prosecution Motion for Leave to Amend its Rule 65 *ter* Witness List to Add Shaun Byrnes, 11 December 2006, para. 8

⁴ Motion, para. 6.

⁵ Motion, para. 3.

summaries encompassing the interview notes were disclosed to the Defence on 26 October 2006 regarding Michael Phillips and 1 November 2006 regarding Shaun Byrnes.⁶

4. The Prosecution then addresses the Trial Chamber's concerns regarding disclosure of the material prepared for the *Milošević* case. It explains that it is not in possession of "any 'statement'" from either of the two witnesses since, as with the present case, no statements were taken from them for the purposes of the *Milošević* case.⁷ Instead, the Prosecution confirms that it is in possession of the *Milošević* interview notes. However, the Prosecution submits that it received authority to disclose only excerpts of those interview notes, which was done on 21 September 2006.⁸ With regard to Michael Phillips, the Prosecution also made available to the Defence five notebooks kept by him during his tenure in Kosovo.⁹ The Prosecution finally submits that it intends to call Michael Phillips at the end of January 2007 and Shaun Byrnes at the beginning of February 2007.

5. In the Joint Defence Response, the Accused oppose the Motion as infringing the rights of the Accused under Articles 20 and 21 of the Statute. They argue that "the interview notes with Mr. Phillips and Mr. Byrnes referred to in the Renewed Motion are 'statements' within the meaning of Rule 66(A)(i) and that they must be disclosed to the Accused, otherwise their rights guaranteed under the Statute and Rules to full disclosure, notice to the allegations against them, and their right to prepare adequately for trial are violated."¹⁰ The Chamber has no reason to doubt the Prosecution assertion that these have been disclosed.

6. The Defence also argue that the Prosecution has not exercised due diligence in securing the consent of the Rue 70 provider for the witnesses to testify and for their materials to be disclosed to the Defence. The Chamber, the Defence argues, should therefore exercise its discretion and not allow the witness to be added to the Rule 65 *ter* list.¹¹

Applicable Law

7. Pursuant to Rule 73 *bis* (F), the Trial Chamber may grant any motion for an amendment to the witness list if satisfied that this is "in the interests of justice". In the exercise of this discretion,

⁶ Motion, para. 5.

⁷ Motion, para. 6.

⁸ Motion, para. 6.

⁹ Motion, para. 7.

¹⁰ Joint Defence Response to Prosecution's Renewed Motion for Leave to Amend Its Rule 65 *ter* Witness List to Add Michael Phillips and Shaun Byrnes with Annex A, 28 December 2006 ("Response"), paras. 3, 6. The Chamber reads the Defence's reference to Rule 66(A)(i) as, in fact, a reference to Rule 66(A)(ii).

¹¹ Response, paras. 5–6.

the Chamber must be guided by the preliminary requirements for admissibility of evidence as set out in Rule 89(C), namely, the relevance and the probative value of the proposed evidence.¹² Furthermore, the Chamber must also consider whether the probative value of the evidence is substantially outweighed by the need to ensure a fair trial under Rule 89(D).¹³ Of particular relevance here is the question of whether the interests of the Defence are adequately protected.¹⁴ In this context, the Chamber should ensure that no prejudice will arise to the Defence as a result of late addition of witnesses.¹⁵

8. Rule 66(A)(ii) provides that

within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge appointed pursuant to Rule 65 *ter*, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial, and copies of all transcripts and written statements taken in accordance with Rule 92 *bis*; Rule 92 *ter*, and Rule 92 *quater*; copies of the statements of additional prosecution witnesses shall be made available to the defence when a decision is made to call those witnesses.

9. Rule 70 deals with matters not subject to disclosure and provides, in relevant part, the following:

- (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.

* * *

- (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.

¹² *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Decision on Prosecution's Motion to Amend Witness List and for Protective Measures, 17 February 2005, para. 3; *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Decision on Prosecution's Motion II to Amend Witness List, 9 March 2005, para. 2.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Decision on Prosecution's Motion II to Amend Witness List, 9 March 2005, para. 3. See also *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-T, Decision on Prosecution Motion to Amend its Rule 65 *ter* Witness List, 28 April 2006; *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-T, Decision on Prosecution Motion to Amend its Rule 65 *ter* List, 6 June 2006; *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-PT, Decision on Motion for Leave to Amend its Original Rule 65 *ter* Witness List dated 7 November 2005 with Annexes A and B, 5 May 2006.

Discussion

10. The Chamber must address the following questions in order to decide the Motion:
- a. Are the *Milošević* “interview notes” statements within the meaning of Rule 66(A)(ii)?
 - b. If so, is Rule 66(A)(ii) disclosure subject to any exceptions?
 - c. If the interview notes may be disclosed in redacted form without violating Rule 66(A)(ii), should the Chamber nevertheless exercise its discretion under Rules 70(G) and 89(D) to exclude the witnesses from giving evidence?
11. As the Chamber has stated in a previous decision,¹⁶

The Appeals Chamber has held that the term “witness statement”, in relation to Rule 66(A)(ii), is to be interpreted as the “account of a person’s knowledge of a crime, which is recorded through due procedure in the course of an investigation into the crime”.¹⁷ This interpretation, read in the light of the Prosecution obligation stated in paragraph 13 above, is broad enough to include statements taken by humanitarian organisations for the purpose of recording allegations of human rights abuses, when these are passed to the Prosecution in order to assist it in identifying potential lines of inquiry which then result in the persons who gave the original statements becoming witnesses in Tribunal proceedings.

This interpretation is also consistent with the Appeals Chamber’s interpretation of Rule 66(A)(i), which provides that the Prosecution is under an obligation to make available to the Defence copies of the supporting material which accompanied the indictment when confirmation was sought, as well as all prior statements obtained by the Prosecution from the accused.¹⁸

The term “supporting materials”, within the meaning of Rule 66(A)(i), has been interpreted to mean the materials upon which the charges are based,¹⁹ and includes all the previous statements of the accused contained in the Prosecution’s files, whether collected

¹⁶ Decision on Ojdanić Motion for Disclosure of Witness Statements and for Finding of Violation of Rule 66(A)(ii), 29 September 2006, paras. 14–16 (original footnotes included).

¹⁷ *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Decision on the Appellant’s Motion for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000, para. 15. The Chamber notes that the Prosecution’s arguments reflected in paragraph 8 above are based upon the same definition provided by the *Blaškić* Appeals Chamber, but considers the Prosecution’s definition of a “statement” as being too narrow.

¹⁸ Even though Rule 66(A)(i) refers to supporting materials and to the prior statements of the accused, it is the Chamber’s understanding 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 indicated in Rule 66(A)(ii). This view has also been adopted by other Trial Chambers of the Tribunal. See *Prosecutor v. Blaškić*, Case No. IT-95-14-PT, Decision on the Production of Discovery Materials, 27 January 1997 (“Decision on Production of Discovery Materials”), para. 38.

¹⁹ *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14-PT, Order on Motion to Compel Compliance by Prosecution with Rule 66(A) and 68, 26 February 1999, p. 3.

by the Prosecution or originating from any other source.²⁰ This interpretation of the term implies that no distinction should be made between the form or forms which these statements may have, because any other interpretation would restrict the rights of the accused in Article 21 of the Statute of the Tribunal.²¹

12. Based upon the above definition of statement, within the meaning of Rule 66 disclosure, it would seem clear that the *Milošević* interview notes are “statements.” The parties have not endeavoured to precisely define the terms “statement” and “interview notes”; however, the Chamber infers from the representations of the parties throughout the litigation of this matter (and the case as a whole) that, in a functional sense, a “statement” is more or less a verbatim account of what the witness has told the Prosecution, which has been reviewed and signed by the witness; whereas, “interview notes” are a less than verbatim account and are not necessarily reviewed and signed by the witness. The Chamber uses the above descriptions loosely, and finds, in any event, that “interview notes” fall squarely within the Appeals Chamber’s definition of a Rule 66 statement, namely an “account of a person’s knowledge of a crime, which is recorded through due procedure in the course of an investigation into the crime.”²²

13. However, Rule 66 disclosure is subject to exceptions. Although the Prosecution has not asserted such a privilege in the present case, Rule 70(A), which begins with the phrase “[n]otwithstanding the provisions of Rules 66 and 67...”, excepts from Rule 66 disclosure “reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case”. “Interview notes” taken by the Prosecution may very well include material protected under Rule 70(A); for example, if, in the course of interviewing one of the witnesses, the Prosecution has made in its “interview notes” comments revealing its trial strategy, it would have been entitled to redact such material from those notes before disclosing them to the Defence.

14. Rule 70 (B) provides yet another exception to Rule 66(A)(ii). As explained above by the Prosecution, some parts of the *Milošević* interview notes have not been disclosed to the Defence because no authorisation has been given by the Rule 70 provider. Pursuant to Rule 70(B), these withheld portions of the interview notes “shall in any event not be given in evidence without prior disclosure to the accused”. This provision indicates, by inference, that Rule 70(B) may operate as

²⁰ *Prosecutor v. Blaškić*, Decision on Production of Discovery Materials, para. 37. See also *Prosecutor v. Tadić*, Case No. IT-96-1-T, T. 5673; *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Decision on the Motion by the Accused Zejnir Delalić for the Disclosure of Evidence, 26 September 1996, para. 4.

²¹ *Prosecutor v. Blaškić*, Decision on Production of Discovery Materials, paras. 34, 37.

²² *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Decision on the Appellant’s Motion for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000, para. 15. The Chamber notes that the Prosecution’s arguments reflected ... above are based upon the same definition provided by the *Blaškić* Appeals Chamber, but considers the Prosecution’s definition of a “statement” as being too narrow.

yet another exception to Rule 66(A)(ii): although Rule 70(B) seems to empower the Prosecution and the Rule 70 provider to circumvent the disclosure obligations of Rule 66, when information is withheld under this provision, it still may not be adduced as evidence without the accused first being placed upon notice of it. In other words, the Prosecution is not permitted to adduce evidence at trial from Mr. Phillips or Mr. Byrnes regarding information discussed during their interviews pertaining to the portions of the interview notes that the Rule 70 provider has not allowed to be disclosed to the Defence.

15. The Chamber holds, as a matter of law, that “interview notes” are statements within the meaning of Rule 66(A)(ii), but that disclosure under this Rule is subject to Rule 70(A) and (B), particularly the latter provision. In the present circumstances, the Prosecution is entitled to have disclosed the *Milošević* interview notes in their redacted form, as mandated by the Rule 70 provider.

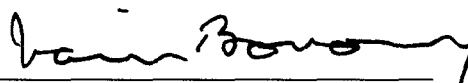
16. However, the Trial Chamber is concerned about the effect that the partial disclosure may have upon the Defence and their case. The Chamber has before it nothing to indicate whether the redacted material could have any bearing on issues in the trial. If it could, nondisclosure could plainly infringe the rights of the Accused to a fair trial. Absent the opportunity to consider and assess that, the Chamber, in its current state of ignorance, is bound to refuse to allow the witnesses to give evidence, because that is the only way of being satisfied that the rights of the Accused to a fair trial are not infringed.

Disposition

17. Accordingly, pursuant to Rules 54, 66, 70, 73 *bis*, and 89 and Articles 20 and 21 of the Statute, the Trial Chamber finds that the probative value of the evidence that Mr. Phillips and Mr. Byrnes would give is substantially outweighed by the need to ensure a fair trial and therefore DENIES the Motion, without prejudice to the Prosecution reapplying in the event of a change of circumstances, including, for example, an opportunity being given to the Trial Chamber to conduct an *in camera* inspection of the material that is subject to the Rule 70 conditions.²³

²³ The Chamber notes, by analogy, Rule 68(iv), which provides the following: “Subject to the provisions of Rule 70, . . . (iv) the Prosecutor shall apply to the Chamber sitting in camera to be relieved from an obligation under paragraph (i) to disclose information in the possession of the Prosecutor, if its disclosure may prejudice further or ongoing investigations, or for any other reason may be contrary to the public interest or affect the security interests of any State, and when making such application, the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential”

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



Judge Iain Bonomy
Presiding

Dated this fifteenth day of January 2007
At The Hague
The Netherlands

[Seal of the Tribunal]