



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 PROSECUTION MOTION FOR LEAVE TO AMEND
ITS RULE 65 TER WITNESS LIST TO ADD WESLEY CLARK**

Office of the Prosecutor

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Counsel for the Accused

Mr. Eugene O'Sullivan and Mr. Slobodan Zečević for Mr. Milan Milutinović
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 partly confidential “Prosecution’s motion for Leave to Amend Its Rule 65 *ter* Witness List with Confidential 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(A), 73 *bis* (F), 75, and 89(C) of the Rules of Procedure and Evidence (“Rules”), to amend its revised witness list filed on 6 July 2006¹ by adding a Rule 70 witness, General Wesley Clark, as one of its witnesses.² The Prosecution submits that procedural history related to this witness was set out in the Prosecution’s submissions filed on 13 September 2006³ and on 10 November 2006,⁴ explaining that the delay was due to the Prosecution’s attempts to obtain permission from the United States Government, pursuant to Rule 70, for the witness to be interviewed, for his interview notes to be disclosed, and for him to be allowed to give evidence in this case. The Prosecution also argues that the witness was identified as a provisional witness on the list of 6 July 2006⁵ and that a brief Rule 65 *ter* summary of his anticipated testimony was disclosed to the Defence at the time.⁶ In addition, General Clark’s prior testimony from the *Milošević* trial, as well as his book on the Kosovo conflict, entitled *Waging Modern War*, was disclosed on 10 May 2006, in both English and BCS.⁷ In July 2006, the Prosecution obtained authorisation to interview the witness and proceeded to do so on 1 August 2006.⁸ After obtaining the required authorisation from the Rule 70 provider, the

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

² Motion, para. 1.

³ Prosecution’s Response to Joint Defence Motion to Exclude the Testimony of Witnesses for Failure to Comply with Disclosure Obligations, 13 September 2006.

⁴ Prosecution’s Submission to Trial Chamber Order Dated 8 November 2006 With Confidential Annex A, 10 November 2006.

⁵ The Trial Chamber notes that the Prosecution here refers to Wesley Clark being listed as “Witness No. 159” on the 6 July list. However, the Chamber notes that Witness No. 159 is Shaun Byrnes and that Wesley Clark was in fact listed as “Witness No. 157”. The Chamber acknowledges that the error has most likely resulted from the earlier Prosecution motion to amend the Rule 65 *ter* list by adding witness Shaun Byrnes. See Decision on Prosecution Motion for Leave to Amend its Rule 65 *ter* Witness List to Add Shaun Byrnes, 11 December 2006.

⁶ Motion, para. 5.

⁷ Motion, para. 7.

⁸ Prosecution’s Response to Joint Defence Motion to Exclude the Testimony of Witnesses for Failure to Comply with Disclosure Obligations, 13 September 2006, para. 5.

Prosecution disclosed, on 21 September 2006, “other rule 70 material” which was based on notes the Prosecution took during the August 2006 interview.⁹

2. The Prosecution clarified in its submission of 10 November 2006¹⁰ and also submits, in its current Motion, that it is not in possession of “a written statement of the witness.”¹¹ The Prosecution further submits that, on 26 October 2006, it disclosed a more detailed Rule 65 *ter* summary and finally, on 13 December 2006, received authorisation from the Rule 70 provider to call this witness to give evidence.¹² Finally, the Prosecution submits that it does not intend to call this witness before February 2007, in order to allow the Defence sufficient time to prepare for his testimony.¹³

3. The Defence oppose the Motion, arguing that the Prosecution has failed its obligations under Rule 66(A)(ii) because it has not disclosed to the Defence “the 131 paragraph statement and 45 paragraph ‘statement serving as a summary’ of General Clark prepared and used in the *Milošević* trial.”¹⁴ The Defence also argue that the Motion should be denied because the Rule 70 provider’s consent for the witness to give evidence is still contingent upon the Prosecution securing a court order granting certain conditions on his testimony. As stated by the Defence, “[w]hile these protective measures are unspecified in the letter sent to General Ojdanic’s counsel by the United States, the letter indicates that General Clark will only be authorized to testify upon certain subject areas.”¹⁵

4. Although conceding that General Clark’s proposed evidence is relevant and has probative value, the Defence argue that the Prosecution has not shown due diligence in its efforts to secure the testimony of the witness and disclose necessary material to the Defence and that this militates against the Chamber finding that it is in the interests of justice to grant leave for him to be added to

⁹ Prosecution’s Submission to Trial Chamber Order Dated 8 November 2006 With Confidential Annex A, 10 November 2006, para. 7.

¹⁰ *Ibid.*, para. 6.

¹¹ Motion, para. 6.

¹² Motion, para. 5.

¹³ Motion, para. 11.

¹⁴ General Ojdanic’s Opposition to Motion to Call General Wesley Clark as a Prosecution Witness, 28 December 2006 (“Response”), para. 7; Mr. Milan Milutinovic Motion to Join “General Ojdanic’s Opposition to Motion to Call General Wesley Clark as a Prosecution Witness”, 28 December 2006 (joining Ojdanić Response); Defence [Šainović] Motion: Joining “General Ojdanić’s Opposition to Motion to Call General Wesley Clark as a Prosecution Witness”, 28 December 2006 (joining Ojdanić Response); Pavković Joinder with “General Ojdanic’s Opposition to Call General Wesley Clark as a Prosecution Witness”, 28 December 2006 (joining Ojdanić Response). Two of the Accused’s responses joining the Ojdanić motion were filed out-of-time. *See* Sreten Lukic’s Joinder in the Opposition Filed by Co-Accused Ojdanic, 2 January 2007; Defence [Lazarević] Motion: Joining “General Ojdanić’s Opposition to Motion to Call General Wesley Clark as a Prosecution Witness”, 2 January 2007.

¹⁵ Response, para. 4, Annex A.

the Rule 65 *ter* list.¹⁶ Moreover, the Ojdanić Defence is in the process of attempting to acquire materials relevant to General Clark's proposed evidence from the United States.¹⁷ The Defence argues that, as a result, they would be unduly prejudiced by the late addition of General Clark to the Rule 65 *ter* list because they will not have requisite material with which to cross-examine the witness and to otherwise investigate and prepare for his evidence.¹⁸

Applicable Law

5. 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, 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.¹⁹ 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).²⁰ Of particular relevance here is the question of whether the interests of the Defence are adequately protected.²¹ In this context, the Chamber should ensure that no prejudice will arise to the Defence as a result of late addition of witnesses.²²

6. 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.

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

¹⁶ Response, para. 9

¹⁷ Response, paras. 14–21.

¹⁸ *Ibid.*

¹⁹ *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.

²⁰ *Ibid.*

²¹ *Ibid.*

²² *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.

- (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.

Discussion

8. All the arguments of the parties have been considered by the Chamber.

9. General Wesley Clark was a career officer in the United States Army. From 1997 through May 2000, he was the Commander in Chief of the United States European Command and the NATO Supreme Allied Commander, and was, therefore, involved in the NATO campaign in Kosovo. According to the Prosecution, General Clark witnessed certain events relevant to the present case and will be able to testify about, among other things, his meetings and interactions with the members of the alleged joint criminal enterprise, negotiations he had with Slobodan Milošević (a named member of the Joint Criminal Enterprise) and Milošević's advisors in October 1998, and the structure and the chain of command of the VJ and the MUP in Kosovo between October 1998 and June 1999.²³ The Trial Chamber considers that the potential evidence of General Clark is relevant and has probative value.

10. However, the Chamber is concerned that there has been some uncertainty as to the state of disclosure regarding the materials related to this witness. The extent of disclosure, according to the Prosecution, has been limited to interview notes made during the August 2006 interview with the witness, as well as the notes provided by the Rule 70 provider.²⁴ However, the Prosecution's submissions of 13 September 2006 refer to interview notes prepared for the purposes of the

²³ Motion, para. 4.

²⁴ Prosecution's Submission to Trial Chamber Order Dated 8 November 2006 With Confidential Annex A, 10 November 2006, para. 7. Motion, p. 3, note 4 ("The Prosecution interviewed Wesley Clark on 1 August 2006 and sent the interview notes to the US Embassy shortly thereafter. Once the Prosecution obtained authorization to disclose the interview notes, it did so in the format of a 65ter summary to the Defence on 26 October 2006.").

Milošević case, as well as the fact that these have not been disclosed.²⁵ In addition, in a renewed motion relating to two other two Rule 70 witnesses, with respect to whom the Trial Chamber had similar concerns, the Prosecution explains that, for those two witnesses, the interview notes from the *Milošević* case had only been partially disclosed, as the authorisation for full disclosure was not forthcoming.²⁶ Despite this, the present Motion makes no mention whatsoever of the *Milošević* interview notes nor the disclosure status of the same.

11. Moreover, the Defence Response raises a factual dispute. The Defence state that the Prosecution has not disclosed to the Defence “the 131 paragraph statement and 45 paragraph ‘statement serving as a summary’ of General Clark prepared and used in the *Milošević* trial,”²⁷ and that “General Clark’s testimony in the *Milosevic* trial ... [is] already in the public domain.”²⁸ However, the Prosecution states that it “is not in the possession of a written statement of the witness” and “has already disclosed General Clark’s prior testimony from the *Milošević* trial”;²⁹ the Prosecution has also not sought to reply to the Defence’s assertion. It thus appears to the Chamber possible that statements of General Clark in the possession of the Prosecution have not been disclosed to the Defence.

12. The Trial Chamber is therefore concerned about the effect that any possible nondisclosure or partial disclosure may have upon the Defence and their case.³⁰ The Chamber has before it insufficient (and/or contradictory) information to indicate whether the undisclosed or 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, as well as for other reasons stated below, the Chamber has decided to continue its consideration of whether it will allow the witness to give evidence, in order to ensure that the rights of the Accused to a fair trial are not infringed.

13. Finally, the Chamber notes the representations of the Rule 70 provider in its letter to the Ojdanić Defence, dated 12 December 2006, that it has “conditionally authorized General Clark’s

²⁵ Prosecution’s Response to Joint Defence Motion to Exclude the Testimony of Witnesses for Failure to Comply with Disclosure Obligations, 13 September 2006, para. 7. *See also* Decision on Prosecution Motion to Amend Its Rule 65 *ter* Witness List, 8 December 2006, para. 34; Decision on Prosecution Motion for Leave to Amend its Rule 65 *ter* Witness List to Add Shaun Byrnes, 11 December 2006, para. 8.

²⁶ Prosecution’s Renewed Motion for Leave to Amend its Rule 65 *ter* List to Add Michael Phillips and Shaun Byrnes With Annex A, 15 December 2006, para. 6.

²⁷ Response, para. 7, p. 2, note 5.

²⁸ Response, p. 2, note 4.

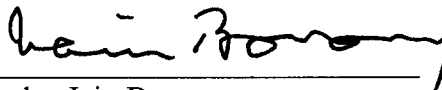
²⁹ Motion, paras. 6–7.

³⁰ The Trial Chamber holds, in a decision also issued today, that, as a matter of law, “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. *See* Decision on Renewed Prosecution Motion for Leave to Amend Its Rule 65 *ter* List to Add Michael Phillips and Shaun Byrnes, 16 January 2007, para. 15.

testimony on specific subject areas” and that ultimate permission for his testimony is contingent upon the Prosecution “securing a court order granting certain protective measures.”³¹ The Chamber is not yet seised of a Rule 70 application by the Prosecution in connection with General Clark’s testimony. It seems clear that one of the conditions that will be imposed by the Rule 70 provider is that his evidence not go beyond the scope of Rule 65 *ter* summary. However, the details of this incipient condition are still not know, and it is uncertain whether any other conditions will be placed upon the testimony of the witness. Bearing in mind that the Prosecution case is already well-advanced, the Chamber considers it to be appropriate to decide this Motion in light of all the circumstances that would apply to the evidence of the witness. The Chamber accordingly does not consider it appropriate to authorise the addition of the witness to the Rule 65 *ter* list without knowing the extent to which the Prosecution might seek to restrict his testimony.³²

14. For the foregoing reasons and pursuant to Rules 54, 66, 70, 73 *bis*, and 89 and Articles 20 and 21 of the Statute, the Trial Chamber hereby CONTINUES CONSIDERATION of the Motion to allow the Prosecution to provide, no later than 29 January 2007, additional information on the state of disclosure and the restrictions sought to be applied to the evidence of the witness. The Defence shall have until 5 February 2007 to respond to any additional submissions by the Prosecution.

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]

³¹ Response, Annex A.

³² *Cf.* Confidential Decision on Prosecution Motion for Reconsideration of Decision on Fifth Prosecution Motion for Protective Measures, 21 June 2006, para. 25 (“With respect to the restrictions upon the examination of the witnesses mandated by [a Rule 70 provider], even if the Prosecution had properly made its motion under Rule 70, it is still in the discretion of the Chamber to decide whether those restrictions are in concert with the rights of the Accused. The *Martić* Chamber exercised its discretion and found the restrictions consistent with the rights of the Accused in that case and in those circumstances. This Chamber has come to a different conclusion. Such differences are entirely expected when an exercise of different Chambers’ discretion in different cases is involved.”).