



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 February 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 February 2007

PROSECUTOR

v.

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

**DECISION ON PROSECUTION MOTION FOR ORDER OF
NON-DISCLOSURE IN RELATION TO SHAUN BYRNES**

Office of the Prosecutor

Mr. Thomas Hannis
Mr. Chester Stamp

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 a confidential “Prosecution’s Motion for Order of Non-Disclosure Regarding Shaun Byrnes,” filed on 2 February 2007 (“Motion”), and hereby renders its decision thereon¹.

1. In its Motion, the Prosecution requests that the following conditions, as requested by the United States, be ordered pursuant to Rule 70 by the Chamber in relation to the disclosure of material in connection with Shaun Byrnes: (a) that the interview notes of Mr. Byrnes be disclosed in redacted form to the Accused and their respective Defence teams; (b) that the redacted interview notes not be disclosed to others apart from the Accused and their respective Defence teams, without the prior approval of the Rule 70 provider; and (c) that the material may only be introduced into the trial record under seal and be referred to during the trial in closed session, unless otherwise authorised by the Rule 70 provider.² The Prosecution further requests that the order apply prospectively to any future documents obtained from the Rule 70 provider under Rule 70(B) in relation to Mr. Byrnes.³

2. The Prosecution submits that the material in question is comprised of the redacted interview notes from 5–6 February 2001 and 30–31 October 2006 of Mr. Byrnes,⁴ which were provided by the Rule 70 provider to the Prosecution pursuant to Rule 70(B).⁵ The Prosecution seeks the disclosure of the material in question as part of the underlying material to support its anticipated renewed request to add Mr. Byrnes to the Rule 65 *ter* witness list.⁶

3. The Prosecution further submits that the Rule 70 provider does not wish the interview notes in question to become public or be shared with third-parties, because the information therein includes material that concerns national security, sensitive material, or information that was deemed irrelevant by the Rule 70 provider.⁷ The Prosecution explains that, for the purposes of disclosure, the Rule 70 provider redacted all information in the interview notes that, in its view, fell

¹ The Chamber recognises that both the Prosecution motion and Defense response on this matter were filed confidentially. The Chamber nevertheless publicly issues this decision, which contains no confidential information.

² Confidential Prosecution Motion for Order of Non-Disclosure Regarding Shaun Byrnes, 2 February 2007 (“Motion”), paras. 7, 10–11.

³ Motion, paras. 10–11.

⁴ Motion, paras. 1, 10. The Chamber notes the 30–31 October 2006 interview notes reference a third interview session with Mr. Byrnes. The notes from this session can not be found by the Prosecution and thus can not be disclosed. Motion, para. 10, note 11.

⁵ *Ibid.*

⁶ Motion, para. 1, note. 1.

⁷ Motion, para. 7.

under the protection of Rule 70.⁸ In particular, the Prosecution has already received approval to disclose six of the seven attachments that relate to the 30–31 October 2006 interview notes.⁹

4. In the confidential Joint Defense Response, the Accused oppose the redaction of material concerning “national security, sensitive material, or [that] was deemed irrelevant by the provider” because “[t]he term ‘sensitive materials’ is vague and too far reaching” and because “the redaction of material ‘deemed irrelevant by the provider’ may prohibit the Accused from adequately preparing to confront the witness in court”.¹⁰ The Defence also argue, *inter alia*, that “the proposed restrictions would prohibit the defence from communicating the substance of the proposed testimony and would thus hamstring investigation and preparation.”¹¹

5. The Trial Chamber notes that Rule 70 provides, in relevant part, as follows:

(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.

6. The Trial Chamber, based upon the submissions of the Prosecution, is satisfied that the material has been provided to the Prosecution by the Rule 70 provider on a confidential basis and that therefore the requirements of Rule 70 have been satisfied. Despite the Chamber’s concern, which was stated previously,¹² regarding the fact that the Rule 70 provider has not given permission for the unredacted interview notes to be disclosed to the Defence and despite the Chamber’s suggestion that the Rule 70 provider allow an *in camera* inspection of the redacted portions, the Rule 70 provider has made a blanket withholding of portions of the interview notes from both the Chamber and the Defence. This decision forces the Chamber to assess whether this blanket withholding activates the provisions of Rules 70(G) and 89(D).

7. While Chamber would have preferred the Rule 70 provider to allow disclosure of the material to the Defence (or at least permit the Chamber to conduct an *in camera* review of the redacted portions of the interview notes), it is aware of the Rule 70 provider’s prerogative to make such a blanket withholding, for whatever purposes it sees fit, *e.g.*, national security interests. Moreover, the Chamber does not find, at this point, *i.e.*, for disclosure purposes, that this blanket

⁸ Motion, paras. 7, 10, note 11.

⁹ *Ibid*, para. 10, note 10.

¹⁰ Confidential Joint Defense Response to Prosecution’s Motion for Non-Disclosure Regarding Shaun Byrnes, 7 February 2007 (“Response”), para. 5.

¹¹ *Ibid*., paras. 5, 6.

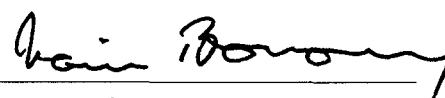
withholding leads to undue prejudice to the Accused. Whether the Chamber will ultimately grant leave for Mr. Byrnes to be added to Prosecution's Rule 65 *ter* witness list is another matter, and the Chamber will deal with that issue if it arises again in the trial.

8. Although the Chamber has, in the past, granted Rule 70 protections prospectively, in the particular circumstances of this case—*e.g.*, the fact that the witness is still subject to a possible future motion to be added to the Rule 65 *ter* list—the Chamber does not find it appropriate to grant the Motion prospectively. The Prosecution may apply for further Rule 70 protections for any additional material of which it may come into possession, and the Chamber will deal with any such future motion when/if it is made.

9. For the foregoing reasons and pursuant to Rules 54 and 70, the Chamber hereby GRANTS the Prosecution's Motion and ORDERS as follows:

- (a) The Prosecution, Accused, and their respective Defence teams, which include counsel and any employees who have been instructed or authorised to have access to confidential material, shall not disclose the material to any persons, governments, organisations, entities, clients, associations, or groups, without the prior approval of the Rule 70 provider.
- (b) The material shall be introduced into the record only under seal and referred to in the trial only in closed session, unless previously authorised by the Rule 70 provider.

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



Judge Iain Bonomy
Presiding

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

[Seal of the Tribunal]

¹² Decision on Prosecution Motion to Amend Its Rule 65 *ter* Witness List, 8 December 2006, paras. 31–35.