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D 17764 - D 17758
05 December 2008

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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-06-90-T
Date: 5 December 2008
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Uldis Ķiniš
Judge Elizabeth Gwaunza

Registrar: Mr Hans Holthuis

Decision of: 5 December 2008

PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

PUBLIC

DECISION ON JOINT DEFENCE MOTION TO PROHIBIT USE OF DEFENCE
DOCUMENTS BY THE PROSECUTION

Office of the Prosecutor

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Procedural Background and Submissions

1. On 13 March 2008, the Chamber held that the Defence documents intended to be used in cross-examination of a witness heard at that time, were to be disclosed to the Prosecution after the conclusion of the examination-in-chief of that witness.¹ This ruling established the procedure in this case on the timing by which the Defence is to disclose the documents it intends to use during cross-examination to the Prosecution.²

2. On 23 September 2008, the Defence filed a joint motion requesting the Chamber to prohibit the Prosecution from using documents it obtained from the Defence pursuant to the Defence's obligation to provide the Prosecution with documents it intends to use in cross-examination at the end of examination-in-chief.³ The Defence submits that due to this practice, and the unpredictable nature of the process of cross-examination, it often provides the Prosecution with documents which the Defence ultimately never uses.⁴ It further submits that the Prosecution sometimes uses these documents in its case-in-chief and that such use is in violation of the Accused's statutorily enshrined right to protection against self-incrimination.⁵ The Defence argues that the right to protection against self-incrimination presupposes that the Prosecution presents its case without evidence obtained against the will of the accused, and that currently, the Defence is compelled by the Chamber's ruling to provide the Prosecution with the documents it intends to use in cross-examination.⁶ According to the Defence, the sole purpose of such a ruling is to ensure that the Prosecution is not prejudiced during cross-examination.⁷ The Defence requests that the Prosecution should be prohibited from using documents provided by the Defence pursuant to the Chamber's ruling of 13 March 2008.⁸ The Defence requests in the alternative that the Chamber establishes a new disclosure procedure which would satisfy the Defence's concerns, or that it orders the Prosecution to move to add the documents obtained from the Defence to its Rule 65 *ter* exhibit list if it intends to use them during its case-in-chief.⁹

¹ T. 660.

² See para. 7, below.

³ Joint Defence Motion Requesting an Order from the Trial Chamber to Prevent Further Misuse of 'Surplus' Defence Documents by Prosecution, 23 September 2008 ("Motion").

⁴ Motion, paras 2-3.

⁵ Ibid., paras 3-5.

⁶ Ibid., paras 6-7.

⁷ Ibid., para. 6.

⁸ Ibid., para 9.

⁹ Ibid., paras 10-11.

3. On 29 September 2008, following discussions in court on 26 September 2008 and an invitation by the Chamber, the Gotovina Defence filed a further submission to the Motion in which it argues that the Prosecution is objecting to a practice which has been in place since the beginning of the trial.¹⁰ According to the Gotovina Defence, this practice meant that a Defence team that cross-examines a witness first will disclose its documents at the conclusion of the examination-in-chief, and a Defence team that cross-examines a witness second, will disclose its documents at the conclusion of the first cross-examination.¹¹ It submits that requiring all three Defence teams to release documents at the end of the examination-in-chief will have the effect of requiring Defence teams to release more documents than they will ultimately use in cross-examination, with the result of enabling the Prosecution to use more documents obtained in such way.¹²

4. On 7 October 2008, the Prosecution filed its response to the Motion in which it submits that its use of documents disclosed by the Defence does not violate the right to protection against self-incrimination as that right is only triggered where an accused is compelled to incriminate himself by force or coercion.¹³ In this case, the Prosecution submits, there is no such implication as the disclosure is voluntary and based on the feeling of “tactical pressure” by the Defence to participate in the trial.¹⁴ The Prosecution further submits that the Chamber gave a ruling on 13 March 2008, which was reaffirmed on 26 September 2008, which unambiguously made clear that the disclosure of documents to be used in cross-examination is to occur after the conclusion of the examination-in-chief.¹⁵

5. On 13 October 2008, the Defence sought leave to file a reply to the Response.¹⁶ The leave was granted on 16 October 2008 and informally communicated to the parties. The Defence then requested a 24-hour extension to file its reply. This request was also granted, and informally communicated to the parties, and the Reply was filed on 30 October 2008.¹⁷ In the Reply, the Defence contends that what the Chamber stated on 13 March 2008 was a

¹⁰ Defendant Ante Gotovina’s Further Submission to Joint Defence Motion Requesting an Order from the Trial Chamber to Prevent Further Misuse of ‘Surplus’ Defence Documents by Prosecution, 29 September 2008 (“Gotovina Further Submission”), paras 1-4, 6; T. 9733-9734.

¹¹ Gotovina Further Submission, para. 2.

¹² *Ibid.*, para. 5.

¹³ Prosecution’s Response to Joint Defence Motion Regarding Use of Defence Cross-Examination Documents by the Prosecution, 7 October 2008 (“Response”), paras 1, 2, 4.

¹⁴ Response, paras 1, 2, 8, 11.

¹⁵ *Ibid.*, para. 14.

¹⁶ Joint Defence Motion Seeking Leave to Reply to Prosecution’s Response to Joint Defence Motion Regarding Use of Defence Cross-Examination Documents by the Prosecution, 13 October 2008.

¹⁷ Joint Defence Reply to Prosecution’s Response to Joint Defence Motion Regarding Use of Defence Cross-Examination Documents by the Prosecution, 30 October 2008 (“Reply”).

ruling.¹⁸ Furthermore, the Defence reiterates many of its arguments from the Motion and submits that the Prosecution failed to address the Defence argument that by using the documents obtained from the Defence pursuant to the established disclosure procedure, the Prosecution was in violation of Rule 65 *ter* of the Tribunal's Rules of Procedure and Evidence ("Rules").¹⁹

Discussion

6. It is a well-established practice before the Tribunal that the Defence may be compelled to disclose to the Prosecution documents it intends to use in cross-examination of witnesses called by the Prosecution. Different Trial Chambers have determined different times at which such disclosure shall take place: after the witness is sworn in but before examination-in-chief begins;²⁰ immediately after examination-in-chief ends;²¹ at least twenty-four hours before a document is due to be used in cross-examination;²² before cross-examination begins;²³ and piecemeal disclosure in the course of cross-examination.²⁴ As

¹⁸ Reply, para. 4.

¹⁹ *Ibid.*, para. 14.

²⁰ *Prosecutor v. Milutinović et al.*, Decision on Joint Defence Motion for Modification of Order on Procedure and Evidence, 16 August 2006 ("A list of documents or other material to be used by a party when cross-examining a witness must be disclosed to the opposing party or parties at the commencement of the direct examination of that witness and after he or she has made the solemn declaration ... At the same time, the cross-examining party must release to the opposing party or parties, via the eCourt system, any documents or other material not already in the possession of the opposing party or parties that form part of the list"). Orders by two other Trial Chambers closely follow the *Milutinović* wording: *Prosecutor v. Popović et al.*, Order on Production of Defence Documents Used in Cross-Examination of Prosecution Witnesses, 24 August 2006 ("a list of documents or other material to be used by the Defence when cross-examining a Prosecution witness must be disclosed to the Prosecution at the commencement of the examination in chief of that witness, after the witness has made the solemn declaration ... concurrently, the Defence must release to the Prosecution, via the eCourt system, any documents or other material not already in the possession of the Prosecution that form part of the list"); and *Prosecutor v. Dragomir Milošević*, Decision on Time-Limits for Disclosure of Documents to be Used During a Witness's Testimony, 18 January 2007 ("the Defence [is] to provide the Prosecution, the Registry, and the Trial Chamber with a list of exhibits it intends to use in court during cross-examination at the commencement of the examination-in-chief of that witness and after he or she has made the solemn declaration ... [and] to release to the Prosecution, the Registry and the Trial Chamber, via the eCourt system, any documents or material that form part of the list ... insofar as they are not already in the possession of the Prosecution, the Registry, and the Trial Chamber"). Also in *Prosecutor v. Haradinaj et al.*, the Trial Chamber relied on the *Milutinović* precedent, see Decision on Notification of Cross-Examination Material, 31 May 2007 ("*Haradinaj* Decision").

²¹ *Prosecutor v. Prlić et al.*, Oral Decision, 8 May 2006, T. 1475 ("these documents [which the Defence intends to use in the course of cross-examination] will be disclosed before the beginning of the cross-examination, but also just after the end of the examination-in-chief. That means that if the examination-in-chief is concluded at 1500 hours, at 1500 hours and one second Defence counsel shall disclose the documents. But if the examination-in-chief is concluded at 1900 hours, in that case the Defence shall disclose the documents at 1900 hours and one second. The cross-examination shall then commence on the following day").

²² *Prosecutor v. Mrkšić et al.*, Oral Decision, 6 December 2005, T. 2953 ("from the 23rd of January on, applying equally to both sides, documents ought to be subject to 24 hours' notice").

²³ *Prosecutor v. Martić*, Oral Decision, 20 February 2006, T. 1578-1579 ("the Prosecution requested that the Trial Chamber rule ... that the cross-examining party should provide to the opposing party no later than the commencement of the cross-examination, a list of those documents or exhibits which it intends to use during the

noted by the Trial Chamber in *Haradinaj et al.*, the practice at the Tribunal regarding this question has changed over time, with the most recent decisions shifting the deadline for disclosure of cross-examination material to the moment following the swearing in of a witness.²⁵

7. On 13 March 2008, the parties informed the Chamber that they had not completed their discussions on the question when the disclosure of documents to be used in cross-examination, by either side, should be completed.²⁶ The Chamber then determined that the Defence documents intended to be used in cross-examination of the witness on the stand at the time, had to be disclosed to the Prosecution after the conclusion of the examination-in-chief of that witness.²⁷ The Chamber also encouraged the parties to continue their discussions on the matter.²⁸ Until the filing of the Motion, the parties have not presented the Chamber with any agreement nor have they requested any further ruling on the matter. It is clear from the Motion and the practice since 13 March 2008, that the Defence accepted the Chamber's determination on 13 March 2008 to be a decision establishing the procedure on the timing by which the Defence is to disclose the documents it intends to use during cross-examination to the Prosecution.²⁹ This procedure established by the Chamber's ruling of 13 March 2008 therefore remains valid for this case.³⁰

8. One of the two main Defence contentions is that this procedure also meant that the Defence teams should each complete the disclosure of the documents to be used in cross-examination at varying moments in time, depending on the order of cross-examination.

cross-examination of a witness. ... The Trial Chamber notes that the Defence ... has agreed ... Considering the above positions of the parties, the Trial Chamber grants the motion").

²⁴ *Prosecutor v. Naletilić and Martinović*, Decision on the Accused Naletilić's Request for Enforcement of Trial Chamber's Previous Order Regarding Documents During Cross-Examination, 3 May 2002 ("the party conducting the cross-examination may give to the other party and to the Chamber the exhibits it intends to use during the cross-examination at the time that the document is submitted to the witness; that an earlier distribution is encouraged as it facilitates the conduct of the proceedings; and that a list of the exhibits intended to be used should be distributed in advance to allow the Chamber as well as the other party to bring the relevant documents into court"); *Prosecutor v. Blagojević and Jokić*, Oral Decision, 28 April 2004, T. 8406-8407 ("before the cross-examination, the party conducting the cross-examination should furnish at least a list of the documents they are going to use during the cross-examination, which will greatly facilitate the proceedings of the present case"); and *Prosecutor v. Halilović*, Decision on Motion for Prosecution Access to Defence Documents Used in Cross-Examination of Prosecution Witnesses, 9 May 2005, para. 9 ("during the Prosecution case the Defence is not obliged to provide in advance (not even at the beginning of cross-examination) the Prosecution with the documents or a list of documents which it intends to use during cross-examination of a witness ... The Defence is therefore entitled to provide the Prosecution only with those documents actually used in court during cross-examination, at the time the documents are shown to the witness").

²⁵ *Haradinaj* Decision, para. 8.

²⁶ T. 660.

²⁷ T. 660, 9733.

²⁸ T. 661.

²⁹ Motion, paras 1, 4, 7, 10.

Nothing in the Chamber's ruling of 13 March 2008 suggests that; and on 26 September 2008, after the Motion had been filed, the Chamber stated that all Defence teams are to complete the disclosure of documents intended to be used in cross-examination after the conclusion of examination-in-chief.³¹ The purpose of this deadline is to ensure procedural fairness and to promote efficiency in this trial, in which, like in other trials before the Tribunal, documents are extensively introduced into evidence. Considering the practice before the Tribunal on this issue referred to above, the stipulated deadline is reasonable and the Chamber sees no reason to change it.

9. The other main argument raised in the Motion is that the procedure established by the Chamber on 13 March 2008 may result in a violation of the Accused's right to be protected against self-incrimination. The scope of this right is limited. According to the Statute, an accused may not be compelled to testify against himself or to confess guilt.³² An accused is furthermore under no general obligation to disclose documents in his possession to the Prosecution or to the Trial Chamber. However, certain procedural consequences may result from procedural positions the accused adopts in his defence. For example, once an accused has decided to take the stand as a witness, he is under an obligation to answer questions, even if the answers may be self-incriminating. Also, in cases in which an accused offers an alibi defence, Rule 67 (B) (i) (a) of the Rules obliges him to disclose specific information upon which he intends to rely in establishing the alibi.

10. As set out above, it has been established in the jurisprudence of the Tribunal that challenging the testimony of a Prosecution witness by using documentary evidence triggers, at a certain point in time, an obligation to disclose to the Prosecution the documents the Defence intends to use in cross-examination. It is the responsibility of Defence counsel to balance the advantages and disadvantages of opting for the placement of a specific document on the list of documents to be used in cross-examination, knowing that by doing so, the Defence will have to disclose the document to the Prosecution, which in turn may later use it in support of its own case. The right of the accused to be protected against self-incrimination does not entail an opportunity to re-assess the expected advantages and disadvantages of the use of a specific document after that document has been added to the list of documents to be used in cross-examination and disclosed to the Prosecution. The right to be protected against self-incrimination allows an accused to make fundamental choices regarding his defence without

³¹ T. 660.

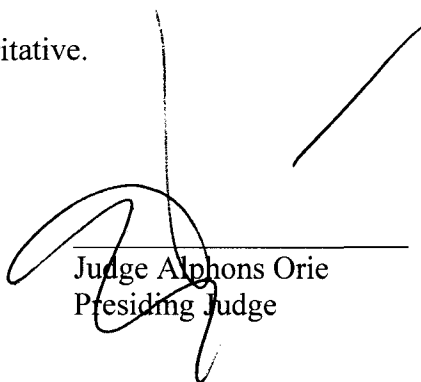
³² T. 9733.

coercion or compulsion to incriminate himself. That right is not meant to shield an accused from the possibly negative effects of his procedural choices, such as the decision about which document to place on the list of documents to be used during cross-examination.

11. In cases where the Prosecution, in its examination-in-chief, uses documents previously disclosed to it by the Defence pursuant to the procedure set by the Chamber, the Chamber finds that it is not necessary for the Prosecution to seek to add such documents to its Rule 65 *ter* exhibit list. The primary purpose of placing a document on that list is to inform the Defence of the material to be used by the Prosecution in the presentation of its case so that the Defence can study that material and prepare for its cross-examination. That purpose is served if the Defence is the source of the document.

12. For the foregoing reasons, the Chamber **DENIES** the Motion in its entirety.

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



Judge Alphons Orié
Presiding Judge

Dated this 5th day of December 2008
At The Hague
The Netherlands

[Seal of the Tribunal]

³² Article 21 (4) (g) of the Statute.