

12 JUNE 2009



International Tribunal for the Prosecution of
Persons Responsible for Serious Violations of
International Humanitarian Law Committed in
the Territory of Former Yugoslavia since 1991

Case No. IT-04-81-T

Date: 12 June 2009

Original: English

IN TRIAL CHAMBER I

Before: Judge Bakone Justice Moloto, Presiding
Judge Pedro David
Judge Michèle Picard

Registrar: Mr. John Hocking

Decision of: 12 June 2009

PROSECUTOR

v.

MOMČILO PERIŠIĆ

PUBLIC

**DECISION ON PROSECUTION MOTION FOR AN
ADVANCE RULING ON THE SCOPE OF PERMISSIBLE
CROSS-EXAMINATION**

The Office of the Prosecutor

Mr. Mark Harmon
Mr. Daniel Saxon

Counsel for the Accused

Mr. Novak Lukić
Mr. Gregor Guy-Smith

TRIAL CHAMBER I (“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 Motion for an Advance Ruling on the Scope of Permissible Cross-Examination”, filed publicly on 5 June 2009, (“Motion”) and hereby renders its Decision.

A. Introduction

1. Muhamed Sacirbey is scheduled to testify as a Prosecution witness, commencing on 15 June 2009. The witness is currently under investigation by the authorities of Bosnia and Herzegovina (“BiH”) for alleged abuse of office through engaging in unauthorised expenditures while serving as Foreign Minister of BiH.¹ To date, Sacirbey has not been indicted by any court and there are no criminal charges pending against him.² In the Motion, the Prosecution seeks an order precluding the Defence to cross-examine the witness on the substance of allegations against him.³

B. Submissions of the Parties

1. Prosecution

2. In its Motion, the Prosecution avers that allegations against Sacirbey “have no direct bearing on any of the issues before the Trial Chamber” and that it does not intend to question the witness about any such allegations.⁴ It claims, therefore, that cross-examination of Sacirbey should only be permitted if the Trial Chamber is satisfied that the allegations are relevant to the credibility of the witness and that “cross-examination would be consonant with the spirit of the Statute”.⁵

3. The Prosecution asserts that Sacirbey is presumed innocent and mere allegations of wrongdoing are not probative of his credibility.⁶

4. The Prosecution further argues that allowing the Defence to cross-examine Sacirbey about the facts underlying the allegations against him would undermine his right under BiH law to remain silent and to be assisted by counsel during questioning.⁷ The Prosecution maintains that Rule 90(E) of the Rules of Procedure and Evidence (“Rules”), which deals with a witness’s right not to incriminate himself, does not provide equal rights compared to those that he would enjoy as a

¹ Motion, paras 1 and 3.

² Motion, para. 1.

³ Motion, paras 2 and 12.

⁴ Motion, para. 7.

⁵ Motion, para. 7.

⁶ Motion, para. 8.

⁷ Motion, para. 9.

witness under BiH Law.⁸ Specifically, the Prosecution points out that Rule 90(E) only applies to questions that would directly incriminate the witness; it does not provide for an option for the witness to be assisted by counsel during questioning; and finally, it is only binding on the Tribunal, and not on BiH courts, which would be able to use the answers provided by Sacirbey to advance their investigation or prosecution.⁹

5. The Prosecution also alleges that permitting such a cross-examination would be “antithetical to the spirit” of the Statute of the Tribunal, its guidelines and rules, which recognise, *inter alia*, the presumption of innocence; that the Trial Chamber has a duty to protect witnesses; that cross-examination must be conducted within reasonable limits; that a suspect has the right to remain silent when questioned by investigators and to have a counsel present during interrogations and that accused persons have the right to choose whether to testify in their own defence and thus be subjected to cross-examination.¹⁰

6. Finally, the Prosecution argues that “there is a risk that if Mr. Sacirbey is cross-examined on the substance of the allegations, the Chamber will be tempted to engage in speculation as to his guilt or innocence”, which would amount to an unnecessary and irrelevant distraction.¹¹

2. Defence

7. On 9 June 2009, the Defence filed “Mr. Perišić’s Response to Prosecution Motion for an Advance Ruling on the Scope of Permissible Cross-Examination” (“Response”), in which it opposes the Motion, arguing that limiting the scope of Mr. Sacirbey’s cross-examination is contrary to the letter and spirit of the Rules, contrary to the Tribunal’s jurisprudence and in direct contravention of the Accused’s right to a fair trial.¹²

8. The Defence argues that the framework for cross-examination of witnesses is outlined in Rule 90(H), which allows a party to cross-examine the witness (a) on the subject matter of evidence-in-chief; (b) matters affecting the credibility of witnesses; (c) where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject matter of that case.¹³ The Defence further emphasises that Rule 90(H)(iii) provides that the Trial Chamber may, in the exercise of its discretion, permit enquiry into additional matters.¹⁴ The Defence concludes that the

⁸ Motion, para. 10.

⁹ Motion, para. 10.

¹⁰ Motion, para. 9.

¹¹ Motion, para. 11.

¹² Response, para. 18.

¹³ Response, para. 10.

¹⁴ Response, para. 11.

fact that the Prosecution does not intend to question Sacirbey on his alleged criminal activities does not preclude the Defence from so doing, based on Rule 90(H).¹⁵

9. The Defence also argues that the Prosecution is incorrect in maintaining that only prior convictions may bear on a witness's credibility, while mere allegations of criminal conduct do not.¹⁶ In support, the Defence relies on a decision in the *Prosecutor v. Momčilo Krajišnik* case,¹⁷ where the Trial Chamber recognised that cross-examination in relation to the facts underlying alleged criminal conduct is permissible and consistent with the right to a fair trial.¹⁸ The Defence adds that the allegations against Sacirbey go directly to his honesty, credibility and reliability as a witness and such issues always have a bearing on the proceedings.¹⁹

10. The Defence further rejects as premature the Prosecution's argument whereby allowing cross-examination of Sacirbey about his alleged misconduct would violate his right to remain silent, his right to the assistance of counsel, and his right to presumption of innocence and his right to have a counsel present during interrogations.²⁰ The Defence alleges that nothing suggests that Sacirbey is not willing to provide his testimony voluntarily, and thus the Prosecution is asserting objections and rights on behalf of the witness, that he himself has not asserted.²¹

11. In addition, the Defence maintains that it is not for the Prosecution or the Trial Chamber to second-guess what BiH authorities may or may not do "at some unknown point in the future, should Mr. Sacirbey ever make himself available to the prosecutors there".²² The Defence also points out the existence of remedies, other than limiting the scope of cross-examination, to address Sacirbey's concerns. Such remedies include conducting certain parts of cross-examination in closed session, and allowing the assistance of the counsel before Sacirbey answers certain questions put to him.²³ The Defence concludes that "given the existence of these alternatives and given that Mr. Sacirbey is not an Accused or a suspect before this Tribunal, the Prosecution request that Mr. Perišić's right to cross-examine him be curtailed is simply without legal or factual merit".²⁴

12. Finally, the Defence submits that there is no merit in the Prosecution's argument that the Trial Chamber may engage in speculation as to Sacirbey's culpability, as the Prosecution has not

¹⁵ Response, para. 11.

¹⁶ Response, para. 15.

¹⁷ *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-T, Decision on Cross-Examination of Milorad Davidović, 15 December 2005 ("Krajišnik Decision").

¹⁸ Response, paras 12-18.

¹⁹ Response, para. 12.

²⁰ Response, paras 19-20.

²¹ Response, paras 20-21.

²² Response, para. 12.

²³ Response, paras 25-27.

²⁴ Response, para. 27.

identified any basis, factual or legal, for its suggestion that the Trial Chamber will be unable to appropriately weigh and consider Sacirbey's evidence.²⁵

C. Applicable Law

13. Rule 90(E) provides that

A witness may object to making any statement which might tend to incriminate the witness. The Chamber may, however, compel the witness to answer the question. Testimony compelled in this way shall not be used as evidence in a subsequent prosecution against the witness for any offence.

14. Rule 90(F) provides in relevant part that

The Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to make the interrogation and presentation effective for the ascertainment of the truth.

15. Rule 90(H) provides in relevant parts that

(i) Cross-examination shall be limited to the subject-matter of the evidence-in-chief and matters affecting the credibility of the witness and, where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject-matter of that case.

(ii) In the cross-examination of a witness who is able to give evidence relevant to the case for the cross-examining party, counsel shall put to that witness the nature of the case of the party for whom that counsel appears which is in contradiction of [*sic*] the evidence given by the witness.

(iii) The Trial Chamber may, in the exercise of its discretion, permit enquiry into additional matters.

D. Discussion

16. At the onset, the Trial Chamber recalls that cross-examination is a basic right afforded to the accused. The Trial Chamber in the case of *Prosecution v. Milutinović et. al.* denied the Prosecution's request to limit the scope of a witness's cross-examination, pointing out that

To restrict cross-examination to the subject matter predetermined by anyone other than the Chamber with the approval, at least tacit, of the Prosecution is inevitably unfair to the Defence. It would prevent them from challenging the honesty and reliability of the witness by looking at inconsistencies in what he may have said on matters outwith the permitted territory of the examination. It would also prevent the Defence from cross-examining on relevant matters favourable to the Defence case that are excluded by the restriction.²⁶

²⁵ Response, para. 28.

²⁶ *Prosecution v. Milutinović et. al.*, Case No. IT-05-87-T, Second Decision on Prosecution Motion for Leave to Amend its Rule 65 *ter* Witness List to add Wesley Clark, 16 February 2007, para. 27 ("*Milutinović* Decision").

17. The *Milutinović* Decision was later upheld by the Appeals Chamber, which stated that “[t]he provisions of Rule 90(H)(i) are important for effective realisation of an accused’s right to confront the witnesses brought against him, and their restriction would appear to be patently unfair.”²⁷

18. The Trial Chamber further considers that subject to the overriding requirement of relevance, Rule 90(H) does not limit the matters that may be raised during cross-examination, which are directed solely at the credibility of the witness.²⁸ The Trial Chamber, thus, cannot but agree with the Defence that the cross-examination of Sacirbey should not be limited to matters contained in examination in-chief and that questions on issues pertaining to his credibility are, in principle, permissible.

19. As to the question whether mere allegations of criminal conduct—as opposed to a criminal conviction—have any bearing on the case, the Trial Chamber recalls that in the *Krajišnik* Decision, it was held that

Indeed, Rule 90(H)(ii) imposes an obligation on a party to cross-examine the witness on his or her evidence which contradicts the nature of the party’s case. This may well include that party’s assessment of the character of a witness.²⁹

...

Where a party wishes to confront a witness with what effectively constitute allegations that the witness has engaged in serious criminal conduct that party must have reasonable grounds to do so at the time the allegations are made. “Reasonable grounds” does not require that the party have in its possession incontrovertible evidence of wrongdoing; it does, however, require something more than mere hunch, innuendo, or unsubstantiated hearsay.³⁰

20. The Trial Chamber finds that allegations of criminal conduct may indeed go to the witness’s credibility, reliability and assessment of his character. In this case, the Prosecution even stipulates that a criminal investigation against Mr. Sacirbey is pending before BiH courts and that it is a matter of public record.³¹

21. The Trial Chamber accepts the Prosecution’s argument that the safeguards provided by Rule 90(E) to the witness only apply before the Tribunal, and do not bind the BiH authorities. The Chamber notes, however, that this does not leave the witness without redress. Sacirbey and the Prosecution are free to request private or closed session when the circumstances so require. Also,

²⁷ *Prosecution v. Milutinović et. al.*, Case No. IT-05-87-A, Decision on Interlocutory Appeal Against Second Decision Precluding the Prosecution From Adding General Wesley Clark to its 65th Witness List, para. 20. See also Article 21 of the Statute.

²⁸ *Krajišnik* Decision, para. 8.

²⁹ *Krajišnik* Decision, para. 8.

³⁰ *Krajišnik* Decision, para. 9.

³¹ Motion, para. 8.

Sacirbey may avail himself of the assistance of counsel, should he deem it necessary, before answering certain questions put to him.

22. The Trial Chamber also recalls, that pursuant to Rule 90(F), it is best placed to judge what questions should be permitted in cross-examination of Sacirbey.

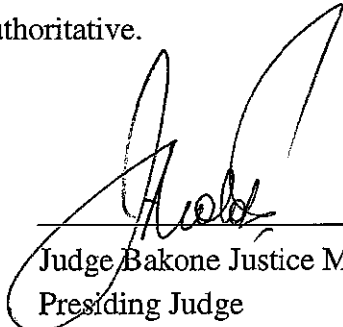
23. Finally, the Trial Chamber notes that the Prosecution proffers no basis for the assertion that the Trial Chamber might be "tempted" to speculate about Sacirbey's guilt or innocence, should the Defence be allowed to cross-examine him about his alleged criminal conduct. Consequently, the Trial Chamber dismisses such argument as being without merit.

E. Disposition

FOR THE FOREGOING REASONS, and pursuant to Rules 54 and 90 of the Rules, the Trial Chamber

DENIES the Motion.

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



Judge Bakone Justice Moloto
Presiding Judge

Dated this twelfth day of June 2009

At The Hague

The Netherlands

[Seal of the Tribunal]