



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-05-87/1-T
Date: 14 May 2009
Original: English

IN TRIAL CHAMBER II

Before: Judge Kevin Parker, Presiding
Judge Christoph Flügge
Judge Melville Baird

Registrar: Mr John Hocking, Acting Registrar

Decision: 14 May 2009

PROSECUTOR

v.

VLASTIMIR ĐORĐEVIĆ

PUBLIC WITH CONFIDENTIAL ANNEX A

**DECISION ON PROSECUTION'S MOTION FOR LEAVE TO
AMEND ITS RULE 65 TER WITNESS LIST**

The Office of the Prosecutor:

Mr Chester Stamp
Ms Daniela Kravetz
Mr Matthias Neuner

Counsel for the Accused:

Mr Dragoljub Đorđević
Mr Veljko Đurđić

1. This decision of Trial Chamber II (“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 in respect of “Prosecution’s Motion for Leave to Amend its Rule 65 *ter* witness list with Confidential Annexes A and B” filed by the Office of the Prosecutor (“Prosecution”) partly confidentially on 9 April 2009 (“Motion”). In this Motion the Prosecution seeks leave to amend its witness list filed on 1 September 2008 (“Witness List”) in order to provide notification of the names of two witnesses designated in the Witness List as Rule 70 witnesses. Vlastimir Đorđević responded on 23 April 2009.¹ On 28 April 2009 the Prosecution sought leave to file a reply, which was granted by the Chamber on 29 April 2009. On 1 May 2009, as ordered by the Chamber, the Prosecution filed a Reply.²

I. SUBMISSIONS

2. The Prosecution submits that allowing the proposed amendment to the Witness List is in the interests of justice. In particular, it is submitted that the Motion is filed at an early stage of the Prosecution case, that the Witness List makes reference to “U.S. Rule 70 witness 1” and “U.S. Rule 70 witness 2” and that at the time of filing of the Witness List the Prosecution had stated that it was not in a position to indicate the names of these witnesses as negotiations with the Rule 70 provider were ongoing. The Prosecution submits further that through letters dated 8 and 19 September 2008 it has sought permission from the U.S. government (“Provider”) to call Shaun Byrnes and Michael Phillips as witnesses in the *Đorđević* trial and that by letters dated 19 March 2009 the Provider has authorised the Prosecution to call the two witnesses, on condition that the Prosecution seeks and obtains prior to their scheduled testimonies an order from the Chamber adopting a list of specific conditions regarding their testimonies. The Prosecution submits further that Vlastimir Đorđević has received all documents in possession of the Prosecution pertaining to these witnesses, noting that pursuant to the Chamber’s “Decision on Prosecution’s Motion for Order of Non-Disclosure” of 9 March 2009 it has disclosed 27 of the 29 documents produced by Byrnes and Phillips. Supplemental Rule 65 *ter* summaries of these witnesses’ anticipated evidence are annexed to the Motion. It is submitted that the Prosecution does not intend to call either witness before June 2009 and accordingly, in the Prosecution’s submission, Vlastimir Đorđević would have ample time to prepare for cross-examination and to seek authorisation from the Provider to use during the trial the Rule 70 material previously disclosed if so intended. Finally, the Prosecution submits that the

¹ *Prosecutor v Đorđević*, Case No. IT-05-87/1-PT, “Vlastimir Đorđević’s Response to Prosecution’s Motion for Leave to Amend its Rule 65 *ter* Witness List with Confidential Annexes A and B”, 23 April 2009 (“Response”).

anticipated evidence of Shaun Byrnes and Michael Phillips is relevant to issues in dispute in the case and to all counts in the Indictment.

3. Vlastimir Đorđević responds that lack of due diligence on behalf of the Prosecution and the potential for undue delay should result in the Motion being denied. In the alternative, Vlastimir Đorđević requests that the Chamber require (i) “full permissible disclosure” of all materials related to Shaun Byrnes and Michael Phillips and (ii) that the two witnesses appear to testify not earlier than the beginning of July 2009 and only if all required permissions regarding the use of documentary evidence during their testimonies have been obtained by that time. More specifically, Vlastimir Đorđević submits that the Motion is not filed at an early stage of the Prosecution case, that the Prosecution should have sought the permission of the Provider prior to the filing of the Witness List on 1 September 2008, and that while Vlastimir Đorđević was on notice of the Prosecution’s intention to call two unnamed U.S. Rule 70 witnesses, it could not have started its preparation for these witnesses until the witnesses were named and the materials pertaining to them were disclosed. Further, it is submitted that it is unclear whether all documents related to these witnesses have been disclosed by the Prosecution and whether there are further conditions for the use of these documents in court. In case Vlastimir Đorđević is required to seek further permissions from the Provider it is requested that the necessary time to secure such permissions is allowed to him.

4. In its Reply the Prosecution clarifies *inter alia* that all documents pertaining to witnesses Byrnes and Phillips (“Rule 70 Documents”) have now been disclosed, the last two documents being enclosed as Annex A to the Motion. It also submits that the Provider is aware of the anticipated scheduling of the testimony of the two witnesses and has agreed to ensure that any timely request by the parties for permission to use any of the Rule 70 Documents in court will be processed to enable each party to use the Rule 70 Documents.

II. LAW

5. Pursuant to Rule 73 *bis* (F) of the Rules of Procedure and Evidence of the Tribunal (“Rules”) the Chamber may grant a motion for an amendment to the witness list if satisfied that this is in the interests of justice. In its assessment, the Chamber will consider the relevance and probative value of the proposed evidence and whether the interests of the Defence and the fairness

² *Prosecutor v Đorđević*, Case No. IT-05-87/1-PT, “Prosecution’s Reply to Vlastimir Đorđević’s Response to Prosecution’s Motion for Leave to Amend its Rule 65 *ter* Witness List with Confidential Annexes A and B”, 1 May 2009 (“Reply”).

of the proceedings are adequately protected.³ Factors to be taken into account in this respect include whether the moving party has shown good cause for its request, the stage of the proceedings at which the request is made, whether granting the amendment would result in undue delay in the proceedings, and whether the moving party has exercised due diligence in identifying proposed witnesses at the earliest possible moment in time.⁴

6. Rule 70 of the Rules governs matters not subject to disclosure. It provides in the 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.

(C) If, after obtaining the consent of the person or entity providing information under this Rule, the Prosecutor elects to present as evidence any testimony, document or other material so provided, the Trial Chamber, notwithstanding Rule 98, may not order either party to produce additional evidence received from the person or entity providing the initial information, nor may the Trial Chamber for the purpose of obtaining such additional evidence itself summon that person or a representative of that entity as a witness or order their attendance. A Trial Chamber may not use its power to order the attendance of witnesses or to require production of documents in order to compel the production of such additional evidence.

(D) If the Prosecutor calls a witness to introduce in evidence any information provided under this Rule, the Trial Chamber may not compel that witness to answer any question relating to the information or its origin, if the witness declines to answer on grounds of confidentiality.

(E) The right of the accused to challenge the evidence presented by the Prosecution shall remain unaffected subject only to the limitations contained in paragraphs (C) and (D).

(F) The Trial Chamber may order upon an application by the accused or defence counsel that, in the interests of justice, the provisions of this Rule shall apply *mutatis mutandis* to specific information in the possession of 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.

III. DISCUSSION

7. Mr Shaun Byrnes was head of the United States Kosovo Diplomatic Observer Mission from August 1998 until March 1999. He is expected to testify about his meetings with heads of sections

³ *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 Mrkšić et al*, Case No. IT-95-13/1-T, "Decision on Prosecution Motion to Amend its Rule 65 *ter* List", 6 June 2006, para 2.

⁴ *Prosecutor v. Lukić et al.*, Case No. IT-98-32/1-T, "Decision on Prosecution's Motion to Amend Prosecution's Witness List (Dr. Fagel)", 3 November 2008, p 3; *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-PT, "Decision on Prosecution Motion to Amend its Rule 65*ter* Witness List", 21 December 2006, para 10; *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, "Confidential Decision on Prosecution's Motions for Leave to Amend Rule 65*ter* Witness List and Rule 65*ter* Exhibit List", 6 December 2006, p 8. See also *Prosecutor v Đorđević*, Case No. IT-05-87/1-T, "Decision on Prosecution's Motion to Amend the Rule 65*ter* Witness List", 12 March 2009, para 4.

of the Serbian Army (“VJ”) and the Ministry of Interior (“MUP”), including about at least one personal meeting with Vlastimir Đorđević and about VJ and MUP operations in Kosovo in 1998 and 1999. Mr Michael Phillips was a Lieutenant-Colonel serving with the Kosovo Verification Mission in Kosovo from November 1998 until July 1999. His expected evidence relates to his meetings with members of the joint criminal enterprise alleged in the Indictment and to activities of the VJ and MUP in Kosovo. The anticipated evidence of both witnesses, therefore, is relevant and probative to issues in the present Indictment.

8. Vlastimir Đorđević submits that the Prosecution has not acted with due diligence in securing the necessary permissions from the Provider. The Chamber notes in this respect that in its submissions pursuant to Rule 65 *ter* made on 1 September 2008 the Prosecution had indicated that it intended to call two U.S. Rule 70 witnesses and that at the time it was “not in a position to indicate the names of these witnesses [...] as negotiations with the Rule 70 providers are ongoing.”⁵ The effect of the submissions in the present Motion is that the Prosecution has requested permission from the Provider to call Shaun Byrnes and Michael Phillips as witnesses in the *Đorđević* case on 8 and 19 September 2008. In each case this request was made in the month in which the Prosecution filed its pre-trial brief and Witness List. This does not indicate undue delay by the Prosecution. It was not until 19 March 2009 that the Prosecution received letters authorising it to call Messrs Byrnes and Phillips as witnesses in the *Đorđević* trial. The present Motion was filed on 9 April 2009. The time that elapsed between the Prosecution receiving the necessary permission from the Provider and its Motion to add the two witnesses to its Witness List does not suggest to the Chamber that there has been a lack of due diligence on behalf of the Prosecution.

9. The Prosecution moved to add Shaun Byrnes and Michael Phillips to its Witness List at a time when the Prosecution case has been underway for over two months. The Chamber is not persuaded, however, that in the present circumstances Vlastimir Đorđević’s defence has been, or will be adversely affected by this delay. The Witness List filed on 1 September 2008 included references to two Rule 70 witnesses whose evidence was expected to relate to the Kosovo Verification Mission and the United States Kosovo Diplomatic Observer Mission. The Prosecution’s pre-trial brief, filed on the same day contains a number of references to anticipated evidence of “Rule 70 witness” in support of specific allegations. More significantly, however, on 9 March 2009 the Chamber authorised disclosure to Vlastimir Đorđević under certain conditions of 27 of the 29 documents relating to the witnesses Michael Phillips and Shaun Byrnes produced by or used with them during interviews conducted by the Prosecution, and the remaining two documents

⁵ *Prosecutor v Đorđević*, Case No. IT-05-87/1-T, “Prosecution’s Submission pursuant to Rule 65 *ter* (E) with Confidential Annex I, Annex II, and Annex III”, 1 September 2008.

were produced with this Motion. Therefore, while the present Motion was not filed before 9 April 2009 Vlastimir Đorđević was on notice from a month earlier of the likelihood that the Prosecution wished to call Messrs Byrnes and Phillips as the two U.S. Rule 70 witnesses referred to in the Prosecution's Witness List of 1 September 2008.

10. The Chamber's authority to assess whether information has been provided in accordance with Rule 70 extends only to an examination whether the information was in fact provided on a confidential basis, of which the Chamber may be satisfied simply by a consideration of the information itself or by the mere assertion of the Prosecutor.⁶ The Chamber is satisfied that the material related to the two witnesses falls within the protection of Rule 70.

11. The Prosecution submits that the Provider has authorised the appearance of witnesses Byrnes and Phillips in the *Đorđević* trial on condition that the Prosecution seeks and obtains an order from the Chamber imposing certain conditions regarding the testimonies of the two witnesses. The Chamber has reviewed these conditions and is satisfied that they are within the scope of Rule 70.

12. In the view of the Chamber any further valid concern of the Defence about the effects of the late notification of the identity of these witnesses will be overcome by an order that neither witness be called earlier than 28 days from the filing of this Decision.

For the foregoing reasons and pursuant to Rules 70, 73 *bis* (F) and 75 of the Rules the Chamber:

- (1) **GRANTS** leave to the Prosecution to add Shaun Byrnes and Michael Phillips to its Witness List;
- (2) **ORDERS** that:
 - a. the testimony of Shaun Byrnes and Michael Phillips shall be limited to the topics listed in Annex A to this Decision;
 - b. the scope of cross-examination shall be limited to the scope of direct examination and issues regarding the credibility of the witnesses;
 - c. Shaun Byrnes and Michael Phillips may decline to answer questions on the grounds of confidentiality;

⁶ *Prosecutor v Milošević*, Case No. IT-02-54-AR108*bis*&AR 73.3, "Public Version of the Confidential Decision on the Interpretation and Application of Rule 70", 23 October 2002, para 29.

- d. representatives of the Provider are allowed to be present during the testimonies of Shaun Byrnes and Michael Phillips;
 - e. questioning of Michael Phillips on the contents of his notebook shall occur in closed session; any notebook pages used for questioning shall be tendered into evidence under seal;
 - f. neither Shaun Byrnes nor Michael Phillips shall be called to give evidence earlier than 28 days from the filing of this Decision;
- (3) **DIRECTS** the Prosecution and Vlastimir Đorđević to contact the Provider as soon as practicable with the view of obtaining permission for using in court with witnesses Shaun Byrnes and Michael Phillips, respectively, any of the Rule 70 Documents identified above if they deem this necessary for their respective examination or cross-examination.

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

Dated this fourteenth day of May 2009
At The Hague
The Netherlands



Judge Kevin Parker
Presiding

[Seal of the Tribunal]