

IT-06-90-T  
D 11293- D 11289  
12 JUNE 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: 12 June 2008  
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr Hans Holthuis

Decision of: 12 June 2008

PROSECUTOR

v.

ANTE GOTOVINA  
IVAN ČERMAK  
MLADEN MARKAČ

*PUBLIC*

DECISION ON PROSECUTION'S MOTION TO LIMIT THE SCOPE OF  
TESTIMONY OF WITNESS 116

Office of the Prosecutor

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Mr Stefan Waespi

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Mr Gregory Kehoe  
Mr Payam Akhavan

Counsel for Ivan Čermak

Mr Steven Kay, QC  
Mr Andrew Cayley  
Ms Gillian Higgins

Counsel for Mladen Markač

Mr Goran Mikuličić  
Mr Tomislav Kuzmanović

1. On 5 May 2008, the Prosecution filed a motion to limit the scope of the testimony of Witness 116, to submit a Rule 92 *ter* statement and associated exhibits and to request the addition of two witness-related documents to the Rule 65 *ter* exhibit list.<sup>1</sup> The Prosecution requested the Chamber to mark for identification the witness statement of Witness 116 as well as all the associated exhibits and to grant leave to the Prosecution to add two documents to the Rule 65 *ter* exhibit list.<sup>2</sup> The Chamber will deal with these requests when Witness 116 appears to testify. The Prosecution also sought leave to exceed the word limit and argued that it had consolidated what might otherwise be two or three separate filings for administrative convenience and efficiency, since the submissions related to a single witness.<sup>3</sup>

2. With regard to the remaining part of the Motion, the Prosecution stated that the Rule 70 provider had agreed that Witness 116 could testify on the topics reflected in the witness statement on the condition that the Chamber order that (a) the scope of the cross-examination be restricted to the scope of the direct examination and to credibility issues, unless the Defence is granted formal permission from the Rule 70 provider to go beyond these topics, (b) Witness 116 may decline to answer questions on the ground of confidentiality, and (c) representatives of the Rule 70 provider shall be permitted to be present during the testimony.<sup>4</sup>

3. The Defence for all three Accused responded that they did not oppose the Motion.<sup>5</sup>

4. Rule 70 of the Rules of Procedure and Evidence (“Rules”) sets out, in relevant parts:

(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

<sup>1</sup> Prosecution Motion to Limit the Scope of Testimony, Submission of Rule 92 *ter* Statement and Associated Exhibits and Motion to Add Two Witness-Related Documents to the Rule 65 *ter* Exhibit List, 5 May 2008 (“Motion”).

<sup>2</sup> Motion, paras 2, 16.

<sup>3</sup> Motion, para. 17.

<sup>4</sup> Motion, paras 3-4.

<sup>5</sup> Ivan Čermak’s Response to Prosecution Motion to Limit the Scope of Testimony, Submission of Rule 92 *ter* Statement and Motion to Add Two Witness-Related Documents to the Rule 65 *ter* Exhibit List, 14 May 2008; Defendant Mladen Markač’s Response to Prosecution’s Motion to Limit the Scope of Testimony, Submission of Rule 92 *ter* Statement and Motion to Add Two Witness-Related Documents to the Rule 65 *ter* Exhibit List, 16 May 2008; Defendant Ante Gotovina’s Response to Prosecution Motion to Limit the Scope of Testimony, Submission of Rule 92 *ter* Statement and Motion to Add Two Witness-Related Documents to the Rule 65 *ter* Exhibit List for Witness 116, 19 May 2008.

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).

[...]

(G) Nothing in paragraphs (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.

5. The information referred to in Rule 70 may be information in the form of testimony.

The Appeals Chamber has held that:

When a person possessing important knowledge is made available to the Prosecutor on a confidential basis, not only the informant's identity and the general subject of his knowledge constitute the 'information' shielded by Rule 70, but also the substance of the information shared by the person – often [...] presented in summary form in a witness statement.<sup>6</sup>

6. Rule 70, in paragraphs (C) and (D), only requires that the information was "provided to the Prosecutor on a confidential basis", subject to Rule 70.<sup>7</sup> A Chamber may be satisfied that this is the case by the mere assertion of the Prosecution or, where the information is in the form of a document, if there is something on the face of the document which indicates that it was indeed provided on a confidential basis.<sup>8</sup>

7. Rule 70 (G), providing that a Chamber may "exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial", contains a safeguard to ensure that an accused is not deprived of his rights to challenge evidence against him and that he receives a fair trial.<sup>9</sup>

<sup>6</sup> *Prosecutor v. Slobodan Milošević*, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2002 ("*Milošević* Appeal Decision"), para. 23.

<sup>7</sup> *Milošević* Appeal Decision, paras 20, 25.

<sup>8</sup> *Milošević* Appeal Decision, para. 29.

<sup>9</sup> *Milošević* Appeal Decision, para. 26.

8. Although Rule 70 does not make any provision for representatives of the Rule 70 provider to be present in court while the evidence is given, the Appeals Chamber has held that it is within the discretion of a Chamber to issue such an order.<sup>10</sup>

9. The Prosecution has informed the Chamber that the witness statement of Witness 116 was provided to it confidentially, subject to Rule 70, and the statement itself contains the words “Confidential – provided under Rule 70”.<sup>11</sup> The Chamber is therefore satisfied that the statement of Witness 116 was provided to the Prosecution confidentially, subject to Rule 70.

10. The Defence does not oppose any of the conditions requested by the Prosecution. The first condition is to limit the cross-examination to the scope of the direct examination and to credibility issues. This is more restrictive than the scope of cross-examination allowed pursuant to Rule 90 (H). The present circumstances are, however, regulated by Rule 70 and in particular Rule 70 (C) which does not allow a Chamber to order the production of additional evidence received from the Rule 70 provider. Moreover, the Defence has not indicated that there is evidence relevant for their cases which could be elicited from Witness 116. It is therefore unlikely that there will be matters which would go beyond the scope of the cross-examination as proposed by the Prosecution.<sup>12</sup> Considering this and considering that the mentioned condition may alleviate concerns of the Rule 70 provider, the Chamber grants the request for the first condition. The second condition requested by the Prosecution is explicitly provided for in Rule 70 (D). As for the third condition, namely that representatives of the Rule 70 provider be present in court during the testimony, the Chamber finds that this request is reasonable, in particular since the Prosecution might not be sufficiently informed to identify every question where sensitive interests of the Rule 70 provider may be adversely affected.<sup>13</sup> The Chamber considers that none of the mentioned conditions triggers the need to exclude evidence under Rule 89 (D) although the option to invoke this provision remains if the course of the examination of Witness 116 should so require.

11. For the foregoing reasons, and pursuant to Rules 54 and 70, the Chamber hereby GRANTS the Motion in part and ORDERS that

<sup>10</sup> *Milošević* Appeal Decision, para. 33.

<sup>11</sup> Motion, paras 1, 3, Confidential Annex A.

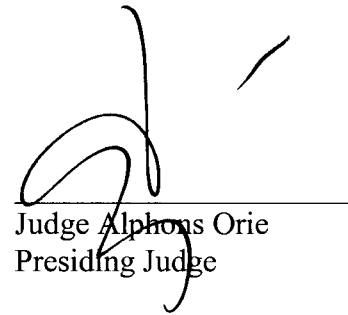
<sup>12</sup> See *Prosecutor v. Milan Milutinović et al.*, Decision on Prosecution Second Renewed Motion for Leave to Amend Its Rule 65 *ter* List to Add Michael Phillips and Shaun Byrnes, 12 March 2007 (“*Milutinović et al.* Decision”), para. 32.

<sup>13</sup> See *Milutinović et al.* Decision, para. 35.

- a) the scope of cross-examination of Witness 116 shall be limited to the scope of direct examination and to credibility issues, unless the Rule 70 provider allows otherwise upon request of the Defence;
- b) Witness 116 be permitted to decline to answer questions on the ground of confidentiality; and
- c) Representatives of the Rule 70 provider may be present in the courtroom during the testimony of Witness 116;

and GRANTS the Prosecution leave to exceed the word limit and DEFERS its decision on the remaining portions of the Motion to the time of the testimony of Witness 116.

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



Judge Alphons Orie  
Presiding Judge

Dated this 12th day of June 2008  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**