

IT-06-90-T
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06 JULY 2009

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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: 6 July 2009
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orié, Presiding
Judge Uldis Ķinis
Judge Elizabeth Gwaunza

Registrar: Mr John Hocking

Decision of: 6 July 2009

PROSECUTOR

v.

ANTE GOTOVINA
IVAN ČERMAK
MLADEN MARKAČ

PUBLIC

DECISION ON GOTOVINA'S MOTION TO LIMIT THE SCOPE OF TESTIMONY
FOR WITNESS AG-24

Office of the Prosecutor

Mr Alan Tieger
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

I. PROCEDURAL HISTORY AND PARTIES SUBMISSIONS

1. On 16 June 2009, the Gotovina Defence filed a motion requesting that the Chamber limit the scope of cross-examination of Witness AG-24 to the scope of examination-in-chief and to credibility issues.¹ In the Motion, the Gotovina Defence further requested the Chamber to permit the witness to decline to answer questions on grounds of confidentiality, and to permit representatives of the Rule 70 provider to be present in court during the witness's testimony.²
2. On 25 June 2009, the Prosecution objected to the Motion, noting that it referred to a statement by the witness which had not been disclosed to the Prosecution.³ The Prosecution submitted that without reviewing this statement, it could not properly assess the requested limitation, and was effectively unable to respond to the Motion.⁴ On 3 July 2009, the Prosecution responded to the Motion, noting that it had been provided with the witness's statement on 2 July 2009.⁵ The Prosecution did not object to the Motion.⁶
3. Neither the Čermak Defence nor the Markač Defence responded to the Motion.

II. APPLICABLE LAW

4. Rule 70 of the Tribunal's 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 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

¹ Defendant Ante Gotovina's Motion to Limit the Scope of Testimony for Witness AG-24, 16 June 2009 ("Motion"), paras 1, 4, 6.

² Motion, paras 4, 6.

³ Prosecution's Objection to Defendant Ante Gotovina's Motion to Limit the Scope of Testimony for Witness AG-24, 25 June 2009 ("Objection"), para. 1.

⁴ Objection, para. 2.

⁵ Prosecution's Response to Defendant Ante Gotovina's Motion to Limit the Scope of Testimony for Witness AG-24, 3 July 2009 ("Response"), para. 1.

⁶ Response, para. 2.

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 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. Rule 70 of the Rules, in paragraphs (C) and (D), only requires that the information was "provided to the Prosecutor on a confidential basis", subject to Rule 70.⁷ A Chamber may be satisfied that the material was provided on a confidential basis for instance by the mere assertion of the Party, or by confirmation from the information provider.⁸

6. Although Rule 70 of the Rules 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.⁹

7. Rule 70 (G) of the Rules, which provides 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.¹⁰

III. DISCUSSION

8 The Gotovina Defence informed the Chamber that the Rule 70 provider had permitted the witness to testify subject to the aforementioned Rule 70 limitations, that is, a limited scope of testimony; permission for the witness to decline to answer questions on

⁷ *Prosecutor v. Slobodan Milošević*, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2002 ("*Milošević* Appeal Decision"), paras 20, 25.

⁸ *Milošević* Appeal Decision, para. 29.

⁹ *Milošević* Appeal Decision, para. 33.

¹⁰ *Milošević* Appeal Decision, para. 26.

grounds of confidentiality; and the presence of government representatives during testimony.¹¹ Pursuant to Rule 70 (F) of the Rules, the Defence can also be the recipient of such confidential material. The Chamber is satisfied that the information provider has offered information about the witness and his knowledge to the Gotovina Defence on a confidential basis, subject to Rule 70 of the Rules.

9. Regarding the request that representatives of the Rule 70 provider be present during the witness's testimony, the Chamber finds that this request is reasonable, particularly since the parties might not be sufficiently informed to identify every question where sensitive interests of the Rule 70 provider may be adversely affected.¹² Additionally, the Prosecution, the Čermak Defence and the Markač Defence have not objected to this request. Further, the condition that the witness is permitted to decline to answer questions on grounds of confidentiality is explicitly provided for in Rule 70 (D) of the Rules.

10. The Gotovina Defence further requests that the scope of the witness's cross-examination be limited to matters raised in direct examination and to credibility issues. This is more restrictive than the scope of cross-examination pursuant to Rule 90 (H) of the Rules. However, the present circumstances are regulated by Rule 70 of the Rules and in particular Rule 70 (C), which does not allow a Chamber to order the production of additional evidence received from a Rule 70 provider. It follows that a Chamber may order the parties to be similarly restricted. Such a restriction may alleviate concerns of the Rule 70 provider. In addition, the Prosecution has not expressed an interest in eliciting evidence relevant for their case from the witness which would go beyond the scope of cross-examination as proposed by the Defence.

11. The Chamber considers that none of the conditions mentioned above trigger the need to exclude evidence under Rule 89 (D) of the Rules, although the option to invoke this provision remains, should the course of the examination of the witness so require. In conclusion, the Chamber finds that the requested conditions are appropriate under Rule 70 of the Rules.

¹¹ Motion, paras 1-4.

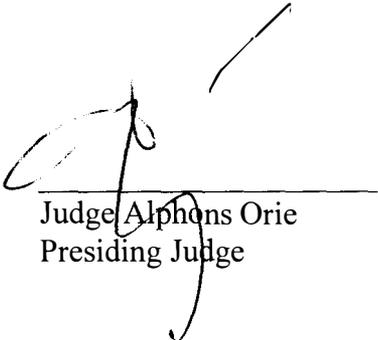
¹² *Cf. Prosecutor v. Milan Milutinović et al.*, Decision on Prosecution Second Renewed Motion for Leave to Amend Its Rule 65 *ter* List to Add Michael Phillips and Shaun Byrnes, 12 March 2007, para. 35.

IV. DISPOSITION

12. For the foregoing reasons, and pursuant to Rules 54 and 70 of the Rules, the Chamber hereby **GRANTS** the Motion and **ORDERS** that

- a) the scope of cross-examination of Witness AG-24 be limited to the scope of direct examination and to credibility issues, unless the Rule 70 provider allows otherwise in a formal authorization upon request of the cross-examining party;
- b) Witness AG-24 be permitted to decline to answer questions on grounds of confidentiality; and
- c) representatives of the Rule 70 provider may be present in court during the testimony of this witness.

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



Judge Alphons Orié
Presiding Judge

Dated this sixth day of July 2009
At The Hague
The Netherlands

[Seal of the Tribunal]