



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-T
Date: 12 March 2007
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IN THE TRIAL CHAMBER

Before: Judge Iain Bonomy, Presiding
Judge Ali Nawaz Chowhan
Judge Tsvetana Kamenova
Judge Janet Nosworthy, Reserve Judge

Registrar: Mr. Hans Holthuis

Decision of: 12 March 2007

PROSECUTOR

v.

**MILAN MILUTINOVIĆ
NIKOLA ŠAINOVIĆ
DRAGOLJUB OJDANIĆ
NEBOJŠA PAVKOVIĆ
VLADIMIR LAZAREVIĆ
SRETEN LUKIĆ**

**DECISION ON PROSECUTION SECOND RENEWED MOTION FOR LEAVE TO
AMEND ITS RULE 65 TER LIST TO ADD MICHAEL PHILLIPS AND SHAUN BYRNES**

Office of the Prosecutor

Mr. Thomas Hannis
Mr. Chester Stamp

Counsel for the Accused

Mr. Eugene O'Sullivan and Mr. Slobodan Zečević for Mr. Milan Milutinović
Mr. Toma Fila and Mr. Vladimir Petrović for Mr. Nikola Šainović
Mr. Tomislav Višnjić and Mr. Norman Sepenuk for Mr. Dragoljub Ojdanić
Mr. John Ackerman and Mr. Aleksandar Aleksić for Mr. Nebojša Pavković
Mr. Mihajlo Bakrač and Mr. Đuro Čepić for Mr. Vladimir Lazarević
Mr. Branko Lukić and Mr. Dragan Ivetić for Mr. Sreten Lukić

THIS 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 confidential and partially *ex parte* “Prosecution’s Second Renewed Motion for Leave to Amend Rule 65 *ter* Witness List to Add Michael Phillips and Shaun Byrnes With Confidential and Partially *Ex Parte* Annexes”, filed on 1 March 2007 (“Motion”), and hereby renders its decision thereon.¹

Background

1. In the Motion, the Prosecution renews its request, pursuant to Rules 73 *bis* (F) and 89(C) of the Rules of Procedure and Evidence (“Rules”), to amend its Rule 65 *ter* witness list, by adding two Rule 70 witnesses, namely Michael Phillips and Shaun Byrnes.² This is a renewed application, as the Trial Chamber had earlier denied, on two different occasions, the same request, without prejudice. The first time it was denied because the Chamber was unable, due to the uncertainty of the state of disclosure of materials related to the two witnesses, to assess the extent with which Rule 66(A)(ii) had been complied with and whether any prejudice would be caused to the Defence if the witnesses were added to the Prosecution witness list.³ The application was then denied for the second time because only partial disclosure of the material relating to the witnesses had been made to the Defence and the Chamber was concerned about the effect such disclosure might have upon the Defence and its case. Instead, it urged the Prosecution and the United States Government (“Rule 70 provider”) to allow it to conduct an *in camera* inspection of the material subject to the Rule 70 conditions, these being the interview notes prepared in 2001 for the purposes of the *Milošević* case, in order to be able to decide whether or not add the two witnesses to the Prosecution’s witness list.⁴

2. On 15 February 2007, the Chamber granted the request of the Prosecution and the Rule 70 provider that certain portions of the *Milošević* 2001 interview notes relating to both witnesses be protected under Rule 70.⁵ The same was the case with a supplemental information sheet disclosing

¹ The Chamber recognises that the Prosecution motion and Defence response were filed confidentially. The Chamber nevertheless, in the interests of a public and fair trial, publicly issues this decision, which contains no confidential information.

² Motion, para. 1.

³ See Decision on Prosecution Motion to Amend its Rule 65 *ter* Witness List, 8 December 2006, para. 34; Decision on Prosecution Motion to Amend its Rule 65 *ter* Witness List to Add Shaun Byrnes, 11 December 2006, para. 8.

⁴ See Decision on Renewed Prosecution Motion for Leave to Amend its Rule 65 *ter* List to Add Michael Phillips and Shaun Byrnes, 15 January 2007, para. 16 (“Decision on Renewed Motion”). At the time of the Decision on Renewed Motion, the Chamber had not yet reviewed either a summary of the 2001 notes or the notes themselves.

⁵ Decision on Prosecution’s Motion for Order of Non-Disclosure in Relation to Michael Phillips, 15 February 2007; Decision on Prosecution Motion for Order of Non-Disclosure in Relation to Shaun Byrnes, 15 February 2007.

extracts of Michael Phillips' interview notes from 1999, taken contemporaneously with the receipt of his personal notebooks.⁶ This meant that the Prosecution was entitled to disclose the redacted, rather than full, 2001 interview notes and only extracts of 1999 interview notes (as discussed below).

Prosecution Arguments

3. In the Motion, the Prosecution asserts that it has now met its Rule 66 disclosure obligations with respect to these two witnesses since, following the granting of protective measures regarding nondisclosure, the Prosecution has disclosed additional materials to the Defence. According to the Prosecution, of all the disclosed material, only a very limited amount of information remains redacted and therefore undisclosed, and its nondisclosure does not impact the right of the Accused to a fair trial. Furthermore, the Prosecution argues that any fairness concerns can be resolved by the Trial Chamber's *in camera* inspection of the redacted materials.⁷

4. The Prosecution then goes on to describe in detail the current state of disclosure. With respect to Michael Phillips, it has disclosed the following items: on 26 October 2006, the supplemental Rule 65 *ter* summary for Michael Phillips reflecting the interview notes prepared in 2006 for the purpose of this case (disclosed pursuant to Rule 66(A)(ii)); five handwritten notebooks kept by Michael Phillips, which were available to the Defence via the Electronic Disclosure System ("EDS") since November 2003⁸ (disclosed pursuant to Rule 68); on 21 September 2006, exculpatory extracts of the interview notes prepared in March 2001 for the purpose of the *Milošević* case (disclosed pursuant to Rule 68); on 15 January 2007, the full text of the March 2001 interview notes, as redacted by the Rule 70 provider (disclosed pursuant to Rule 66(A)(ii));⁹ on 26 February 2007, a supplemental information sheet for Michael Phillips containing extracts of October 1999

⁶ Decision on Prosecution Motion for Order of Non-Disclosure in Relation to Michael Phillips, 23 February 2007.

⁷ Motion, para. 1.

⁸ Motion, para. 5(b). The Chamber notes that Confidential Annex A seems to indicate different dates for the EDS disclosure with respect to these five handwritten notebooks. According to Annex A, four sets of these notes were disclosed via EDS on 18 July 2006, whereas one set, namely the one relating to events that took place from 30 November to 9 December 1998, was disclosed on 15 August 2002 to the Ojdanić and Šainović Defence teams (when a hard copy was provided), on 28 June 2005 to the Pavković, Lazarević, and Lukić Defence teams (again by providing a hard copy), and on 7 March 2003, to the Milutinović Defence team (this time via EDS). The Chamber acknowledges some discrepancies in the dates of disclosure contained within Annex A of the Motion and the Motion itself. The Prosecution has created a certain amount of confusion over the actual dates for disclosure so that it is not possible for the Chamber to determine whether disclosure of some of the hand-written notebooks of Michael Phillips was made in 2003 or 2006. Whether this material was made available to the Defence in 2003 or 2006, there has been adequate time for the Defence to analyse such material in order to prepare for cross-examination (as discussed more fully below).

⁹ The Chamber notes that there may be a minor inconsistency in this date and that it is most likely meant to be February, rather than January, since that is when the Chamber issued its Rule 70 nondisclosure order for this material. See Decision on Prosecution Motion for Order of Non-disclosure in Relation to Michael Phillips, 15 February 2007. Any discrepancy makes no difference to the Chamber's determination in this matter.

interview notes taken contemporaneously with the receipt of his personal notebooks (disclosed pursuant to Rule 66(A)(ii)); on 17 January 2007, five additional handwritten notebooks kept by Michael Phillips, which were also available to the Defence since November 2003 via EDS (disclosed pursuant to Rule 66(A)(ii)); and, on 17 January 2007, ten transcripts of the notebooks referenced above, which were also available to the Defence since November 2003 via EDS (disclosed pursuant to Rule 66(A)(ii)).¹⁰

5. As far as Shaun Byrnes is concerned, the Prosecution has now disclosed the following materials: on 1 November 2006, the supplemental Rule 65 *ter* summary reflecting the interview notes prepared in 2006 for the purpose of this case (disclosed pursuant to Rule 66(A)(ii)); on 21 September 2006, exculpatory extracts of the interview notes prepared in February and October 2001, for the purposes of the *Milošević* case (disclosed pursuant to Rule 68); on 16 February 2007, full text of February 2001 interview notes, as redacted by the Rule 70 provider (disclosed pursuant to Rule 66(A)(ii)); on 16 February 2007, the full text of October 2001 interview notes, as redacted by the Rule 70 provider (disclosed pursuant to Rule 66(A)(ii)); and, on 16 February 2007, six documents attached to the February 2001 interview notes (disclosed pursuant to Rule 66(A)(ii)). One remaining attachment to these interview notes is still under review by the Rule 70 provider.¹¹

6. The Prosecution further notes that some of this material was redacted by the Rule 70 provider pursuant to orders of the Chamber under Rule 70, but that most of this material was available to the Chamber for an *in camera* inspection. For example, as stated earlier, the 2001 interview notes for both witnesses have been disclosed with redactions. However, the Rule 70 provider has now agreed to allow the Trial Chamber to review them *in camera* and with a “few minor redactions for which permission cannot be granted”.¹² As far as the 2006 notes of the Prosecution interviews of Michael Phillips and Shaun Byrnes are concerned, the Prosecution observes that they were disclosed in the form of Rule 65 *ter* summaries, as contemplated by Rule 66(A)(ii) in conjunction with Rule 70.¹³ With respect to the supplemental information sheet relating to Michael Phillips, the document includes extracts of 1999 interview notes, which were disclosed pursuant to Rule 66(A)(ii) and Rule 68; the undisclosed portions fall under Rule 70(A), contain no Rule 68 material, and will not be relied upon in the presentation of the evidence.¹⁴

¹⁰ Motion, paras. 5–6 and Confidential Annex A.

¹¹ Motion, paras. 7–8 and Confidential Annex B.

¹² Motion, para. 9, note 7; para. 11; Confidential and *Ex Parte* Annex D. The Prosecution notes that Annex D also includes the undisclosed attachment to the February 2001 interview notes of Shaun Byrnes, which are still under review by the Rule 70 provider.

¹³ Motion, para. 10.

¹⁴ Motion, para. 12.

7. The Prosecution concludes that, subject to minimal reductions, the Defence now has all the material in the possession of the Prosecution regarding Michael Phillips and Shaun Byrnes. Thus, it can adequately prepare for cross-examination. For that reason, the Prosecution argues, the addition of these witnesses does not unfairly prejudice the Defence, and the right to fair trial is preserved.¹⁵

8. The Prosecution also makes submissions regarding Rule 70 measures requested by the Rule 70 provider.¹⁶ First, examination-in-chief is to be limited to the topics outlined in the supplemental Rule 65 *ter* summary for each witness.¹⁷ Second, cross-examination is to be limited to the scope of the examination-in-chief and to matters affecting the credibility of the witness. In this respect, the Prosecution notes that the Rule 70 provider has narrowed its requested measures relating to cross-examination of the witnesses upon credibility issues in light of the Trial Chamber's "Second Decision on Prosecution Motion for Leave to Amend its Rule 65 *ter* Witness List to Add Wesley Clark", issued on 16 February 2007 ("Clark Decision"). The third and final condition requires the presence of representatives of the Rule 70 provider in the courtroom during the testimony of the two witnesses.¹⁸

9. The Prosecution concludes the Motion by requesting the Trial Chamber to grant leave to amend its witness list and add to it witnesses Michael Phillips and Shaun Byrnes. In addition, the Prosecution requests that these two witnesses be permitted to testify in accordance with the Rule 70 measures listed above.¹⁹

Defence Arguments

10. The Defence filed on 8 March 2007 its confidential "Joint Defence Response in Opposition to the Confidential and *Ex Parte* Prosecution's Second Renewed Motion for Leave to Amend Rule 65 *ter* List to Add Michael Phillips and Shaun Byrnes With Confidential and Partially *Ex Parte* Annexes" ("Response"). In the Response, the Defence begins by outlining the involute procedural history of this matter.²⁰ The Defence opposes the Motion and addresses the Prosecution arguments *seriatim*. First, with respect to the 2006 interview notes prepared for both witnesses, it observes that it has only received supplemental Rule 65 *ter* summaries of the same, a fact now expressly acknowledged by the Prosecution in its Motion. The Defence argues that this is contrary to the

¹⁵ Motion, para. 14.

¹⁶ Motion, para. 15.

¹⁷ Motion, Confidential Annex C.

¹⁸ Motion, para. 15, note 9.

¹⁹ Motion, para. 16.

²⁰ Response, paras. 2-3.

Chamber's "Decision on Renewed Prosecution Motion for Leave to Amend Its Rule 65 *ter* List to Add Michael Phillips and Shaun Byrnes," issued 15 January 2007 ("Decision on Renewed Motion"), wherein the Chamber held that interview notes are "statements" within the meaning of Rule 66(A)(ii). The Defence claims that this complaint was made on several occasions in the past and that, nevertheless, the Trial Chamber's order for full compliance with Rule 66(A)(ii) has still not occurred.²¹

11. Second, with respect to the 2001 interview notes of both witnesses, the Defence argues that they contain substantial redactions and that, as a result, the Defence finds itself in a state of ignorance because of its inability to consider and access the notes in their entirety and because it is not in a position to confront the witnesses on cross-examination on the basis of the Prosecutor's version of those notes. In addition, not all redacted portions have been disclosed to the Chamber for its review.²²

12. Third, as far as the disclosure of the supplemental information sheet incorporating Michael Phillips' 1999 interview notes is concerned, the Defence contends that this document, as acknowledged by the Prosecution, includes only extracts of these notes. Thus, the same argument, namely, that the Defence is entitled to receive the interview notes themselves and not the Prosecutor's version of the contents of the interview notes in the summary form, applies here as well.²³

13. Fourth, in relation to Michael Phillips' handwritten notebooks, the Defence accepts that all ten were disclosed on 17 January 2007, but takes the position that it is not able to confirm whether they were available via EDS since November 2003. This is because the EDS system does not have an index to indicate the nature of a document and, therefore, it would have been virtually impossible to know of this material's existence and/or find it. Thus, it cannot be contended that the Defence was aware of this material since November 2003.²⁴

14. Fifth, with respect to the undisclosed document attached to Shaun Byrnes' February 2001 interview notes and still under review by the Rule 70 provider, the Defence reminds the Chamber of the Pre-Trial Judge's order in May 2006 to the effect that Rule 70 provider had to take a final

²¹ Response, paras. 6(a), 7(a).

²² Response, paras. 6(b), 7(c).

²³ Response, para. 6(c).

²⁴ Response, para. 6(d).

decision regarding disclosure of this material. This warning, according to the Defence, was clearly meant to ensure timely disclosure.²⁵

15. In addition to the state of disclosure and redactions, the Defence also opposes the second and the third Rule 70 measures sought by the Rule 70 provider. With respect to the conditions placed upon the cross-examination of the witnesses, the Defence refers to paragraphs 27 and 30 of the Clark Decision and argues that that decision provides that only the Chamber can determine restrictions upon cross-examination and that the restrictions requested would prevent the Defence from raising potentially favourable matters to the Accused that may not be raised during examination-in-chief. This, the Defence says, is expressly contrary to Rule 90(H).²⁶

16. As far as the third condition is concerned, namely the presence of the representatives of the Rule 70 provider in the courtroom, the Defence argues that the Chamber's intimation in the Clark Decision that this might be an appropriate measure was due to the high profile of General Clark as opposed to the witnesses now in question. Such a condition is therefore not only unnecessary, but would also lead a neutral interested bystander to believe that the Chamber was not fully in control of the proceedings due to the influence of the Rule 70 provider through its presence in the courtroom.²⁷

17. The Defence concludes by invoking Rules 89(D) and 70(G) and argues that a late addition of Michael Phillips and Shaun Byrnes to the witness list would be prejudicial and unfair, especially in light of the unsatisfactory state of disclosure and the proposed Rule 70 conditions.²⁸

Applicable Law

18. Pursuant to Rule 73 *bis* (F), the Trial Chamber may grant any motion for an amendment to the witness list if satisfied that this is "in the interests of justice". In the exercise of this discretion, the Chamber must be guided by the preliminary requirements for admissibility of evidence as set out in Rule 89(C), namely, the relevance and the probative value of the proposed evidence.²⁹ Furthermore, the Chamber must also consider whether the probative value of the evidence is substantially outweighed by the need to ensure a fair trial under Rule 89(D).³⁰ Of particular

²⁵ Response, para. 7(d).

²⁶ Response, paras. 9–11.

²⁷ Response, para. 12.

²⁸ Response, para. 13.

²⁹ *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. Limaj et al.*, Case No. IT-03-66-T, Decision on Prosecution's Motion II to Amend Witness List, 9 March 2005, para. 2.

³⁰ *Ibid.*

relevance here is the question of whether the interests of the Defence are adequately protected.³¹ In this context, the Chamber should ensure that no prejudice will arise to the Defence as a result of late addition of witnesses.³²

19. Rule 66(A)(ii) provides that

within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge appointed pursuant to Rule 65 *ter*, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial, and copies of all transcripts and written statements taken in accordance with Rule 92 *bis*; Rule 92 *ter*, and Rule 92 *quater*; copies of the statements of additional prosecution witnesses shall be made available to the defence when a decision is made to call those witnesses.

20. Rule 70 deals with matters not subject to disclosure and provides, in relevant part, the following:

- (A) Notwithstanding the provisions of Rules 66 and 67, reports, memoranda, or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under those Rules.
- (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.

³¹ *Ibid.*

³² *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Decision on Prosecution's Motion II to Amend Witness List, 9 March 2005, para. 3. *See also Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-T, Decision on Prosecution Motion to Amend its Rule 65 *ter* Witness List, 28 April 2006; *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; *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-PT, Decision on Motion for Leave to Amend its Original Rule 65 *ter* Witness List dated 7 November 2005 with Annexes A and B, 5 May 2006.

- (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 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.

21. The Appeals Chamber has held the following:

All that Rule 70 requires is that the information "was provided to the Prosecutor on a confidential basis." ... [T]he information must also be "used solely for the purpose of generating new evidence," but for paragraphs (C) and (D) that requirement necessarily drops out, for once the information is introduced as evidence at trial, it by definition is no longer "used solely for the purpose of generating new evidence."

* * *

Chambers of the Tribunal do indeed have the authority to assess whether information has been provided in accordance with Rule 70(B) and so benefits from the protections afforded by that Rule. However, such enquiry must be of a very limited nature: it only extends to an examination of whether the information was in fact provided on a confidential basis This is an objective test. The Chambers may be satisfied of this simply by a consideration of the information itself, or by the mere assertion of the Prosecutor, or they may require confirmation from the information provider or, where the information is in the form of a document, for example, there may be something on the face of the document which indicates that it was indeed provided on a confidential basis.³³

22. Thus, the Appeals Chamber has held that the role of a Chamber in determining whether Rule 70 applies is "whether the information was in fact provided on a confidential basis". In conducting this objective inquiry, the Chamber can make its determination upon the material itself, the assertion of the Prosecution, or confirmation by the information provider.³⁴

23. In respect of the form that Rule 70 information can take, the Appeals Chamber has held,

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, as in this case, presented in summary form in a witness statement.³⁵

24. In respect of the application of Rule 70(G), the Appeals Chamber has observed that

³³ *Prosecutor v. Milošević*, Case No. IT-02-54-AR108bis & AR73.3, public version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2002, paras. 25, 29 (emphasis added).

³⁴ See confidential Decision on Prosecution Motion for Reconsideration of Decision on Fifth Prosecution Motion for Protective Measures, 21 June 2006, para. 18.

³⁵ *Ibid.*, para. 23.

safeguards exist to ensure that any misuse does not deprive accused persons of their rights to challenge evidence against them and to receive a fair trial. ... [P]aragraph (G) of Rule 70 expressly empowers the Trial Chamber to “exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.” Designed to ensure that the restrictions in paragraphs (C) and (D) do not undermine the bedrock requirement of fair trial when the Rule is properly invoked, paragraph (G) also give Trial Chambers a tool to protect that requirement if the Rule has been misused.³⁶

Discussion

25. The Chamber has carefully considered all the arguments of the parties. The Chamber deals first with the issue of disclosure and then with the related matter of the proposed Rule 70 restrictions, before making a decision as to whether or not to add Michael Phillips and Shaun Byrnes to the Prosecution’s witness list and grant the Rule 70 measures sought by the Prosecution.

Disclosure

26. The Chamber will first address the Defence’s claim relating to the 2006 interview notes. The Chamber does not accept the argument that the disclosure of a supplemental Rule 65 *ter* summary, which according to the Prosecution encompasses 2006 interview notes, is clearly contrary to the Chamber’s Decision on Renewed Motion. In paragraphs 10–11 of that decision, the Chamber discussed the jurisprudence of the Tribunal in relation to the definition of the term “statement” and then went on to apply that law to the specifics of this case. The Chamber finds it helpful to recall what it stated on that occasion:

12. Based upon the above definition of statement, within the meaning of Rule 66 disclosure, it would seem clear that the *Milošević* interview notes are “statements.” The parties have not endeavoured to precisely define the terms “statement” and “interview notes”; however, the Chamber infers from the representations of the parties throughout the litigation of this matter (and the case as a whole) that, in a functional sense, a “statement” is more or less a verbatim account of what the witness has told the Prosecution, which has been reviewed and signed by the witness; whereas, “interview notes” are a less than verbatim account and are not necessarily reviewed and signed by the witness. The Chamber uses the above descriptions loosely, and finds, in any event, that “interview notes” fall squarely within the Appeals Chamber’s definition of a Rule 66 statement, namely an “account of a person’s knowledge of a crime, which is recorded through due procedure in the course of an investigation into the crime.”³⁷

13. However, Rule 66 disclosure is subject to exceptions. Although the Prosecution has not asserted such a privilege in the present case, Rule 70(A), which begins with the phrase “[n]otwithstanding the provisions of Rules 66 and 67...”, excepts from Rule 66 disclosure “reports, memoranda, or other internal documents prepared by a party, its

³⁶ *Ibid.*, para. 26 (footnote omitted).

³⁷ *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Decision on the Appellant’s Motion for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000, para. 15. The Chamber notes that the Prosecution’s arguments reflected ... above are based upon the same definition provided by the *Blaškić* Appeals Chamber, but considers the Prosecution’s definition of a “statement” as being too narrow.

assistants or representatives in connection with the investigation or preparation of the case". "Interview notes" taken by the Prosecution may very well include material protected under Rule 70(A); for example, if, in the course of interviewing one of the witnesses, the Prosecution has made in its "interview notes" comments revealing its trial strategy, it would have been entitled to redact such material from those notes before disclosing them to the Defence.

14. Rule 70 (B) provides yet another exception to Rule 66(A)(ii). As explained above by the Prosecution, some parts of the *Milošević* interview notes have not been disclosed to the Defence because no authorisation has been given by the Rule 70 provider. Pursuant to Rule 70(B), these withheld portions of the interview notes "shall in any event not be given in evidence without prior disclosure to the accused". This provision indicates, by inference, that Rule 70(B) may operate as yet another exception to Rule 66(A)(ii): although Rule 70(B) seems to empower the Prosecution and the Rule 70 provider to circumvent the disclosure obligations of Rule 66, when information is withheld under this provision, it still may not be adduced as evidence without the accused first being placed upon notice of it. In other words, the Prosecution is not permitted to adduce evidence at trial from Mr. Phillips or Mr. Byrnes regarding information discussed during their interviews pertaining to the portions of the interview notes that the Rule 70 provider has not allowed to be disclosed to the Defence.

15. The Chamber holds, as a matter of law, that "interview notes" are statements within the meaning of Rule 66(A)(ii), *but that disclosure under this Rule is subject to Rule 70(A) and (B)*, particularly the latter provision. In the present circumstances, the Prosecution is entitled to have disclosed the *Milošević* interview notes in their redacted form, as mandated by the Rule 70 provider.³⁸

The Chamber therefore clearly stated that, even though interview notes are statements within the meaning of Rule 66(A)(ii), this does not result in automatic disclosure to the Defence due to the fact that Rule 66(A)(ii) is itself subject to Rule 70.

27. The Prosecution now claims that the 2006 interview notes were submitted in Rule 65 *ter* summary form pursuant to Rule 66(a)(ii) and in conjunction with Rule 70.³⁹ The Chamber, therefore, is of the view that the Rule 70 provider has placed a Rule 70 condition upon the 2006 interview notes that they only be disclosed in summary form and that this is well-within the parameters of Rule 70, as interpreted by the Appeals Chamber. This necessarily means that the Chamber is satisfied that this particular disclosure is satisfactory and does not breach the terms of Rule 66(A)(ii), as this provision is subject to Rule 70. The same reasoning applies to the supplemental information sheet relating to Michael Phillips which includes extracts of 1999 interview notes.

28. As far as Michael Phillips' handwritten notebooks are concerned, the Chamber notes that, according to Confidential Annex A, all ten were disclosed on 17 January 2007 when a CD was

³⁸ Decision on Renewed Motion, paras. 12–15 (emphasis added).

³⁹ Motion, para. 10.

placed in Defence lockers.⁴⁰ Despite the submissions of the parties regarding the dates upon which all ten of the handwritten notebooks were placed upon EDS, it is undisputed, according to the Defence, that they were available as of 17 January 2007.⁴¹ The Chamber notes that the way in which the Prosecution has dealt with this matter leaves much to be desired, but nevertheless finds that the Defence has had ample time to prepare for cross-examination of this witness since 17 January 2007.

29. When it comes to the undisclosed document attached to Shaun Byrnes' February 2001 interview notes, which is still under review by the Rule 70 provider, while it is true that the Chamber has expressed a view that the time has already come and gone in which the Rule 70 provider should have taken the decision regarding what it would agree to disclose to the Defence,⁴² it is also true that this matter has only arisen relatively recently and only then upon the insistence of the Chamber. The Chamber has had an opportunity to review this document, *in camera*, and considers that, if it is disclosed, it will not have a significant impact upon the time necessary for the Defence preparation for cross-examination.

30. Turning finally to the 2001 interview notes, the Chamber has had an opportunity to review, *in camera*, the bulk of the redactions made to the 2001 interview notes by the Rule 70 provider, including the document referred to in paragraph 29. The Chamber is satisfied that the redacted portions inspected by the Chamber are not *prima facie* exculpatory and that their nondisclosure will not cause unfair or undue prejudice to the Defence. That leaves the very small number of redacted portions which have not been disclosed to the Chamber. Having considered the context surrounding these minor portions, the Chamber recognises that the risk of undue prejudice to the Defence is minimal.

Rule 70 conditions

31. As summarised above, the Defence objects to two of the three Rule 70 conditions imposed by the Rule 70 provider, namely conditions two and three. With respect to condition two, that is, the limitations placed upon the Defence's right to cross-examine, the Chamber notes the Rule 70 provider's *change of position* with respect to the cross-examination on the credibility of the witnesses, which may touch upon matters outwith the scope of the examination-in-chief. The Chamber is now satisfied that only preventing the Defence from cross-examining on the matters

⁴⁰ Motion, Confidential Annex A, p. 1

⁴¹ Response, para. 6(d).

⁴² T. 261–262 (17 May 2006).

favourable to its case which are excluded by the restriction does not *necessarily* cause undue prejudice to the Defence or contravene Rule 90(H). This is so for two reasons.

32. First, permitting the Defence to challenge, in cross-examination, all the matters raised during examination-in-chief, *as well as the credibility of the witnesses*, makes it likely that not many other relevant subjects will remain for exploration with the witnesses. Most matters favourable to the Defence case, which it might wish to raise, will be connected to the issues arising during examination-in-chief or during the challenges posed to the witnesses' credibility.

33. Second, in relation to matters favourable to the Defence case, the Defence can ask the Rule 70 provider for permission to alter its Rule 70 conditions so as to include certain topics that do not affect credibility and are not to be mentioned during examination-in-chief. The Chamber previously held in the Clark Decision that the combination of restricting the cross-examination of such a public figure as General Clark, who has made so many public comments on the issues related to this case, and requiring the Defence to seek prior agreement of the Rule 70 provider if it wishes to have that restriction varied, *together*, operated to wrest control of the proceedings from the Chamber.⁴³ Here, however, the Rule 70 provider has allowed for the full cross-examination of the witnesses on matters going to credibility. The extent to which the Rule 70 provider will prevent cross-examination once the Defence submits any request it wishes for permission to cross-examine on matters favourable to it remains to be seen.

34. If the Defence does choose to seek such permission from the Rule 70 provider and the issue is not resolved in time for Defence's cross-examination, the Defence may seek to call the witnesses during its case, if necessary, by means of the compulsory process mechanisms available to it via order of the Chamber under Rule 54. In the event that the Rule 70 provider does not permit enquiry into additional topics in time for the cross-examination of the witnesses during the Prosecution case-in-chief and the Defence is later unsuccessful in calling the witnesses in its own case, then the Defence may move the Chamber to exclude their evidence in its entirety, or any parts thereof, and the Chamber will do so where it is satisfied that the probative value of the evidence is substantially outweighed by the need to ensure a fair trial. At the end of the day and subject to the above qualifications, the Chamber is of the view that condition two, as mandated by the Rule 70 provider, does not cause undue prejudice to the Defence to such an extent so as not to allow the addition of the two witnesses to the Prosecution witness list.

⁴³ See Clark Decision, para. 26.

35. The Defence also challenges condition three, namely the presence of representatives of the Rule 70 provider in the courtroom during the evidence of the two witnesses. The Chamber has earlier expressed its willingness to accept this condition with respect to General Wesley Clark on the basis, not that he was a prominent witness, but because the Prosecution may not be sufficiently informed to identify every question where sensitive interests of the Rule 70 provider might be adversely affected.⁴⁴ In other words, the Chamber's previous acknowledgement of the prominence of General Clark was not connected to the Chamber's acceptance of the presence of the Rule 70 provider's representatives in the courtroom. The same reasons apply to Michael Phillips and Shaun Byrnes. Accordingly, the Chamber does not think that this condition can have any bearing on whether the two witnesses should be added to the Prosecution witness list or not. Finally, the Appeals Chamber has expressly held that it is within the discretion of a Chamber to grant such a Rule 70 condition, despite the fact that the Rule does not expressly provide for such an order.⁴⁵

Disposition

36. In light of all the circumstances and having carefully considered (a) the current state of disclosure, (b) the Rule 70 restrictions, and (c) the proposed evidence of the two witnesses, the Chamber is of the view that the probative value of the evidence of the witnesses is not substantially outweighed by the need to ensure a fair trial and that, on the face of this matter, no undue prejudice to the Defence will arise if these witnesses are added to the Prosecution Rule 65 *ter* list. However, the Chamber will remain vigilant throughout the evidence of the witnesses in order to avert the possibility of undue prejudice during their testimony and will review the situation after the evidence has been adduced. If the Chamber, following the testimony of these witnesses, is of the view that nondisclosure of certain information in the 2001 interview notes, in combination with examination-in-chief, has caused the Defence undue prejudice, it will exclude the evidence affected pursuant to Rule 70(G).

37. For all of the foregoing reasons and pursuant to Rules 54, 66, 70, 73 *bis* (F), 89(C), and 89(D) of the Rules of Procedure and Evidence and Articles 20 and 21 of the Statute, the Trial Chamber hereby GRANTS the Prosecution's Motion and ORDERS as follows:

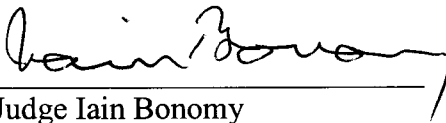
- a) The Prosecution is granted leave for add Michael Phillips and Shaun Byrnes to its Rule 65 *ter* witness list.

⁴⁴ See *ibid.*, para. 28.

⁴⁵ *Prosecutor v. Milošević*, Case No. IT-02-54-AR108bis & AR73.3, public version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2002, para. 33.

- b) Direct examination of Michael Phillips and Shaun Byrnes shall be limited to the content of the summaries attached to the Motion as Confidential Annex C.
- c) Cross-examination of Michael Phillips and Shaun Byrnes shall be limited to the scope of the examination-in-chief and the matters affecting the credibility of the witnesses, unless the Rule 70 provider allows otherwise upon further request of the Defence.
- d) Two representatives of the Rule 70 provider may be present in the courtroom during the testimony of the witnesses.

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



Judge Iain Bonomy
Presiding

Dated this twelfth day of March 2007
At The Hague
The Netherlands

[Seal of the Tribunal]