



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: 24 April 2007
Original: English

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: 24 April 2007

PROSECUTOR

v.

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

**DECISION ON ADMISSION AND PUBLICATION OF EVIDENCE TENDERED
THROUGH MICHAEL PHILLIPS**

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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”) recalls its “Decision on Prosecution Second Renewed Motion for Leave to Amend Its Rule 65 *ter* List to Add Michael Phillips and Shaun Byrnes” issued on 12 March 2007, in which it stated that no unfair prejudice to the Defence will arise if these witnesses were added to the Prosecution Rule 65 *ter* list but that it would review the situation, pursuant to Rule 70(G), after the evidence had been adduced.¹ Having now heard the evidence of Mr. Phillips, the Chamber finds it appropriate to issue its decision on whether it should be admitted. In addition, the Chamber is seised of the confidential “Prosecution’s Submission Regarding the Testimony and Exhibits of US Rule 70 Witness Michael Phillips”, filed on 2 April 2007 (“Motion”).²

I. Background

1. Witness Michael Phillips gave evidence before this Trial Chamber on 19 and 20 March 2007. As mentioned above, he was added to the Prosecution’s Rule 65 *ter* witness list on 12 March 2007, following the Chamber’s ruling that the Defence would not be unduly prejudiced by this course of action, despite the fact that the United States, the state of which the witness is an official (“Rule 70 provider”), made him available to give evidence subject to certain conditions, which the Chamber was bound by the terms of Rule 70 to observe.³ Nevertheless, in order to avert the possibility of undue prejudice, the Chamber decided to remain vigilant throughout the evidence of Mr. Phillips and to review the situation after his evidence has been adduced.⁴
2. The Chamber had also issued two decisions granting the Prosecution’s motions, on behalf of the United States, requesting non-disclosure and confidentiality of certain Rule 65 *ter* materials in connection with Mr. Phillips.⁵ Among these materials were Mr. Phillips’ notebooks, as well as

¹ 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. 36.

² The Chamber recognises that the Motion was filed confidentially. The Chamber nevertheless, in the interests of a public and fair trial, publicly issues this decision, which contains no confidential information.

³ The conditions are outlined in the 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. 37. Direct examination of Mr. Phillips was to be limited to the content of Rule 65 *ter* summaries, cross-examination was to be limited to the scope of examination-in-chief and the matters affecting the credibility of the witness, unless agreed otherwise by the Rule 70 provider; and two representatives of the Rule 70 provider were allowed to be present in the courtroom during the witness’s testimony.

⁴ 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. 36.

⁵ Decision on Prosecution Motion for Order of Non-disclosure in Relation to Michael Phillips, 15 February 2007 and Decision on Prosecution Motion for Order of Non-disclosure in Relation to Michael Phillips, 23 February 2007.

notes taken during an interview of him by the Prosecution. During Mr. Phillips' testimony, three Defence teams referred to these notebooks, and it became necessary to complete his evidence in closed session. In addition, the Defence sought to cross-examine Mr. Phillips on certain areas beyond the scope initially authorised by the Rule 70 provider. The Rule 70 provider consented to such requests so long as the evidence heard, and the documents used, remained under seal. The Chamber observed that it would give the Rule 70 provider an opportunity to review the entire record of this closed session evidence.⁶ On 20 March 2007, the Chamber ordered the Prosecution to submit, by 30 March 2007, which portions of the testimony and documents must remain under seal which resulted in the current Motion.⁷

II. Decision on Admission of Evidence

3. The Chamber has now reviewed the evidence given by Mr. Phillips in both public and closed sessions and is satisfied that its probative value is not substantially outweighed by the need to ensure a fair trial, pursuant to Rules 70(G) and 89(D). The Chamber will therefore admit the evidence in question. However, the Chamber notes that there is uncertainty about the format and numbering of some of the exhibits tendered during Mr. Phillips' evidence. The Chamber will address that issue below, in the context of dealing with the Motion relating to the confidentiality of the transcript and some of the exhibits.

III. Confidentiality of Evidence

A. Parties' submissions

4. The Prosecution submits that the Rule 70 provider has now reviewed the transcripts of the closed session testimony and has determined that minor redactions are necessary to ensure compliance with the conditions imposed under Rule 70. These are set out in confidential Annex A to the Motion.⁸

5. As far as Mr. Phillips' notebooks are concerned, the Prosecution first refers to the portions used by the Šainović Defence⁹ and submits that the Rule 70 provider has no objection to public release without redaction of the specific pages used, but does object to public disclosure of the

⁶ T. 11923–11924 (19 March 2007).

⁷ T. 12047 (20 March 2007).

⁸ Motion, paras. 3, 4.

⁹ 2D17, 2D18, 2D19, and 2D20.

surplus pages.¹⁰ Accordingly, the Prosecution requests the Chamber to direct the Šainović Defence to remove the surplus pages from e-Court.¹¹

6. The Prosecution then moves onto the portions of the notebooks used by the Lukić Defence. It states that, on 30 March 2007, the Lukić Defence provided the Prosecution with exhibit 6D198, which purportedly included all pages referred to during its cross-examination on 20 March 2007.¹² Here again, the Rule 70 provider consents to disclosure to the public of the pages used by the Lukić Defence, but not to the disclosure of the surplus pages. Therefore, the Prosecution requests the Chamber to direct the Lukić Defence to remove these surplus pages from e-Court.¹³

7. As far as Ojdanić Defence is concerned, on 29 March 2007, it too provided the Prosecution with another exhibit, 3D560, purportedly including all pages referred to during the cross-examination on 19 March 2007.¹⁴ On 30 March 2007, the Ojdanić Defence withdrew 3D560 and in its place submitted 3D561, 3D562, 3D563, 3D564, 3D565, 3D566, 3D567, 3D568, 3D569, 3D570,¹⁵ 3D571, 3D572, 3D573, and 3D574.¹⁶

8. The Prosecution submits that brief redactions are required for exhibits 3D561, 3D563, 3D565, 3D567, and 3D569 before they can be released to the public. These are attached to the Motion as confidential Annex B.¹⁷ The Prosecution also notes that the Rule 70 provider does not object to public release of 3D566 and 3D567, but that certain surplus pages not used in cross-examination should be removed from e-Court. The allegedly unexplored pages are as follows: 3D566, pages 3D01-3366 through to 3D01-3370; and 3D567, page 3D01-3374.¹⁸

¹⁰ The Rule 70 provider thus consents to the release of 2D17, pages 0322-5017, 0322-5018; 2D18, page 0322-4958; 2D19, page 0322-6673; and 2D20, page 0321-6611.

¹¹ Motion, para. 6.

¹² The Chamber notes that the Lukić Defence originally used a single notebook uploaded, but not used, by the Prosecution as P2835 and then only pages 37 and 39. T. 11987–11989 (20 March 2007).

¹³ The Rule 70 provider thus consents to the public release of 6D198, pages 6D03-1883, 6D03-0885; Motion, para. 7.

¹⁴ The Chamber notes that the Ojdanić Defence originally used five notebooks, uploaded as 3D545, 3D546, 3D549, 3D550, and 3D551.

¹⁵ The Chamber notes that the Motion, at para. 8 refers to 3D670 rather than 3D570 but that it becomes obvious later on in the Motion, in para. 11 for example, that the Prosecution in natural fact meant to refer to exhibit 3D570.

¹⁶ Motion, para. 8. The Chamber notes, however, that 3D573 and 3D574, which are excerpts from General Drewienkiewicz's notebook rather than Mr. Phillips' notebooks, do not appear to have been included in exhibit 3D560. The Ojdanić Defence Notification mentioned in footnote 20 below confirms this position.

¹⁷ Motion, para. 10.

¹⁸ Motion, para. 9.

9. Finally, the Prosecution submits that no redactions are sought for 3D562, 3D564, 3D568, 3D570, 3D571, and 3D572. With respect to 3D566, no redactions are sought for pages 3D01-3365 and 3D01-3371, the two pages referred to in cross-examination.¹⁹

10. The Defence has filed no response to the Motion.²⁰

B. Discussion

1. Transcript redactions

11. As stated above, the Rule 70 provider seeks certain redactions to the closed session testimony of Mr. Phillips before this part of the transcript of his testimony can be made public.²¹ The Chamber has considered the proposed redactions with a view to ensuring that they are consistent with the Rule 70 restrictions and finds that they are so consistent.

2. Exhibit admission

12. Given that the Rule 70 provider understandably has restricted consideration of permission for public release to those pages of the witness's notebooks which were used by Defence counsel during Mr. Phillips' cross-examination, the Chamber will first identify which pages were referred to in evidence, as well as the exhibit numbers applicable to those pages.

a. Šainović exhibits

13. With respect to exhibits tendered by the Šainović Defence, namely 2D17, 2D18, 2D19, and 2D20, the Chamber first notes that 2D17 consists of only two pages, both of which were used during cross-examination.²² As a result, the Rule 70 provider makes no objection to their public release.²³

14. As regards 2D18, the Chamber notes that the Motion provides that only one page, namely page 0322-4958, has been used by the Defence, when in fact all four pages in the exhibit have been raised during cross-examination.²⁴ As a result, on 21 April 2007, the Chamber asked, via an email

¹⁹ Motion, para. 11.

²⁰ The Chamber notes that it has received, on 24 April 2007, General Ojdanić's Notification Re Exhibits 3D561, 3D563, 3D565, 3D566, 3D567, and 3D569, filed on 23 April 2007. The Chamber notes that this notification is premature as the Chamber deals in the disposition of this decision with the steps the Ojdanić Defence, as well as the other Defence counsel involved, need to take in order to comply with the Rule 70 provider's conditions.

²¹ Motion, Annex B.

²² T. 11877–11879 (19 March 2007).

²³ Motion, para. 6.

²⁴ T. 11879–11882 (19 March 2007).

and on notice to all parties, for clarification from the Prosecution. It received a response on 24 April 2007 informing the Chamber that the Rule 70 provider had no objection to making all four pages of this exhibit public in their un-redacted form.

15. A similar mistake appears to have been made with respect to 2D19, where the Motion provides that the Rule 70 provider consents to the release of page 0321-6673, thereby implying that this page was used in cross-examination, whereas the other one, namely 0321-6675 was not. The Chamber notes, however, that it was in fact the text from the top of page 0321-6675 that was used in cross-examination.²⁵ The Chamber sought clarification on this issue in the same email described above and received a response to the effect that the Rule 70 provider had no objections to making these two pages public without any redactions.

16. Finally, with respect to 2D20, the Chamber notes that only page 0321-6611 was used in cross-examination, as submitted by the Prosecution.²⁶

b. Lukić exhibits

17. The Chamber notes that, during its cross-examination, the Lukić Defence used only two pages of what was originally exhibit P2835, these being pages 37 and 39.²⁷ These pages are now reflected in 6D198, pages 6D03-0883 and 6D03-0885 respectively.

c. Ojdanić exhibits

18. With respect to 3D566, the Chamber notes that this exhibit corresponds to pages 3D01-2956 through to 3D01-2962 of exhibit 3D546, the latter exhibit being one of Mr. Phillips' notebooks, uploaded in its entirety by the Ojdanić Defence. Of the pages mentioned, the Ojdanić Defence referred to the first page (page 3D01-2956), asking a question relating to a specific entry there, and then to the last page (page 3D01-2962), where it again asked a question.²⁸ These pages correspond to pages 3D01-3365 and 3D01-3371 of exhibit 3D566.

19. As far as 3D567 is concerned, the Chamber observes that this exhibit corresponds to pages 3D01-3068 through to 3D01-3070 of exhibit 3D549, the latter being another Phillips' notebook, also originally uploaded in its entirety. Of the mentioned pages, the Defence used only 3D01-3068

²⁵ T. 11882–11883 (19 March 2007).

²⁶ T. 11884–11887 (19 March 2007).

²⁷ T. 11987–11989 (20 March 2007).

²⁸ T. 11902 (19 March 2007).

and 3D01-3069.²⁹ These correspond to the first two pages of what is now exhibit 3D567, pages 3D01-3372 and 3D01-3373. Accordingly, the last page, namely 3D01-3374 is superfluous.

20. Finally, the Chamber notes that the Prosecution has stated no objection to two exhibits proposed for admission by the Defence, namely 3D573 and 3D574.³⁰ These are two excerpts from General Drewienkiewicz's notebook which were used by Ojdanić Defence to show the activities of the KLA in early March 1999.³¹ The Chamber is of the view, in light of the other proposed redactions by the Rule 70 provider, that these particular exhibits do not raise any concerns on behalf of the Rule 70 provider.

3. Exhibit redactions

21. Having identified the notebook pages used and their exhibit numbers thereof, the Chamber now considers whether the redactions sought are consistent with the conditions imposed on the presentation of Mr. Phillips' evidence. The Rule 70 provider seeks only minor redactions to the following documents used by the Defence: 3D561, 3D563, 3D565, 3D567, and 3D569.³² Having assessed all the proposed redactions, the Chamber is of the view that not making this information public is consistent with the Rule 70 restrictions.

IV. Disposition

22. Accordingly, the Trial Chamber, pursuant to Rules 54, 70, and 89 hereby ADMITS into evidence Michael Phillips' testimony and the documents tendered through him and it GRANTS the Motion and ORDERS as follows:

- a. The transcript of Mr. Phillips' evidence shall be redacted as proposed in confidential Annex A attached to the Motion before being made available for public release.
- b. The following exhibits shall be admitted into evidence and made available to the public:
 - i. 2D17 (pages 0322-5017 and 0322 5018);
 - ii. 2D18 (pages 0322-4958, 0322-4959, 0322-4961, and 0322-4963);

²⁹ T. 11903 (19 March 2007).

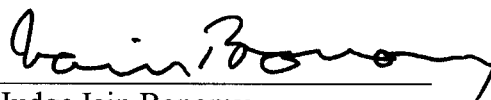
³⁰ Motion, para. 8.

³¹ T. 12015-12016 (20 March 2007).

³² Motion, paras. 10 and 11, Annex B.

- iii. 2D19 (pages 0321-6673 and 0321-6675);
 - iv. 2D20 (page 0321-6611);
 - v. 6D198 (pages 6D03-0883 and 6D03-0885);
 - vi. 3D566 (pages 3D01-3365 and 3D01-3371); and
 - vii. 3D562, 3D564, 3D568, 3D570, 3D571, 3D572, 3D573, and 3D574.
- c. Exhibits 3D561, 3D563, 3D565, 3D567 (only pages 3D01-3372 and 3D01-3373), and 3D569 shall be admitted into evidence under seal. The Ojdanić Defence shall, seven days from the date of this decision, upload public versions of these exhibits, with new exhibit numbers and redacted as proposed in confidential Annex B attached to the Motion. The Ojdanić Defence will then notify the other parties and the Chamber that it has done so, after which time these shall be deemed admitted into evidence and made available for public release.
- d. The following documents shall be removed from the record of the proceedings (removed from e-Court) and shall form no part of the official record: (i) 3D545, 3D546, 3D549, 3D550, 3D551, and 3D560; and (ii) P2835.
- e. The surplus notebook pages not listed under 21(b) and (c) above, and yet uploaded into e-Court, shall not be admitted into evidence and shall not form part of the official record of these proceedings.

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


Judge Iain Bonomy
Presiding

Dated this twenty fourth day of April 2007
At The Hague
The Netherlands

[Seal of the Tribunal]