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CASE/AFFAIRE NO. IT-05-87-AR73.1 DATE 20 April 2007

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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-05-87-AR73.1  
Date: 20 April 2007  
Original: English

**IN THE APPEALS CHAMBER**

**Before:** Judge Fausto Pocar, Presiding  
Judge Mohamed Shahabuddeen  
Judge Mehmet Güney  
Judge Andréia Vaz  
Judge Theodor Meron

**Registrar:** Mr. Hans Holthuis

**Decision of:** 20 April 2007

**PROSECUTOR**

v.

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

**DECISION ON INTERLOCUTORY APPEAL  
AGAINST SECOND DECISION PRECLUDING THE  
PROSECUTION FROM ADDING GENERAL WESLEY  
CLARK TO ITS 65<sup>TH</sup> WITNESS LIST**

**The Office of the Prosecutor:**

Ms. Christine Dahl  
Mr. Thomas Hannis  
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**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 Ackermann 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

1. The Appeals 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 (“Appeals Chamber” and “International Tribunal”, respectively), is seized of the “Prosecution Brief in Interlocutory Appeal of Second Decision Precluding the Testimony of General Wesley Clark” confidentially filed on 21 March 2007 (“Appeal”),<sup>1</sup> which was certified by the Trial Chamber pursuant to Rule 73(B) of the Rules of Procedure and Evidence of the International Tribunal (“Rules”) on 14 March 2007.<sup>2</sup> In its Appeal, the Prosecution contests the Trial Chamber’s denial of its request to add General Clark as a witness to its Rule 65ter list in the “Second Decision on Prosecution Motion for Leave to Amend its Rule 65ter Witness List to Add Wesley Clark” rendered on 16 February 2007 (“Impugned Decision”). On 2 April 2007, Counsel for the Accused (“Defence”) filed its Response submitting that the Impugned Decision should be affirmed in all respects<sup>3</sup> and, on 10 April 2007, the Prosecution filed its Reply.<sup>4</sup>

## I. BACKGROUND

2. General Wesley Clark is a retired career officer in the United States Army. From 1997 to May 2000, he was Commander-in-Chief of the United States European Command and the North Atlantic Treaty Organisation (“NATO”) Supreme Allied Commander. As such, he was involved in the NATO campaign in Kosovo.

3. On 10 July 2006, the trial commenced in this case.<sup>5</sup> In light of General Clark’s background, on 15 December 2006, the Trial Chamber was seized of the “Prosecution’s Motion for Leave to Amend its Rule 65ter Witness List with Confidential Annex A”, filed partly confidentially (“First Motion”), wherein the Prosecution sought leave pursuant to Rules 73(A), 73bis(F), 75 and 89(C) of the Rules, to amend its revised witness list filed on 6 July 2006<sup>6</sup> to include General Clark as one of its witnesses.<sup>7</sup> The Prosecution explained that although it had listed General Clark as a provisional witness in its list of 6 July 2006, the delay in bringing its request to amend that list was caused by

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<sup>1</sup> The Appeal was filed publicly (without confidential appendices) on 23 March 2007, and this Decision cites to that version of the Appeal.

<sup>2</sup> Decision on Prosecution Request for Certification of Interlocutory Appeal of Second Decision on Addition of Wesley Clark to Rule 65ter List, 14 March 2007 (“Certification Decision”).

<sup>3</sup> Joint Defence Response to Interlocutory Appeal Concerning General Wesley Clark, 2 April 2007 (“Response”), para. 48.

<sup>4</sup> Prosecution Reply Brief in Interlocutory Appeal on Second Decision Precluding the Testimony of General Wesley Clark, 10 April 2007 (“Reply”).

<sup>5</sup> Public Hearing of 10 July 2006, T. 414.

<sup>6</sup> Notice of Filing of Revised 65ter Witness List, filed confidentially on 6 July 2006.

<sup>7</sup> First Motion, para. 1.

its attempts to obtain authorization from the United States Government as a Rule 70 provider to call General Clark.<sup>8</sup>

4. In support of its request, the Prosecution submitted that General Clark had witnessed significant events relevant to the present case and would be able to testify to: 1). his meetings and interactions with members of the alleged joint criminal enterprise; 2). negotiations with Slobodan Milošević and his top political and military advisors in October 1998 with respect to the withdrawal of VJ<sup>9</sup> and MUP<sup>10</sup> forces from Kosovo; 3). the structure and chain of command of the VJ and the MUP in Kosovo between October 1998 and June 1999; 4). the signing of the 25 October 1998 Agreement between the former Socialist Federal Republic of Yugoslavia and NATO; and 5). the build-up of Serb troops in March of 1999.<sup>11</sup>

5. On 15 January 2007, the Trial Chamber rendered its “Decision on Prosecution Motion for Leave to Amend its Rule 65ter Witness List to Add Wesley Clark” (“First Decision”). In that decision, the Trial Chamber considered that the potential evidence of General Clark is relevant and has probative value for this case.<sup>12</sup> However, it stayed its determination on whether to allow the Prosecution to include General Clark on its Rule 65ter list until the Prosecution provided further information on two matters of particular concern to the Trial Chamber.<sup>13</sup> The first had to do with a factual dispute between the Parties with respect to the state of disclosure regarding the materials related to this witness.<sup>14</sup> The second concerned the uncertainty surrounding what Rule 70 restrictions the Prosecution would seek to be applied to the evidence of General Clark given that the Trial Chamber had not yet been seized of a Rule 70 application by the Prosecution in this regard.<sup>15</sup>

6. On 16 February 2007, the Trial Chamber rendered the Impugned Decision following the confidential filing of the “Prosecution’s Submission Pursuant to Trial Chamber Decision dated 15 January 2007 with Annexes” on 29 January 2007, wherein the Prosecution addressed the two outstanding aforementioned concerns. With respect to the issue of disclosure, the Trial Chamber held that although the delay caused by the manner in which the Prosecution had chosen to conduct this matter was significant, it was not enough, on its own, to preclude the addition of General Clark to the Prosecution’s Rule 65ter witness list.<sup>16</sup> As for the issue of the Rule 70 restrictions to be

<sup>8</sup> *Id.*, para. 5.

<sup>9</sup> Užice Corps of the Army of the FRY.

<sup>10</sup> Serbian Ministry of Internal Affairs.

<sup>11</sup> First Motion, para. 4.

<sup>12</sup> First Decision, para. 9.

<sup>13</sup> *Id.*, para. 14.

<sup>14</sup> *Id.*, paras. 10-12, 14.

<sup>15</sup> *Id.*, paras. 13-14.

<sup>16</sup> Impugned Decision, paras. 19-23, 32.

applied to General Clark's testimony, the Prosecution stated that General Clark's testimony is to be conducted in open session, subject to obtaining the following requests: 1). that the protective measures granted to General Clark on 30 October 2003 by the Trial Chamber in *Prosecutor v. Slobodan Milošević*<sup>17</sup> would apply; and 2). that those protective measures would be varied to the extent that General Clark's examination-in-chief and cross-examination would be confined to the subject of Kosovo.<sup>18</sup> The Trial Chamber held that at least two of the Rule 70 restrictions would render the trial unfair and were unnecessary in the circumstances namely, limiting the scope of the Defence's cross-examination of General Clark, and requiring the Defence to seek prior agreement from the Rule 70 provider if it wishes to have that restriction varied.<sup>19</sup> Consequently, the Trial Chamber denied, without prejudice, the Prosecution's request to add General Clark to its Rule 65ter list as it considered that granting it would be inappropriate at this point in time.<sup>20</sup> It is against this holding that the Prosecution has filed the present Appeal.

## II. STANDARD OF REVIEW

7. The preliminary issue to be determined in disposing of this Appeal concerns what is the appropriate standard of review the Appeals Chamber is to apply to the Impugned Decision. In its Response, the Defence notes that the Prosecution's Appeal makes no mention of the standard of review and argues that it is a deferential one given that a decision to vary a party's witness list is an exercise of the Trial Chamber's discretion.<sup>21</sup> The Prosecution replies that because the Trial Chamber misapplied the test under Rules 70(G) and 89(D) of the Rules in the Impugned Decision, this constitutes an error of law, which does not attract deference.<sup>22</sup>

8. The Appeals Chamber recalls that it is well established in the jurisprudence of the International Tribunal that Trial Chambers exercise discretion in various types of decisions for purposes of fair and expeditious management of a trial, including in relation to the admissibility of some types of evidence.<sup>23</sup> In reviewing such decisions, the Appeals Chamber accords deference to

<sup>17</sup> Case No. IT-02-54-T, Confidential Decision on Prosecution's Application for a Witness Pursuant to Rule 70(B), 30 October 2003.

<sup>18</sup> See Impugned Decision, paras. 4, 25.

<sup>19</sup> *Id.*, paras. 26-31. The Impugned Decision is not entirely clear whether each of these two restrictions would independently render the trial unfair or instead whether the unfairness would stem from their combined effect. For reasons that will become evident, the Appeals Chamber sees no need to resolve this issue.

<sup>20</sup> *Id.*, para. 32. The Trial Chamber noted, as a final matter, "that there may still be an opportunity for General Clark to be added to the witness list, should circumstances materially change in respect to the issues identified in this Decision." *Id.*, para. 33.

<sup>21</sup> Response, paras. 16-19.

<sup>22</sup> Reply, paras. 3-7.

<sup>23</sup> *Prosecutor v. Milan Martić*, Case No. IT-95-11-AR73.2, Decision on Appeal Against the Trial Chamber's Decision on the Evidence of Witness Milan Babić, 14 September 2006 ("*Martić Decision*"), para. 6 & fn. 7.

the Trial Chamber in recognition of the Trial Chamber's "organic familiarity with the day-to-day conduct of the parties and practical demands of the case."<sup>24</sup>

9. In the Impugned Decision, the Trial Chamber considered whether to allow General Clark to be added to the Prosecution's Rule 65ter witness list pursuant to Rule 73bis(F) of the Rules, which provides that, after commencement of trial, a Trial Chamber "may grant the Prosecutor's request" to vary the decision as to the number of witnesses to be called "if satisfied that this is in the interest of justice."<sup>25</sup> In determining whether it was in the interests of justice to vary its decision as to the number of witnesses to be called in this case, the Trial Chamber took into consideration Rules 70(G) and 89(D) of the Rules,<sup>26</sup> under which a Trial Chamber *may* exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial. Clearly, as reflected in the permissive language of these Rules and by the fact that what was at issue in the Impugned Decision was the admissibility of a Rule 70 witness for giving evidence, the Impugned Decision constitutes an exercise of the Trial Chamber's discretion.<sup>27</sup> Thus, the Appeals Chamber's deferential standard of review for discretionary decisions by a Trial Chamber applies.

10. Consequently, in reviewing the Impugned Decision, the Appeals Chamber will consider whether the Prosecution has demonstrated that the Trial Chamber has committed a "discernible error" resulting in prejudice.<sup>28</sup> The Appeals Chamber will only overturn a Trial Chamber's exercise of its discretion where it is found to be "(1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion."<sup>29</sup> The Appeals Chamber notes that the Prosecution's allegation that the Trial Chamber misapplied the test under Rules 70(G) and 89(D) of the Rules in the Impugned Decision as an error of law falls within the rubric of this deferential standard of review.

### III. DISCUSSION

11. Turning to the Impugned Decision, the sole issue raised in the Prosecution's Appeal is whether the Trial Chamber erred in its determination that conditions stipulated by the United States Government for allowing General Clark to testify with respect to confidential information provided

<sup>24</sup> *Id.*, para. 6 & fn. 8 (quotation marks omitted).

<sup>25</sup> Rule 73bis(F) of the Rules (emphasis added). *See also* Impugned Decision, para. 12.

<sup>26</sup> *Id.*, paras. 12-14.

<sup>27</sup> *See also* Martić Decision, para. 7 (holding that the Appeals Chamber will not conduct a *de novo* review of a Rule 89(D) decision).

<sup>28</sup> *Id.*, para. 7 & fns. 11, 12.

<sup>29</sup> *Id.* (quotation marks omitted).

under Rule 70 of the Rules, required it to exclude him as a Prosecution witness under Rules 70(G) and 89(D) because the probative value of that testimony is substantially outweighed by the need to ensure a fair trial. As noted previously, the two specified Rule 70 conditions that led the Trial Chamber to reach this conclusion are as follows: 1). the scope of examination-in-chief and cross-examination of the witness is to be limited to the content of the Rule 65ter witness summary<sup>30</sup> of anticipated trial testimony; and 2). the Defence may seek to have the scope of cross-examination expanded by prior agreement of the United States Government (obtained directly from that Government or through the representation of the Office of the Prosecutor), once the summary of the evidence-in-chief is disclosed to them.<sup>31</sup>

12. In reaching its determination, the Trial Chamber reasoned, with reference to Rule 90(H)(i) of the Rules,<sup>32</sup> that

[t]o restrict cross-examination to the subject matter predetermined by anyone other than the Chamber with the approval, at least tacit, of the Prosecution is inevitably unfair to the Defence. It would prevent them from challenging the honesty and reliability of the witness by looking at inconsistencies in what he may have said on matters outwith the permitted territory of the examination. It would also prevent the Defence from cross-examining on relevant matters favourable to the Defence case that are excluded by the restriction. There is no obligation on the Defence to indicate in advance the line of cross-examination to be pursued. To require them to seek permission from examination on a particular subject would oblige them to make disclosure not required by the Rules.<sup>33</sup>

Furthermore, the Trial Chamber recalled that it is essential that a trial “should not only be fair but be seen to be fair” and found that “[a]ny neutral interested bystander would be bound to view as unfair a trial in which one of the parties to a conflict insisted upon controlling the cross-examination of its citizen who commanded one force in the trial of Accused from the other, thus depriving them of their full right to confront the witnesses against them.”<sup>34</sup>

#### A. Limiting the Scope of Cross-Examination

13. The Prosecution first argues that although the Trial Chamber correctly articulated the test under Rule 70(G) and Rule 89(D) of the Rules when assessing the Rule 70 condition placed upon General Clark’s proposed testimony that the scope of his cross-examination be limited to the scope

<sup>30</sup> See Rule 65ter(E).

<sup>31</sup> Impugned Decision, paras. 25-31.

<sup>32</sup> Rule 90(H)(i) of the Rules states:

Cross-examination shall be limited to the subject-matter of the evidence-in-chief and matters affecting the credibility of the witness and, where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject-matter of that case.

<sup>33</sup> Impugned Decision, para. 27.

<sup>34</sup> *Id.*, para. 30.

of his examination-in-chief, it did not properly apply it. According to the Prosecution, the test is applied in two stages:

The first stage is whether the Rule 70 conditions have an adverse impact on the fairness of the trial. Risk of unfairness is not sufficient. "Impact" means that the risk must [be] manifest and be demonstrable. The second stage addresses whether this adverse impact results in unfairness of such a degree that it "substantially outweighs" the probative value of the evidence, requiring its exclusion [ . . .].<sup>35</sup>

14. The Prosecution contends that the Trial Chamber erred when it prematurely presumed that unfairness was inevitable with respect to the above limitation on General Clark's cross-examination rather than assessing whether it *in fact* had an adverse impact on the fairness of the trial.<sup>36</sup> The Prosecution submits that the information before the Trial Chamber was insufficient for it to properly exercise its discretion given that General Clark has not yet testified or refused to answer a question upon examination under Rule 70 of the Rules,<sup>37</sup> and the Defence has not yet concluded its discussions with the Rule 70 provider to expand the scope of testimony for cross-examination.<sup>38</sup> Consequently, in its view, the Trial Chamber improperly excluded relevant evidence on the basis of risk of harm or speculative harm rather than on actual demonstrable harm. According to the Prosecution, Rules 70(G) and 89(D) are

properly applied *after* the Trial Chamber hears General Clark's testimony and considers whether and to what extent the Rule 70 conditions curtailed his cross-examination. Only then can it properly assess, as opposed to speculate about, the weight to be attached to General Clark's evidence in light of any restrictions on cross-examination and in light of the entire trial record. Only then can it assess whether the Rule 70 conditions render the trial so unfair as to require exclusion of the whole testimony.<sup>39</sup>

15. The Prosecution further argues that this approach is supported by the *Martić* Decision,<sup>40</sup> wherein the Appeals Chamber held that any adverse impact on the fairness of the trial caused by limitations on cross-examination of a witness must be assessed "within the plenitude of the trial as a whole".<sup>41</sup> The Prosecution also contends that the *Martić* Decision demonstrates that exclusion of *all* of the witness testimony is not the only response available to a Trial Chamber for purposes of safeguarding the fairness of the proceedings where there are such limitations.<sup>42</sup>

<sup>35</sup> Appeal, para. 10.

<sup>36</sup> *Id.*, para. 11.

<sup>37</sup> Rule 70(D) provides that "[i]f 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."

<sup>38</sup> Appeal, paras. 12-16, 19-21.

<sup>39</sup> *Id.*, para. 16 (emphasis added). *See also id.*, paras. 17-18.

<sup>40</sup> *See supra* fn. 23.

<sup>41</sup> Appeal, para. 18 quoting the *Martić* Decision.

<sup>42</sup> *Id.*, paras. 17-18.



16. The Appeals Chamber considers that, as stated previously, at issue in the Impugned Decision was whether to vary the Prosecution's Rule 65*ter* witness list to allow it to call General Clark as an additional witness after the commencement of trial under Rule 73*bis*(F) of the Rules upon finding that it was in the interests of justice to do so. In reaching its decision on that question, the Trial Chamber properly resorted to the general provisions for admission of evidence found in Rule 89 of the Rules, which include the test for exclusion of proffered evidence.<sup>43</sup> It also appropriately considered Rule 70(G) of the Rules given that General Clark is a proposed witness who would testify to confidential Rule 70 information provided by the United States Government and whose testimony would be subject to certain restrictions stipulated by that Rule 70 provider. Rule 70(G) of the Rules provides that Rule 70 restrictions on the presentation of evidence outlined in Rule 70(C) and (D) shall not "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."

17. The Appeals Chamber does not agree that the Trial Chamber erred in applying the test for exclusion of evidence found in Rules 70(G) and 89(D) of the Rules when it found that it would be inappropriate to grant the Prosecution's request in light of the limitation placed by the Rule 70 provider on the scope of General Clark's cross-examination as a condition for allowing him to testify. Nothing in the plain language of these Rules requires a Trial Chamber, when considering whether to admit a witness to give testimony, to first hear that testimony and then, only once adverse harm to the fairness of the trial actually results, exclude the evidence if the unfairness substantially outweighs its probative value. To interpret the Rules in such a way would unduly restrict the discretion of the Trial Chamber in controlling the proceedings before it and would jeopardize its ability to uphold its statutory obligation to ensure that the trial proceedings before it are both fair and expeditious.<sup>44</sup>

18. Furthermore, this analysis does not change simply because the Trial Chamber was considering whether to admit a Rule 70 witness subject to conditions imposed by a Rule 70 provider. While Rule 70(C) and (D) of the Rules refers to certain restrictions on a Trial Chamber in hearing a witness testify to confidential material provided by a Rule 70 provider, those restrictions

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<sup>43</sup> See Impugned Decision, para. 17 (holding that in the exercise of its discretion to amend a witness list pursuant to Rule 73*bis*(F), it "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. 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).").

<sup>44</sup> See Articles 20(1) and 21(2) of the Statute of the International Tribunal ("Statute").

apply only after the Trial Chamber has determined that the Rule 70 witness testimony “elected” to be presented by a party at trial<sup>45</sup> is admissible under Rule 89 of the Rules. In making that determination, a Trial Chamber is entitled under Rule 70(G) of the Rules to consider whether the Rule 70 restrictions stipulated with respect to that witness testimony would undermine the need to ensure a fair trial and substantially outweigh the testimony’s probative value such as to lead to exclusion of that testimony. A Trial Chamber is not obliged to automatically admit such Rule 70 witness testimony where it is deemed relevant and probative and, only afterwards, assess the actual unfairness caused to the trial by the Rule 70 conditions as applied. The Appeals Chamber recalls that Rule 70 protections on confidential information provided by States have been incorporated in the International Tribunal’s Rules in recognition of the need of States for safeguards with respect to certain State interests. They have also been included to allow and to encourage States to fulfil their cooperation obligations under Article 29 of the Tribunal’s Statute<sup>46</sup> by providing a broad range of information relevant to a particular case.<sup>47</sup> However, this deference to States’ interests does not go so far as to supersede a Trial Chamber’s authority to maintain control over the fair and expeditious conduct of the trial.<sup>48</sup> In sum, under Rules 70(G) and 89(D) of the Rules, a Trial Chamber may, as the Trial Chamber did here, assess the conditions placed upon proposed Rule 70 witness testimony and determine, without hearing that testimony, that it may not be admitted on the basis that the Rule 70 conditions would result in substantial unfairness to the trial, which outweighs that testimony’s probative value.

19. The Appeals Chamber further finds that the Prosecution’s citation to the *Martić* Decision in support of its interpretation of the test under Rules 70(G) and 89(D) of the Rules is inapposite. While in that decision the Appeals Chamber similarly considered whether limitations on the cross-examination of witness testimony would result in substantial unfairness to the trial which outweighs its probative value and thereby requires its exclusion under Rule 89(D) of the Rules, the question arose after the testimony had already been admitted by the Trial Chamber and only because of the unexpected death of the witness prior to the close of cross-examination. The Appeals Chamber in the *Martić* Decision did not address whether proposed witness testimony may be excluded prior to its admission under Rule 89(D) of the Rules because of the need to ensure a fair trial. Nor did it

<sup>45</sup> See Rule 70(C) and (F) of the Rules.

<sup>46</sup> Article 29(1) of the Statute reads: “States shall co-operate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.”

<sup>47</sup> *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-AR108bis.2, Decision on Request of the United States of America for Review, 12 May 2006 (“Decision of 12 May 2006”), para. 33.

<sup>48</sup> See Article 20(1) of the Statute. See also Decision of 12 May 2006, para. 38, wherein the Appeals Chamber emphasized that “Rule 70 should not be used by States as a blanket right to withhold, for security purposes, documents necessary for trial from being disclosed by a party for use as evidence at trial as this would jeopardize the very function of the International Tribunal, and defeat its essential object and purpose” (internal quotation marks omitted).

consider possible exclusion of proffered witness testimony because it was subject to Rule 70 conditions.

20. Finally, the Appeals Chamber considers that the Prosecution fails to show that the Trial Chamber erred by prematurely finding that the Rule 70 limitation on the scope of General Clark's cross-examination would render the proceedings unfair, and that this unfairness substantially outweighs the probative value of General Clark's proposed testimony. It was reasonable for the Trial Chamber to conclude this in light of the fact that the Rule 70 restriction, as presented, would unfairly limit the ability of the Defence to challenge General Clark's credibility and prevent it from obtaining evidence from General Clark relevant to its case as allowed under Rule 90(H)(i) of the Rules unless it had obtained prior approval from the Rule 70 provider. The provisions of Rule 90(H)(i) are important for effective realization of an accused's right to confront the witnesses brought against him,<sup>49</sup> and their restriction would appear to be patently unfair. Thus, it was reasonable for the Trial Chamber to conclude that its only recourse was exclusion of General Clark's testimony.

#### **B. Requiring Approval for Expanding the Scope of Cross-Examination**

21. Second, the Prosecution submits that the Trial Chamber erred in excluding General Clark's proffered testimony on the basis that the Rule 70 condition, which requires that the Defence must seek prior approval before expanding the scope of its cross-examination, would unfairly force the Defence to indicate in advance its line of cross-examination. The Prosecution contends that if the Trial Chamber was concerned that the Defence would be required to make such disclosure to the Rule 70 provider, this concern is without foundation. The Prosecution notes that the Defence has already made a request to the Rule 70 provider for relevant information for purposes of cross-examination, and the Defence does not necessarily have to disclose its line of cross-examination in doing so. Furthermore, any concern that the Defence would be required to disclose its line of cross-examination to the Prosecution in seeking to expand the scope of cross-examination is ill-founded because discussions between the Defence and Rule 70 provider are confidential and are not disclosed to the Prosecution. Finally, the Prosecution argues that any concern that the Defence will be required to disclose its line of cross-examination to the Trial Chamber is groundless because seeking agreement with the Rule 70 provider to expand the scope of cross-examination does not give rise to any need for the Defence to disclose those discussions with the Chamber. The only stage at which the Defence may have to reveal such discussions is when it seeks the Trial

Chamber's approval under Rule 70(F) of the Rules for the conditions agreed upon between the Defence and Rule 70 provider. That being said, the Prosecution submits that at present, the Defence has not been compelled to disclose its line of cross-examination in advance to the Rule 70 provider, the Prosecution or the Trial Chamber and thus, the Trial Chamber's decision to exclude General Clark's proposed testimony on that basis was premature and an unreasonable exercise of the Trial Chamber's discretion. According to the Prosecution, "[t]he Trial Chamber has not articulated what harm has been caused to the Defence; has not reasoned why any such harm substantially outweighs the probative value of General Clark's evidence; and has not considered remedies other than complete exclusion of the witness."<sup>50</sup>

22. The Appeals Chamber notes that in the Impugned Decision, the Trial Chamber held that "[t]here is no obligation on the Defence to indicate in advance the line of cross-examination to be pursued" and that "[t]o require them to seek permission for examination on a particular subject would oblige them to make disclosure not required by the Rules."<sup>51</sup> It considered that this Rule 70 condition required it to exclude the proposed testimony under Rules 70(G) and 89(D) of the Rules. The Appeals Chamber finds that the Prosecution has failed to demonstrate a discernible error in this approach. While the Trial Chamber did not specifically state to whom the Defence would unfairly be obliged to make disclosure with respect to its line of cross-examination, it is clear that it would at least have to do so to the Rule 70 provider and, consequently, General Clark as the witness. The Rule 70 provider would have to inform General Clark that he is allowed to answer questions beyond the original scope of cross-examination stipulated and, as a result, any advantage gained by pursuing a new line of cross-examination would be mitigated or even lost given that General Clark would be prepared for it.

23. Furthermore, as found above, the Trial Chamber was not required to find actual harm to the fairness of the trial that has resulted from the application of this Rule 70 condition upon admission of General Clark's testimony into evidence in order to find that the testimony should be excluded under Rules 70(G) and 89(D).<sup>52</sup> Nor was it required to consider other remedies than exclusion of that testimony from the record once the harm was done. It was appropriate under Rules 70(G) and 89(D) of the Rules for the Trial Chamber to find that the application of this Rule 70 condition as it

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<sup>49</sup> See Article 21 of the Statute.

<sup>50</sup> Appeal, para. 28. See also paras. 22-27.

<sup>51</sup> Impugned Decision, para. 27.

<sup>52</sup> See *supra* para. 17.

stands would result in unfairness that substantially outweighs the probative value of that testimony such that the testimony should not be admitted in the first place.<sup>53</sup>

### C. Rule 70 Conditions and Rule 70 Witnesses

24. In light of the foregoing reasoning, there is no need for the Appeals Chamber to consider the Defence's argument that "Rule 70 does not permit a provider to condition the appearance of a witness before the Tribunal on the granting, in advance, of blanket protective measures which limit the scope of that testimony."<sup>54</sup>

## IV. DISPOSITION

25. On the basis of the foregoing, the Appeals Chamber **DISMISSES** the Appeal.

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

Dated this 20th day of April 2007,  
at The Hague,  
The Netherlands.



Judge Fausto Pocar, Presiding Judge

[Seal of the International Tribunal]

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<sup>53</sup> See *supra* paras. 17-18, 20.

<sup>54</sup> Response, para. 24.