



United Nations
Nations Unies



International
Criminal Tribunal
for the Former
Yugoslavia

Court
Management and
Support Services
Section

Tribunal Pénal
International pour
l'ex-Yougoslavie

Section des
Services
d'administration et
d'appui judiciaire

**Notice of
confidentiality
applicable to fax**

This facsimile transmission contains United Nations proprietary information that is strictly confidential and/or legally privileged, and is intended solely for the use of officials of the United Nations and/or the named recipient hereof. Any unauthorized disclosure, copying, distribution or other use of the information herein is strictly prohibited. If you have erroneously received this facsimile transmission, please notify the United Nations immediately.

A49

CASE/AFFAIRE NO. IT-05-87-AR73.1 DATE 02 April 2007

FROM/DE SYED RIAZ HAIDER, COURT OFFICER

TO/A

<input type="checkbox"/> President/Président	<input checked="" type="checkbox"/> Prosecutor/Procureur	<input checked="" type="checkbox"/> Defense Counsel/Conseil de la Défense	cc
<input checked="" type="checkbox"/> Appeals Chamber/ Chambre d'appel (5)	<input checked="" type="checkbox"/> Case Manager/ Commis aux affaires	Mr. Fila/Mr. Petrović Mr. Visnjić/Mr. Sepenuk Mr. O'Sullivan/Mr. Zecević	
<input type="checkbox"/> Trial Chamber I/ Chambre de 1ère instance I	<input type="checkbox"/> Chief of Investigations/ Chef des enquêtes	Mr. Ackerman / Mr. Aleksić Mr. Bakrač / Mr. Čepić Mr. B. Lukic/Mr Ivetic	
<input type="checkbox"/> Trial Chamber II/ Chambre de 1ère instance II		
<input type="checkbox"/> Trial Chamber III/ (4) Chambre de 1ère instance III		
<input checked="" type="checkbox"/> E-copy			

Embassy/Ambassade

Other/Autre

<input checked="" type="checkbox"/> Registrar/Deputy Registrar/Greffier/Greffier adjoint MR. A. DE WITT	<input checked="" type="checkbox"/> VWS Coordinator/Coordinateur de la SVT MS. W. LOBWEIN
<input checked="" type="checkbox"/> Senior Legal Officer/Juriste hors-classe MS MARCHI-UHEL/LO (2)	<input type="checkbox"/> UNDU Commanding Officer/Commandant du QPNU
<input checked="" type="checkbox"/> PTV/MOW	<input checked="" type="checkbox"/> OLAD

PLEASE FIND ATTACHED/VEUILLEZ TROUVER CI-JOINT

Order/Warrant/decision issued by Appeals Chamber or Trial Chamber or a Judge on/
Ordonnance/Mandat/Décision émis(e) par la Chambre d'appel ou les Chambres de 1ère instance ou un Juge le ___/___/___

Order/Decision issued by the President on/Ordonnance/Décision émise par le Président le ___/___/___

Motion/Request/Application submitted by Prosecution/Defence Counsel on/
Motion/Requête/Demande présentée par l'Accusation/le Conseil de la défense le ___/___/___

Response/reply/brief submitted by Prosecution/Defence Counsel on/
Réponse/Réplique/Mémoire présenté(e) par l'Accusation/le Conseil de la défense le 02 / 04 / 07

Decision of the Registrar on/Décision du Greffier le ___/___/___

Other/Autre

RECEIVED/RECU FILED/ENREGISTRE

Office hours/heures ouvrables
Date: 02/04/07

Office hours/heures ouvrables
Date: 02/04/2007

Outside Office hours/en dehors des heures ouvrables
Date: ___/___/___
Time/Heure: ___ h

Outside Office hours/en dehors des heures ouvrables
Date: ___/___/___
Time/Heure: ___ h

Article 27.2- Directive for the Registry: A party anticipating a late filing will call the Registry during office hours to request permission of the Registrar and instruction for after hour filing.
Article 27.2-Directive pour le Greffe: une partie prévoyant un dépôt hors des heures ouvrables se mettra en rapport avec le personnel du Greffe durant les heures de bureau pour solliciter l'autorisation du Greffier et les instructions nécessaires.

Churchillplein 1, 2517 JW The Hague. P.O. Box 13888, 2501 EW The Hague. Netherlands
Churchillplein 1, 2517 JW La Haye. B.P. 13888, 2501 La Haye. Pays-Bas
Tel.: 31-70-416 5000 Fax: 31-70-416 8637

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

CASE No. IT-05-87-AR73.1

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Guney
Judge Andresia Vaz
Judge Theodor Meron

Registrar: Mr. Hans Holthuis

Date Filed: 2 April 2007

THE PROSECUTOR

v.

MILAN MILUTINOVIC
NIKOLA SAINOVIC
DRAGOLJUB OJDANIC
NEBOJSA PAVKOVIC
VLADIMIR LAZAREVIC
SRETEN LUKIC

JOINT DEFENCE RESPONSE TO
INTERLOCUTORY APPEAL CONCERNING
GENERAL WESLEY CLARK

The Office of the Prosecutor:

Mr. Thomas Hannis
Mr. Chester Stamp
Ms. Christina Moeller

Counsel for General Ojdanic:

Mr. Tomislav Visnjic
Mr. Norman Sepenuk

Mr. Eugene O'Sullivan and Mr. Slobodan Zecevic for Milan Milutinovic
Mr. Toma Fila and Mr. Vladimir Petrovic for Nikola Sainovic
Mr. John Ackerman and Mr. Aleksander Aleksic for Nebojsa Pavkovic
Mr. Mihaljo Bakrac and Duro Cepic for Vladimir Lazarevic
Mr. Branko Lukic and Mr. Dragan Ivetic for Mr. Sreten Lukic

Case No. IT-05-87-AR73.1

02 April 2007

“Joint Defence Response to Interlocutory Appeal Concerning
General Wesley Clark”

1. On 21 March 2007, pursuant to certification granted by the Trial Chamber, the *Prosecution Brief in Interlocutory Appeal of Second Decision Precluding the Testimony of General Wesley Clark* was filed.

Procedural History

2. The lengthy proceedings which led up to the Impugned Decision are highly relevant to the appeal and are set forth below:

5 April 2006—Trial Chamber *Pre-Trial Order* and *Appended Work Plan* sets commencement of trial for 10 July 2006

26 April 2006—At Rule 65 *ter* conference, General Ojdanic defence team puts prosecution on notice that it would object to late disclosure of Rule 70 witnesses

10 May 2006—Prosecution files Rule 65 *ter* witness list, but does not disclose identity of Rule 70 witnesses

17 May 2006—Prosecution says it cannot disclose Rule 70 witnesses because provider would not discuss issue until there was a trial date¹

Pre-Trial Judge orders prosecution to disclose identity of Rule 70 witnesses and their statements by 6 July 2006²

07 July 2006—Prosecution first discloses it intends to call General Wesley Clark as a witness. No statements of General Clark are disclosed.

10 July 2006—Trial commenced.

19 July 2006—Ojdanic defence requests production of materials relating to General Clark from OTP and asks that they obtain those not in their possession from NATO and U.S.A.³

Prosecution does not respond.

02 Aug 2006—Ojdanic defence sends second request. Prosecution suggests that General Ojdanic defence team use own efforts to obtain the material from NATO and U.S.A.⁴

¹ Transcript of 17 May 2006 @ 261

² Transcript of 17 May 2006 @ 264

³ Text is at Annex “A”, attached to *General Ojdanic's Submissions Concerning Disclosure of Rule 70 Material* (22 September 2006)

⁴ Text is at Annex “B” attached to *General Ojdanic's Submissions Concerning Disclosure of Rule 70 Material* (22 September 2006)

Case No. IT-05-87-AR73.1

02 April 2007

“Joint Defence Response to Interlocutory Appeal Concerning
General Wesley Clark”

14 Aug 2006—General Ojdanic makes Rule 70 Request for Clark material on U.S.A., NATO, and General Clark.⁵

17 Aug 2006—United States responds that request is premature in that prosecution has never made a formal request for General Clark to testify.⁶

18 Aug 2006—General Ojdanic defence requests and obtains permission from USA to share its letter with prosecution.

General Ojdanic asks prosecution for explanation—indicates delay is hampering its preparation.⁷

Prosecution never responds.

22 Aug 2006—General Ojdanic defence requests meeting with USA to encourage them to begin search for Rule 70 material and to interview three former U.S. government employees concerning General Clark.⁸

30 Aug 2006-- *Joint Defence Motion to Exclude the Testimony of Witnesses for Failure to Comply with Disclosure Obligations* (30 August 2006)

11 Sep 2006—General Ojdanic defence meets with U.S. government representatives in Washington, D.C. They advise that no request for General Clark’s testimony has yet been made by prosecution. Requests for documents and interviews of witnesses on hold.⁹

13 Sep 2006—*Prosecution Response to Joint Defence Motion to Exclude the Testimony of Witnesses for Failure to Comply with Disclosure Obligations* (30 August 2006)—It is represented that a “draft” request for General Clark to testify was sent to the USA on 16 August 2006.

21 Sep 2006—Prosecution represents in open court that it sent a formal request for General Clark to be a witness “yesterday”¹⁰

⁵ *General Ojdanic’s Request to United States of America, NATO, and General Wesley K. Clark Pursuant to Rule 70* (filed with Registry on 14 August 2006)

⁶ The letter is Annex “B” to the Prosecution’s Brief.

⁷ E-mail exchange is attached as Annex “C” to *General Ojdanic’s Submissions Concerning Disclosure of Rule 70 Material* (22 September 2006)

⁸ E-mail exchange is attached as Annex “D” to *General Ojdanic’s Submissions Concerning Disclosure of Rule 70 Material* (22 September 2006)

⁹ Report of meeting is attached as Annex “E” to *General Ojdanic’s Submissions Concerning Disclosure of Rule 70 Material* (22 September 2006)

¹⁰ Transcript of 21 September 2006 @ 3693

Case No. IT-05-87-AR73.1

02 April 2007

“Joint Defence Response to Interlocutory Appeal Concerning
General Wesley Clark”

22 Sep 2006—*General Ojdanic’s Submissions Concerning Disclosure of Rule 70 Material*

2 Oct 2006—*Prosecution’s Submissions Re General Ojdanic’s Submissions Concerning Disclosure of Rule 70 Material*. It is represented that provider advised that “a reply to our formal request for authorization for his [Clark’s] testimony could be expected shortly”.)

18 Oct 2006—*Decision on Joint Defence Motion to Exclude Evidence for Failure to Comply With Disclosure Obligations*. [Decides that General Clark is not on the witness list and a motion would have to be filed to add him.]

12 Dec 2006—United States informs General Ojdanic defence team that it has “conditionally authorized” General Clark to testify as prosecution witness “contingent on the prosecution securing a court order granting certain protective measures.”¹¹

15 Dec 2006—*Prosecution’s Motion for Leave to Amend its Rule 65 ter Witness List* [requests to add General Clark]

28 Dec 2006—*General Ojdanic’s Opposition to Motion to Call General Wesley Clark As a Prosecution Witness*

15 Jan 2007—*Decision on Prosecution Motion for Leave to Amend its Rule 65 ter Witness List to Add Wesley Clark* [Trial Chamber requests additional information on the restrictions sought to be applied to the testimony of the witness and the status of disclosure]

29 Jan 2007—*Prosecution’s Submission Pursuant to Trial Chamber Decision Dated 15 January 2007* [the United States Government has agreed for General Clark to testify in open session, conditioned upon the OTP obtaining an order from the Trial Chamber granting the requested protective measures.]¹²

01 Feb 2007—*Joint Defence Further Submission in Opposition to Motion to Add General Wesley Clark to Prosecution Witness List*

16 Feb 2007—*Second Decision on Prosecution Motion for Leave to Amend Its Rule 65 ter Witness List to Add Wesley Clark* (the “Impugned Decision”)

¹¹ The letter is Annex A to the Prosecutor’s Brief.

¹² Para. 17

Case No. IT-05-87-AR73.1

02 April 2007

“Joint Defence Response to Interlocutory Appeal Concerning
General Wesley Clark”

23 Feb 2007—*Prosecution’s Request for Certification to Appeal the Second
Decision Regarding the Addition of General Wesley Clark to the
Prosecution’s Witness List*

01 Mar 2007—*Joint Defence Response to Prosecution Application for
Certification to Appeal: Testimony of General Wesley Clark*

14 Mar 2007—*Decision on Prosecution Request for Certification of Interlocutory
Appeal of Second Decision on Addition of Wesley Clark to the Rule
65 ter List*

3. An examination of the documents listed above indicates that the United States delayed its permission for General Wesley Clark to be a witness until 12 December 2006—six months after the trial had commenced. When it did give that permission, it was expressly “contingent on the prosecution securing a court order granting certain protective measures.”¹³ The prosecution did not specify the protective measures being sought until 29 January 2007—less than two months before it was scheduled to complete its case. It was under these circumstances that the Trial Chamber declined leave to add General Clark to the prosecution’s witness list.

The Impugned Decision

4. The Trial Chamber issued its *Second Decision on Prosecution Motion for Leave to Amend its Rule 65 ter Witness List to Add Wesley Clark* on 16 February 2007.

5. Noting the “late stage of the Prosecution case at which the Motion came before the Trial Chamber”, the Trial Chamber comprehensively addressed the issues of lack of disclosure and the proposed restrictions on General Clark’s testimony.¹⁴

6. The Trial Chamber noted that in the context of a motion to vary a party’s witness list pursuant to Rule 73 bis (F), it must be established that the addition of General Clark was in the interests of justice.¹⁵

7. The Trial Chamber addressed the issues of disclosure and concluded that they posed no bar to adding General Clark to the witness list. However, it commented that “In the knowledge that General Clark was a potential witness from a time significantly before

¹³ The letter is Annex A to the Prosecutor’s Brief.

¹⁴ Para. 1

¹⁵ Para. 12

“Joint Defence Response to Interlocutory Appeal Concerning
General Wesley Clark”

the commencement of the trial, the Prosecution has persistently failed to address the associated problems with the degree of diligence expected by the Chamber.”¹⁶

8. With respect to the protective measures, the United States had conditioned its consent to General Clark’s testifying at all on the granting of protective measures which included limiting the scope of cross examination to the matters contained in the prosecutor’s summary, unless expanded with the prior agreement of the United States.¹⁷

9. The Trial Chamber declined to provide the advance, blanket protective measures demanded by the United States. It held that the restrictions on cross-examination would render the trial unfair as it would deprive the accused of the right to cross-examine on matters of credibility and matters favorable to their defence.¹⁸

10. The Trial Chamber went on to assure the United States that if it consented to allow General Clark to testify, the Trial Chamber would be “conscious of the need to protect the sensitive interests of parties affected by trials such as this, including the current Rule 70 provider.” It provided that the United States could have two representatives present in court during General Clark’s testimony “to intervene on behalf of the government when necessary” and opined that the other protective measures granted to General Clark in the *Milosevic* trial may also be appropriate.¹⁹

11. The Trial Chamber noted that General Clark seemed particularly capable of testifying without the blanket protections sought by the United States, given that he had spoken extensively about the same issues in public, had testified in the *Milosevic* trial, and had been both Supreme Commander of NATO forces and a U.S. Presidential candidate.²⁰

12. The Trial Chamber further noted that “justice must be seen to be done” and that “any 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 a trial of Accused from the other, thus depriving them of their full right to confront the witnesses against them.”²¹

¹⁶ Para. 22

¹⁷ Paras. 25-26

¹⁸ Para. 27

¹⁹ Para. 28

²⁰ Para. 29

²¹ Para. 30

“Joint Defence Response to Interlocutory Appeal Concerning
General Wesley Clark”

13. The Trial Chamber ruled that the protective measures insisted upon by the United States made it inappropriate “at this time” to allow General Clark to be added to the prosecution’s witness list.²² It noted 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.”²³

Post-Decision Developments

14. Despite the invitation of the Trial Chamber to the United States to reconsider its insistence on blanket protective measures as a condition precedent to its consent to have General Clark testify, and to trust the Trial Chamber to rule on the issues as they arose during the trial, the United States never consented to allow General Clark to testify. On 9 March 2007, the prosecutor advised the Trial Chamber that while the United States was willing to modify its position as to two other witnesses, it was unwilling to do so as to General Clark.²⁴

15. On 14 March 2007, the Trial Chamber issued its *Decision on Prosecution Request for Certification of Interlocutory Appeal of Second Decision on Addition of Wesley Clark to the Rule 65 ter List*. The Trial Chamber noted that it had denied permission to add General Clark to the prosecution’s witness list “because of its concern regarding the proposed Rule 70 restrictions on the cross examination of General Clark, as well as its apprehension regarding the delay caused by the manner in which the Prosecution has chosen to conduct this matter.”²⁵

Standard of Review

16. The prosecution’s brief makes no mention of the standard of review to be applied to the Trial Chamber’s decision to deny leave to vary the prosecution’s witness list pursuant to Rule 73 *bis* (F). That section provides that:

“After commencement of the trial, the Prosecutor may file a motion to vary the decision as to the number of crime sites or incidents in respect of which evidence may be presented or the number of witnesses that are to be called or for additional time to present evidence and the Trial Chamber may grant the Prosecutor’s request if satisfied that this is in the interests of justice.”

²² Para. 31

²³ Para. 32

²⁴ Transcript of 9 March 2007 @ 11296

²⁵ Para. 1

“Joint Defence Response to Interlocutory Appeal Concerning
General Wesley Clark”

17. The decision to vary the witness list is thus a matter of discretion for the Trial Chamber. The Appeals Chamber has held that discernable errors that will cause the Appeals Chamber to overturn the exercise of discretion by a Trial Chamber are that the Trial Chamber (1) misdirected itself as to the principle to be applied or the law relevant to the exercise of its discretion; (2) took into account irrelevant considerations; (3) failed to take into account relevant considerations; (4) gave insufficient weight to relevant considerations; (5) made an error as to the facts upon which it has exercised its discretion; or (6) reached a decision that no reasonable Trial Chamber could have reached.²⁶

18. The Appeals Chamber has also noted that:

“Trial Chambers exercise discretion in different types of decisions—such as when imposing sentence, in determining provisional release, in relation to admissibility of some types of evidence, in evaluating evidence, and in deciding points of practice and procedure. Deference is afforded to the Trial Chamber’s discretion in these decisions because they draw on the Trial Chamber’s organic familiarity with the day-to-day conduct of the parties and practical demands of the case, and require a complex balancing of intangibles in crafting a case-specific order to properly regulate a highly-variable set of trial proceedings.”²⁷

19. The Appeals Chamber has consistently applied these principles. In the *Milosevic* case, it upheld the Trial Chamber’s discretion to not allow an OTP investigator to testify.²⁸ And in the *Martic* decision relied upon by the prosecution, the Appeals Chamber emphasised that the Appeals Chamber does not conduct a *de novo* review of a Trial Chamber decision concerning the reception of evidence. The Appeals Chamber said:

²⁶ *Prosecutor v Krajisnik*, No. IT-00-39AR73.1, *Decision on Interlocutory Appeal of Decision on Second Defence Motion for Adjournment* (25 April 2005) at para. 7; *Prosecutor v Halilovic*, No. IT-01-48-AR73.2, *Decision on Interlocutory Appeal Concerning Admission of Record of Interview of the Accused from the Bar Table* (19 August 2005) at para. 5

²⁷ *Prosecutor v Popovic et al.*, No. IT-05-86-AR73.1, *Decision on Vinko Pandurevic’s Interlocutory Appeal Against the Trial Chamber Decision on Joinder of the Accused* (24 January 2006) at para. 4

²⁸ *Prosecutor v Milosevic*, No. IT-02-54-AR73.2, *Decision on Admissibility of Prosecution Investigator’s Evidence* (30 September 2002)

Case No. IT-05-87-AR73.1

02 April 2007

“Joint Defence Response to Interlocutory Appeal Concerning
General Wesley Clark”

“The question before the Appeals Chamber is not whether it agrees with that decision but whether the Trial Chamber has correctly exercised its discretion in reaching that decision.”²⁹

19. Therefore, Defence contends that the standard of review of the Trial Chamber’s discretionary decision not to allow the prosecution to vary its witness list should be a deferential one.

Argument

**Rule 70 and the Concept of
“Conditional Consent”**

20. Rule 70 provides in pertinent part that:

(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.

(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).

²⁹ *Prosecutor v Martić*, No. IT-95-11-AR73.2, *Decision on Appeal Against the Trial Chamber Decision on the Evidence of Witness Milan Babić* (14 September 2006) at para. 7

“Joint Defence Response to Interlocutory Appeal Concerning
General Wesley Clark”

(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. Rule 70 makes no mention of the concept of “conditional consent” to testify. That concept was an invention of the United States government, and is the direct cause of the failure of General Clark to give evidence in this case.

22. The notion of “conditional consent” was first raised in the letter of the United States of 12 December 2006. The representative of the United States wrote that:

“the United States Government has **conditionally** authorized General Wesley Clark, Ret. to testify for the prosecution... The authorization is **contingent** on the prosecution securing a court order granting certain protective measures.”³⁰

23. The United States never wavered from that position, even after the Trial Chamber invited it to authorize General Clark to testify and to trust the Trial Chamber to protect its interests.³¹

24. Defence contends 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. Rather, the witness is obligated to appear before the Tribunal and be subject to rulings of the Trial Chamber on issues arising under Rule 70.

25. This interpretation of Rule 70 is consistent with a plain reading of its text. Rule 70(C) provides that the Trial Chamber cannot compel a Rule 70 provider or witness to provide additional evidence beyond that which it elected to disclose to the prosecution. Rule 70 (D) provides that the Trial Chamber cannot compel a Rule 70 provider or witness to answer any question relating to the information provided under Rule 70 or its origin. No provision exists for a refusal of a Rule 70 provider or witness to appear to give testimony, or to condition his appearance on any terms whatsoever.

26. In fact, Rule 70(E) expressly provides that 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). Since there are no limitations in

³⁰ See Appendix A to Prosecutor’s Brief

³¹ Impugned Decision at para. 28

Case No. IT-05-87-AR73.1

02 April 2007

“Joint Defence Response to Interlocutory Appeal Concerning
General Wesley Clark”

paragraphs (C) or (D) which preclude an accused from cross examining a Rule 70 provider or witness on issues of credibility or issues which will advance the defence case, the conditions sought to be imposed by the United States on the cross-examination of General Clark violated Rule 70(E) as they affected the right of the accused to challenge his evidence.

27. Therefore, the “conditional consent” of the United States violated the provisions of Rule 70.

28. The concept of “conditional consent” also violates the obligations of States and individuals to cooperate with the Tribunal found in Article 29 of the Statute. There is no authority of any State or individual to tell the Trial Chamber under what conditions it will give evidence. Its obligation is to appear before the Tribunal and adhere to its rules. If the person or entity chooses to provide information to a party pursuant to Rule 70, it can expect that the protections of that Rule will be afforded to it when it appears before the Tribunal. But it has no right to refuse to appear at all unless conditions of its own choosing are met.

29. This was recognized by the Appeals Chamber in an earlier decision in this case concerning intercepted conversations. The Appeals Chamber held that

“Rule 70 should not be used by States as a blanket right to withhold, for security purposes, documents necessary for trial from being used as evidence at trial as this would jeopardize the very function of the Tribunal. Such an interpretation of Rule 70 would be a violation of a State’s obligation under Article 29 to cooperate with the Tribunal.”³²

30. In this case, the position of the United States was that General Clark would not appear at all unless its conditions were met. The prosecution, as was its prerogative, declined to compel General Clark to appear and give evidence, subject to the protections of Rule 70. It cannot now complain that the Trial Chamber erred in failing to allow General Clark to testify and umpire the individual issues under Rule 70 as they arose. The Trial Chamber was prepared to hear General Clark’s evidence absent the blanket

³² *Prosecutor v Milutinovic et al*, No. IT-05-87-AR108bis.2, *Decision on Request of United States of America for Review* (12 May 2006) at para. 38

“Joint Defence Response to Interlocutory Appeal Concerning
General Wesley Clark”

restrictions.³³ It was the United States, with the acquiescence of the prosecution, which decided he would not give evidence.

31. Holding that a person or entity furnishing evidence to a party could condition its very appearance before the Tribunal on conditions not found in Rule 70 would set a dangerous precedent. What if the Government of Serbia, having provided archives and other information to the defence pursuant to Rule 70, decided that all defence witnesses who served in the Serbian military or government could not be compelled to testify unless the Trial Chamber granted blanket protective measures such as those requested by the United States? This would severely impede the rights of the accused to compel evidence on its behalf, the prosecution to test that evidence, and the interests of justice.

32. The same standards must be applied to the United States. It had no right to condition General Clark’s appearance as a witness on the granting of blanket protective measures. Therefore the Trial Chamber was well within its discretion in finding that the interests of justice would not be served by adding General Clark to the witness list given the condition precedent to his testimony set by the United States.

**The Trial Chamber Correctly
Exercised Its Discretion Not to
Grant Leave to Add General Clark**

33. The Trial Chamber’s decision not to grant leave for the prosecution to add General Clark as a witness was based upon two factors—the restrictions insisted on by the United States, and the lack of diligence in not including General Clark on the original witness list. It was well within its discretion on both scores.

34. The prosecution, having advocated the blanket protective measures sought by the United States as a *sine que non* for General Clark’s becoming a prosecution witness, cannot now complain on appeal that the Trial Chamber should have ruled on the scope of cross-examination on a question-by-question basis while General Clark was on the stand. Had the Trial Chamber granted the blanket protective measures sought by the prosecution, and thereby obtained the consent of the United States to have General Clark

³³ The prosecution’s quotation of the Presiding Judge in footnote 6 of its brief is unfair. The Trial Chamber has gone out of its way to accommodate the Rule 70 interests of this provider and the prosecution. See *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)

Case No. IT-05-87-AR73.1

02 April 2007

“Joint Defence Response to Interlocutory Appeal Concerning
General Wesley Clark”

testify, it would have been in no position to, as the prosecution now asserts, rule on the scope of cross examination on a question-by-question basis in accordance with Rule 70(G). Therefore, the prosecution’s appeal contradicts its own position before the Trial Chamber. That is improper. A party is estopped from changing its position on appeal to the detriment of the accused in that case.³⁴

35. Should the Appeals Chamber determine that a Rule 70 provider has the right to condition his consent to testify upon receiving advance blanket protective measures from a Trial Chamber, the issue then becomes whether the Trial Chamber erred in refusing to provide the measures required by the United States in this case.

36. The United States required conditions that would have precluded the defence from questioning General Clark on issues beyond the scope of direct examination relating to his credibility and on matters relevant to the defence case. This would have required the Trial Chamber to suspend the operation of Rule 90(H).

37. Rule 90(H) provides that:

“(i) 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.

(ii) In the cross-examination of a witness who is able to give evidence relevant to the case for the cross-examining party, counsel shall put to that witness the nature of the case of the party for whom that counsel appears which is in contradiction of the evidence given by the witness.

(iii) The Trial Chamber may, in the exercise of its discretion, permit enquiry into additional matters.”

38. As the Trial Chamber recognized, such a ruling would have been patently unfair. If a provider, working with the prosecution, can assure that a witness’ credibility cannot be challenged by an accused, and any favorable information the witness may have cannot be elicited by an accused, the trials at the Tribunal would be relegated to little more than “show trials.”

³⁴ *Prosecutor v Brdjanin*, No. IT-98-36-A, *Decision on Motion to Dismiss Ground 1 of the Prosecutor’s Appeal* (5 May 2005)

“Joint Defence Response to Interlocutory Appeal Concerning
General Wesley Clark”

39. And, as the Trial Chamber recognized, such a practice in this case, where General Clark was the commanding officer of the victorious NATO forces and General Ojdanic the commanding officer of the vanquished FRY forces, would have been reasonably seen as victor’s justice and a farce, undermining the integrity of this Tribunal and its judgements.³⁵

40. As the Trial Chamber noted, the proposed blanket restrictions were particularly unnecessary for a witness such as General Clark. After retiring from the United States government, General Clark appeared almost nightly on CNN as a military analyst, touting his success in Kosovo, and responding to questions from CNN anchormen and women without qualification. He thereafter went on a nationwide tour to promote his book, appearing in dozens of lecture halls, bookstores, and meetings at which he responded to questions from reporters, literary critics, and readers. Then, he campaigned for President of the United States, participating in daily press conferences and question-and-answer sessions with any citizen who cared to show up.

41. None of those appearances limited the questions which could be asked of General Clark or required, as the United States did here, advance notice of the questions to be asked of General Clark.. If reporters and members of the public were free to put questions to General Clark without restriction for the past 8 years, why shouldn’t the lawyers for six accused on trial for their lives in an international court be permitted to do the same?

42. The Trial Chamber was well within its discretion in declining to provide a blanket protective measure for General Clark which would have precluded any cross examination on matters of credibility or matters favorable to the defence case, and which would have required the defence to tip off the witness and his provider to its questions on cross-examination.

43. In addition, the Trial Chamber was well within its discretion in denying the motion to add General Clark on grounds of lack of diligence.³⁶ Although the trial date of 10 July 2006 was known to the prosecution since 5 April 2006, and it knew all along that General Clark was needed as a witness, it didn’t get around to submitting a draft request

³⁵ Impugned decision at para. 33

³⁶ *Decision on Prosecution Request for Certification of Interlocutory Appeal of Second Decision on Addition of Wesley Clark to the Rule 65 ter List* (14 March 2007) at para. 1

Case No. IT-05-87-AR73.1

02 April 2007

“Joint Defence Response to Interlocutory Appeal Concerning
General Wesley Clark”

for General Clark’s testimony to the United States until five months later, on 16 August 2006, and didn’t make a formal request until 20 September 2006. The United States didn’t act on the request for three months until 12 December 2006, some five months after the trial began and three months before it was scheduled to conclude.

44. Trial Chambers in several other cases have denied motions to add witnesses where the prosecution failed to provide a convincing explanation for not adding the witness to its list earlier.³⁷ The Trial Chamber in this case was well within its discretion to do so as well.

Conclusion

45. The prosecution’s appeal in this case is a misguided one. Had the United States been willing to have General Clark testify, subject to the Trial Chamber’s rulings on issues which arose during his testimony, there would have been no issue and no appeal. It was the United States, not the Trial Chamber, who prevented General Clark from testifying.

46. The decision of the Trial Chamber refusing to grant blanket protective measures to General Clark which would have precluded all cross examination on issues of credibility and matters favorable to the defence case outside of the scope of direct examination was consistent with Rule 90(H) and Rule 70(G). The prosecution should not now be heard to complain that General Clark should have been allowed to testify under conditions antithetical to a fair trial.

47. By withholding, delaying, and conditioning its consent for General Clark to testify, the United States has played the Tribunal for a puppet. The Trial Chamber was well within its discretion to refuse to add General Clark in light of the unreasonable pre-conditions demanded for his testimony, and the lack of diligence in placing him on the witness list in the first place.

48. It is respectfully requested that the decision of the Trial Chamber be affirmed in all respects.

Word count: 4693

³⁷ *Prosecutor v Mrskic et al*, No. IT-95-13/1-T, *Decision on Prosecution Motion to Amend its Rule 65 ter List* (6 June 2006); *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Prosecutor’s Second Motion for Reconsideration of the Trial Chamber’s “Decision on Prosecutor’s Motion for Leave to Vary the Witness List Pursuant to Rule 73 bis (E)”* (14 July 2004) at para. 9

Case No. IT-05-87-AR73.1

02 April 2007

“Joint Defence Response to Interlocutory Appeal Concerning
General Wesley Clark”

Respectfully submitted,

Counsel for General Ojdanic



Tomislav Visnjic

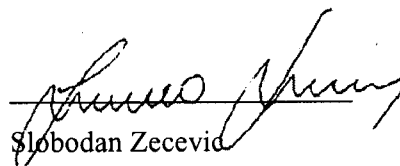


Norman Sepenuk

Counsel for Mr. Milutinovic

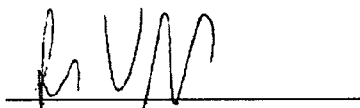


Eugene o Sullivan

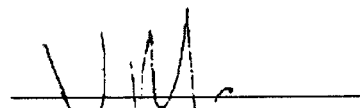


Slobodan Zecevic

Counsel for Mr. Sainovic



Toma Fila



Vladimir Petrovic

Counsel for General Pavkovic



John Ackerman



Aleksandar Aleksic

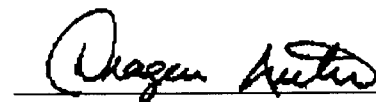
Counsel for General Lazarevic


Mihajlo Bakrac
Djuro Cepic

Counsel for General Lukic



Branko Lukic



Dragan Ivetic