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CASE/AFFAIRE NO. IT-05-87-T **DATE** 16 February 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-T
Date: 16 February 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: 16 February 2007

PROSECUTOR

v.

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

**SECOND DECISION ON PROSECUTION MOTION FOR LEAVE TO AMEND
ITS RULE 65 TER WITNESS LIST TO ADD WESLEY CLARK**

Office of the Prosecutor

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Mr. Chester Stamp

Counsel for the Accused

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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 partly confidential “Prosecution’s Motion for Leave to Amend its Rule 65*ter* List with Confidential Annex A”, filed on 15 December 2006 (“Motion”), and of the confidential “Prosecution’s Submission Pursuant to Trial Chamber Decision dated 15 January 2007 with Annexes,” filed on 29 January 2007 (“Submission”), and hereby renders its decision thereon.¹

Background and arguments of the parties

1. This Submission arises from the Prosecution’s Motion to add General Wesley Clark, Supreme Allied Commander Europe of NATO, to its Rule 65 *ter* witness list and the subsequent “Decision on Prosecution Motion for Leave to Amend Its Rule 65 *ter* Witness List to Add Wesley Clark,” issued on 15 January 2007 (“First Decision”), wherein the Chamber decided to continue its consideration of the matter pending the provision by the Prosecution of further information on two matters. (A more detailed procedural history of this matter is set forth in the First Decision, and will not be repeated herein.)² Of particular concern to the Chamber in the First Decision was the factual dispute between the parties as regards the two witness statements used in the *Milošević* case, as well as the interview notes (“*Milošević* interview notes”) prepared for the purposes of that case. In addition, it was plain from the Motion that, if General Clark was added to the Prosecution’s witness list, the Prosecution would seek to apply restrictions to the content and manner of presentation of his testimony under Rule 70 of the Rules of Procedure and Evidence (“Rules”), insisted upon by the United States Government. In view of the late stage of the Prosecution case at which the Motion came before the Trial Chamber, it determined in its First Decision that it was appropriate to decide the question of whether General Clark should be added to the list in light of all the circumstances that would apply to his evidence, including any restrictions sought. The Prosecution was, therefore, invited to make further submissions on both matters.

2. In the Submission, the Prosecution provides the necessary information as to the state of disclosure. The relevant documents disclosed are as follows: the 235-page transcript of General Clark’s testimony in the *Milošević* case (disclosed on 10 May 2006); General Clark’s book entitled *Waging Modern War: Bosnia, Kosovo and the Future of Combat* (disclosed on 10 May 2006);

¹ The Chamber recognises that some of the Prosecution filings and the Defence response on this matter were filed confidentially. The Chamber nevertheless publicly issues this decision, which contains no confidential information.

² Decision on Prosecution Motion for Leave to Amend Its Rule 65 *ter* Witness List to Add Wesley Clark, 15 January 2007 (“First Decision”), para. 12.

PBS/"Frontline Online" Interview with General Clark (disclosed on 10 May 2006); exculpatory material from the *Milošević* interview notes (disclosed on 21 September 2006); the supplemental Rule 65 *ter* summary (disclosed on 25 October 2006); the "45-paragraph statement," which is an unsigned draft of the Rule 89(F) statement of General Clark, prepared for the purposes of the *Milošević* case (disclosed on 11 January 2007); the "131 paragraph summary," which is a draft summary of General Clark's anticipated testimony in the *Milošević* case (Annex B to the Submission).³

3. The Prosecution explains that it has not disclosed the *Milošević* interview notes *verbatim* as their substance is encompassed in the materials already disclosed. The Prosecution further states that General Clark's interview notes of 3 August 2006, prepared for the purposes of this case, have also not been disclosed *verbatim*. Rather, the substance of the information contained therein was disclosed in the form of the supplemental Rule 65 *ter* summary and General Clark's book.⁴ The Prosecution notes that it will not adduce any evidence regarding information that has not been previously disclosed to the Defence and that the essence of the examination-in-chief is based on the supplemental Rule 65 *ter* summary, General Clark's book, and the *Milošević* transcript.⁵ As a result, the Prosecution contends that no prejudice to the Defence will arise from non-disclosure of the *verbatim* interview notes. The Prosecution finally observes that, should any issue arise during the course of his testimony that could prejudice the Defence due to Rule 70 protection, the Trial Chamber will at that time have the discretion to give the evidence limited weight or to exclude it in its entirety pursuant to Rule 70(G).⁶

4. Addressing the second concern of the Trial Chamber, the Prosecution submits that General Clark's testimony is to be conducted in open session, subject to obtaining the requested protective measures pursuant to Rule 70. Such measures are twofold. First, on 30 October 2003, the Trial Chamber in the *Milošević* case granted General Clark certain protective measures.⁷ The Prosecution argues that they now continue to apply *mutatis mutandis* to this case, pursuant to Rule 75(F) of the Rules. Of particular importance here is the fact that the scope of the examination-in-chief and cross-examination was thereby limited to the 131-paragraph summary. Second, and in addition to the "existing" Rule 70 measures,⁸ the United States Government has requested their

³ The disclosure of this summary was authorised on the day of the filing of the Submission, but subject to obtaining protective measures. Submission, para. 6(g).

⁴ Submission, paras. 6, 8–11.

⁵ Submission, para. 13.

⁶ Submission, para. 15.

⁷ *Prosecutor v. Milošević*, Case No. IT-02-54-T, Confidential Decision on Prosecution's Application for a Witness Pursuant to Rule 70(B), 30 October 2003; attached to the present Submission as Annex C.

⁸ Submission, para. 19.

variation, designed primarily to limit General Clark's evidence to issues related to this case and to Kosovo. Accordingly, the scope of testimony that has been authorised in this case is set forth in the supplemental Rule 65 *ter* summary attached to the Submission as Annex A.⁹ The Prosecution concludes that, once the witness has been added to the Rule 65 *ter* list, it will make an application for a variation as described above.¹⁰

5. The Accused responded on 1 February 2007 by filing their "Joint Defence Further Submission in Opposition to Motion to Add General Wesley Clark to Prosecution Witness List" ("Response"), wherein they address both the issue of the interview notes and the restrictions on General Clark's testimony. With respect to the former, the Defence notes that the Prosecution has failed to disclose all interview notes in their *verbatim* form. Furthermore, certain paragraphs of the summaries of these notes have been deleted and there is, therefore, reason to believe that they may contain material not included in the disclosed material, which may pertain to General Ojdanić.¹¹ In addition, since the parties can expect a ruling similar or identical to the ruling made in the decision relating to Shaun Byrnes and Michael Phillips,¹² the Prosecution's failure to provide the interview notes to the Trial Chamber for an *in camera* review together means that General Clark should not be added to the witness list.¹³

6. The Defence also notes that the "131 paragraph summary" was disclosed to it on 29 January 2007, some six and a half months after it should have been disclosed pursuant to the Trial Chamber's order of 17 May 2006.¹⁴ As argued by the Defence, the delay surrounding the issue of whether General Clark will be a witness has also operated to deny the Ojdanić Defence access to underlying information in possession of the United States, which is essential to challenging him as a witness. As a result, the Ojdanić Defence has been unable to obtain the underlying material from the United States and NATO pursuant to Rule 70, the former claiming that the request is premature as the Trial Chamber has not yet decided whether or not to add General Clark as a witness. This means that it has not been able to file a motion for an order pursuant to Rule 54 *bis* to obtain this material, as the Appeals Chamber requires that all efforts to obtain material under Rule 70 must first be exhausted in order to satisfy Rule 54 *bis* (A)(iii).¹⁵

⁹ Submission, paras. 17–19.

¹⁰ Submission, para. 21.

¹¹ Response, para. 4, note 3.

¹² Decision on Renewed Prosecution Motion for Leave to Amend its Rule 65 *ter* List to Add Michael Phillips and Shaun Byrnes, 15 January 2007, paras. 16–17.

¹³ Response, paras. 5–6.

¹⁴ Response, para. 3. *See also* Order Arising from Rule 65 *ter* Conference, 18 May 2006.

¹⁵ Response, paras. 7–9.

7. According to the Defence, it is absolutely essential that it be in possession of such underlying documents because the materials disclosed by the Prosecution are General Clark's own "after-the-fact, and possibly self-serving versions of these events" which can be properly tested only by access to the contemporaneous documents.¹⁶ The Defence thus concludes that the delay caused by the Prosecution and the United States has now made it impossible for the necessary material to be sought, ordered, obtained, investigated, and analysed for cross-examination in the short time remaining for the presentation of the Prosecution case. Accordingly, adding General Clark to the witness list at this late stage would be prejudicial to the Defence.¹⁷

8. As far as restrictions on General Clark's testimony are concerned, the Defence asserts that the proposed limitations are "completely unacceptable," as they are neither justified by the relevant Rules, nor logical.

9. For example, Rule 90(H), which sets out the parameters for cross-examination, indicates that cross-examination may, in addition to addressing matters raised during examination-in-chief,¹⁸ also be used to obtain evidence relevant to the Defence case¹⁹ and to challenge a witness's credibility.²⁰ Furthermore, pursuant to Rule 90(H)(iii), the Trial Chamber has discretion to permit inquiry into additional matters. As a result, the Defence argues that the limitations dictated by the United States Government would go beyond the terms of Rule 90.²¹

10. The Defence also contends that the Submission contains two legal errors. First, the conditions under which General Clark gave evidence in the *Milošević* case do not apply *mutatis mutandis* to this case, as Rule 75(F) applies to witness protective measures and the decision in the *Milošević* case pertained to the Rule 70 conditions for *viva voce* testimony. Second, Rule 70(C) and (D) apply only to the provider of the information and the Prosecution, which means that the Trial Chamber can still require a witness to answer questions relating to his credibility or to matters relevant to the case for the Accused.²²

11. In support of their contention that the limitations proposed are illogical, the Defence points out that, in the past eight years, General Clark has been very outspoken about his role in Kosovo. He spoke to the media and responded to their questions without qualification. He also wrote a

¹⁶ Response, para. 10.

¹⁷ Response, paras. 10–13.

¹⁸ Rule 90(H)(i).

¹⁹ Rule 90(H)(ii).

²⁰ Rule 90(H)(iii).

²¹ Response, paras. 14–17.

²² Response, paras. 18–23.

book and went on a nationwide tour to promote it, again responding to questions. Finally, in campaigning for the Presidency of the United States, he participated in daily press conferences and question-and-answer sessions with citizens. Accordingly, the Defence argues, if reporters and members of the public have been free to put questions to General Clark for the past eight years, there is no reason why a defence team in a criminal trial should not be able to do the same.²³

Applicable Law

12. 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.²⁴ 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).²⁵ Of particular relevance here is the question of whether the interests of the Defence are adequately protected.²⁶ In this context, the Chamber should ensure that no prejudice will arise to the Defence as a result of late addition of witnesses.²⁷

13. 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.

14. Rule 70 deals with matters not subject to disclosure and the presentation of evidence provided under that Rule and states, 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

²³ Response, paras. 24 and 25.

²⁴ *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.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *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.

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.

* * *

- (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.

15. Rule 89 is concerned with admissibility of evidence and provides, in relevant parts, as follows:

- (C) A Chamber may admit any relevant evidence which it deems to have probative value.
- (D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

16. Finally, Rule 90(H) is concerned with the scope of cross-examination in a trial and states:

- (H)
 - (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.

The Chamber considers the applicability of these provisions in the discussion below.

Discussion

17. Rule 70(A) and (B) seems to indicate that they are to take precedence over the Prosecution's obligations under Rule 66.²⁸ Accordingly, if the Prosecution is unable to furnish a witness statement because of its obligations under Rule 70, the Trial Chamber will not be *obliged* to deny the Prosecution the chance to add a particular Rule 70 witness to its witness list. However, pursuant to Rules 73 *bis* (F), 89(D), and 70(G), a motion to amend a list of witnesses may be denied where the failure to comply with disclosure obligations would cause prejudice to the Defence to such an extent that the fairness of the trial would be at stake and adding the witness would thus not be in the interests of justice. In general, that prejudice flows from the late stage at which the matter arises and any associated delay, such as in the timing of disclosure.

18. However, restrictions on the content and manner of presentation of the testimony of a witness may also adversely affect the fairness of the trial by causing undue prejudice to the Defence, leading to the Trial Chamber refusing to hear the witness by applying Rules 89(D) and 70(G). It would be pretty pointless to add General Clark to the Prosecution's Rule 65 *ter* witness list at this stage and then later decide to refuse to allow him to testify because the restrictions sought to be imposed on his evidence under Rule 70 would cause undue prejudice to the Defence. The Trial Chamber thus considers that it would be an artificial and impractical exercise to address the question of amending the list separately from the question of whether the witness will be permitted to give evidence. The question in relation to both matters is whether the Accused would be so unduly prejudiced that they would not receive a fair trial.

Disclosure

19. On 17 May 2006, the Pre-Trial Judge ordered the Prosecution to file, by 6 July 2006, a submission identifying the Rule 70 witnesses it intended to call and to disclose the statements of those witnesses to the Defence teams.²⁹ In its confidential "Decision on Joint Motion to Exclude Evidence for Failure to Comply with Disclosure Obligations," issued 18 October 2006, the Chamber, after having exhaustively detailed the procedural history of the Prosecution's management (or lack thereof) of this matter, held that General Clark had not been properly included

²⁸ 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, paras. 13–14.

²⁹ Order Arising from Rule 65 *ter* Conference, 18 May 2006, p. 1.

on the Rule 65 *ter* list and, in order for him to be called as a witness, the Prosecution would have to apply to add him. In that decision, the Chamber explained the following:

10. The Chamber notes that great time and effort were expended during the pretrial phase of these proceedings in order to avoid the trial becoming mired in procedural difficulties such as the ones narrated above. The Chamber has postponed determination of this matter in order to enable the Prosecution to make as full submissions as possible; however, the Chamber is now satisfied that it is appropriate in the interest of good trial management to determine the Motion. As of 6 July 2006, the date upon which the Prosecution had to identify the Rule 70 witnesses it intended to call during its case-in-chief, the Prosecution identified the three United States witnesses as “provisional witnesses,” admitting that this was only in “partial compliance” with the order of the Pretrial Judge. Moreover, the Prosecution did not even conduct interviews with them until on the very last day of July and in August. It was then only in September, almost three weeks after the filing of the Motion, that the Prosecution submitted a formal request to the Rule 70 provider for permission for the three witnesses to testify. The Prosecution has not intimated to the Chamber any response to that request; and, the Prosecution has made no application to add these witnesses to its Rule 65 *ter* list as witnesses it intends to call, rather than “provisional witnesses.” It was and remains open to the Prosecution to make an appropriate application to amend its Rule 65 *ter* list of witnesses under the applicable law of the Tribunal.³⁰

20. The Chamber has now been seised of such a motion and briefed as to the state of disclosure. The Chamber considers that it is, in general, satisfied with the current state of disclosure, although it took quite some time for the Prosecution to both discharge its Rule 66(A)(ii) obligations and adequately communicate this information to the Chamber. Moreover, despite the non-disclosure of some of the materials pertaining to General Clark, due to Rule 70 conditions, the Chamber considers that this does not necessarily preclude addition to the Rule 65 *ter* list.

21. The Chamber has also been made aware of the fact that the Ojdanić Defence is still in negotiations with the Rule 70 provider for material that it says is required for the preparation of cross-examination of the witness and that the Rule 70 provider has conditioned its fulfilment of Ojdanić’s requests upon the addition of General Clark to the witness list.³¹ Although the Chamber does not consider the completion of this process a strictly necessary prerequisite for General Clark to be added to the Rule 65 *ter* list, it does consider that, in these specific circumstances, the Ojdanić Defence’s concerns are valid and should be addressed by the Rule 70 provider with all deliberate speed, pursuant to its obligation under Article 29 of the Statute of the Tribunal and Rule 70(F).

22. In the knowledge that General Clark was a potential witness from a time significantly before the commencement of the trial, the Prosecution has persistently failed to address the associated problems with the degree of diligence expected by the Chamber. However, in the end,

³⁰ Decision on Joint Motion to Exclude Evidence for Failure to Comply with Disclosure Obligations, 18 October 2006, para. 10 (citation omitted).

³¹ Response, paras. 7–10 and Annex A.

the principal issue is not whether the Trial Chamber is being unduly lenient to the Prosecution or whether the Prosecution should be penalised in some way for its conduct, but whether taking the decision now to allow General Clark to give evidence would mean that the Defence would have insufficient time to prepare for cross-examination. While the resulting delay is significant and, as such, could potentially be unfairly prejudicial to the Accused's right to a fair trial, the Chamber considers that it is still possible for the Prosecution and the United States Government, by diligently addressing the outstanding issues, to provide to the Defence the material necessary to enable them to adequately present the Defence case in cross-examining the witness. However, on any view, it is bound to be a close run thing, since, as presently advised, the latest date at which the evidence could be led would be in the week commencing 19 March 2007. Nevertheless, if timing were the only issue, the Chamber would grant the Motion to add General Clark to the list on the understanding that, should the Chamber's optimism be misplaced, it would consider a motion by the Defence to refuse to hear the witness when he is tendered.

23. The Chamber now moves on to a consideration of the extent to which the proposed Rule 70 restrictions impact on the Motion.

Rule 70 restrictions

24. The Chamber first notes the Prosecution's misapprehension that Rule 70 measures are subject to the automatic continuation provisions of Rule 75. Rule 75 is concerned with measures for protection of victims and witnesses and has no bearing whatsoever upon conditions mandated by Rule 70 providers.³² It is true that a Rule 70 provider may provide information upon a confidential basis to a party and expect those conditions to apply, not only to a particular case, but to all cases in which the party may want to use the material. This is a matter to be dealt with between the Rule 70 provider and the party.³³ However, once having been furnished with Rule 70 material and the decision having been made by the party to use the material in a trial-related way that involves the Chamber (*e.g.*, redacted disclosure, restrictions upon examination, admitting evidence under seal), it is the obligation of the party to make the appropriate Rule 70 application to the Chamber in each case in order to give the Chamber the opportunity to determine whether the Rule 70 conditions are consistent with the accused's right to a fair trial pursuant to Rule 70(G). In this way, there is no such thing as an existing Rule 70 "protective measure" that continues from case to case, and the Trial Chamber must decide these issues anew in each case.

³² Confidential Decision on Prosecution Motion for Reconsideration of Decision on Fifth Prosecution Motion for Protective Measures, 21 June 2006, para. 13.

³³ It is even conceivable that a party will receive material subject to Rule 70 conditions and then decide not to honour them and run the risk of suffering the concomitant consequences.

25. The Rule 70 restrictions which applied in the *Milošević* trial are as follows:³⁴
- (1) General Wesley Clark (“the witness”) may be added to the Prosecution witness list;
 - (2) the witness’s testimony shall be treated as information provided pursuant to and protected by Rule 70 (C) and (D);
 - (3) two representatives of the US Government may be present in court during the testimony of the witness;
 - (4) the evidence of the witness shall be given in open session subject to the protective measures set out below;
 - (5) the evidence contained in paragraphs 61, 62, 63, 65, 66, 67 and 85 of the summary attached to the Motion as *ex parte* Annex A may be given in private session in order to protect the national interests of the US and request may be made for additional evidence to be so given on the same ground;
 - (6) the public gallery be closed during the course of the witness’s testimony;
 - (7) the broadcast of the testimony be delayed for a period of 48 hours to enable the US Government to review the transcript and make representations as to whether evidence given in open session should be redacted in order to protect the national interests of the US, and shall be delayed for a period thereafter to enable the Trial Chamber to consider and determine any redactions requested, and, if ordered, for the redactions to be made to the tape of the testimony prior to its release;
 - (8) the scope of examination-in-chief and cross-examination of the witness be limited to the content of the summary attached to the Motion as *ex parte* Annex A;
 - (9) [t]he Accused or Amici Curiae may seek to have the scope of examination expanded by prior agreement of the US Government (obtained directly from that Government or through the representation of the Office of the Prosecutor), once the summary of the evidence-in-chief to be given is disclosed to them; and
 - (10) [t]he Prosecution shall disclose the summary contained in *ex parte* Annex A forthwith.

In addition, the Prosecution seek to vary restriction number (8) as it applied in the *Milošević* trial so that the examination-in-chief- and cross-examination are confined to the subject of Kosovo.

26. While a number of the conditions proposed might well be applied by the Trial Chamber in the exercise of its power to so control the proceedings as to ensure that the trial is fair to all involved, they are sought to be applied in this instance by stipulation of the United States Government that the same conditions as applied to the evidence of this witness in the *Milošević* case should apply in this case. The Chamber recognises the prerogative of the Rule 70 provider to

³⁴ *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution’s Application for a Witness Pursuant to Rule 70(B), 30 October 2003, pp. 5–6. This decision was made public by the Chamber’s “Order on the Testimony of General Wesley Clark”, issued on 17 November 2003.

invoke Rule 70 at its discretion, but notes also that, when faced with a condition which would impact unfairly upon the trial, the only course open to the Chamber to ensure that the trial is fair is to refuse to hear the evidence of the witness, in this case by refusing to allow him to be added to the Prosecution's witness list. At least two of the conditions give rise to the question whether their imposition would render the trial unfair, namely limiting the scope of examination-in-chief and cross-examination and requiring the Defence to seek the prior agreement of the Rule 70 provider if it wishes to have that restriction varied. The result of the application of these conditions would be to wrest a measure of control of the proceedings from the Chamber and hand it to the Rule 70 provider.

27. To 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 for examination on a particular subject would oblige them to make disclosure not required by the Rules.

28. The Trial Chamber, with its knowledge of the issues in this trial, is best placed to exercise proper control over the presentation of General Clark's testimony. It is particularly conscious of the need to protect the sensitive interests of parties affected by trials such as this, including the current Rule 70 provider. However, it is uniquely placed to judge what questions should be permitted in cross-examination in the interest of a fair trial. In recognition of the fact that the Prosecution may not be sufficiently informed to identify every question where sensitive interests of the Rule 70 provider, such as national security interests, might be adversely affected, the Chamber accepts that, in the circumstances affecting this prominent witness, it would be appropriate for two representatives of the United States Government, legally qualified, to be present in the Court during the testimony of the witness to intervene on behalf of the Government when necessary. The interests of the Rule 70 provider would thus be adequately protected and the Chamber would retain control over the protection of the interests of the Accused in a fair trial. The other conditions which applied to his evidence during the *Milošević* trial *may* also be appropriate.

29. There are other reasons why the imposition of restrictions on cross-examination by the Rule 70 provider is unnecessary. The Chamber observes that some of the Rule 70 conditions may be

seeking to protect information for which permission may already have been granted for public disclosure and which has been disclosed to the media. As pointed out by the Defence, General Clark has spoken extensively in public about the matters at issue in this case, and the Chamber is unaware of the Rule 70 provider having had any concerns in this regard. Furthermore, General Clark has been a witness in proceedings before this Tribunal in the past and was the Supreme Allied Commander Europe of NATO and a former United States Presidential candidate. The Chamber is of the view that General Clark is perfectly capable of handling difficult and sensitive questions posed in cross-examination under the supervision of the Trial Chamber and to give him special protection from cross-examination is neither necessary nor appropriate under these circumstances.

30. It is also essential that the trial should not only be fair but be seen to be fair. Justice must be seen to be done.³⁵ The trial process under the Tribunal's Statute is seen worldwide as an essential ingredient in the efforts of the international community to restore and maintain peace in the region and to bring healing and reconciliation to the territories and peoples of the former Yugoslavia. The Tribunal's mission is to try individuals accused of committing serious violations of international humanitarian law in the territory of the former Yugoslavia since 1991.³⁶ 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 the trial of Accused from the other, thus depriving them of their full right to confront the witnesses against them.

31. Once again, the Chamber acknowledges the right of states to protect their interests. However, the Chamber must also retain control over the proceedings before it. If this results in a loss of evidence to the Prosecution then this may be an inevitable and legitimate cost of the invocation of Rule 70.

Disposition

32. The Chamber has identified two different factors it considers important in resolving this Motion. As stated above, the delay, caused by the manner in which the Prosecution has chosen to

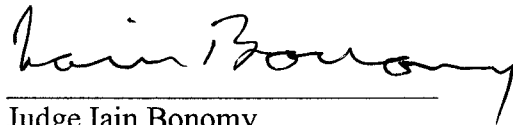
³⁵ The Appeals Chamber has recalled the well-known maxim of Lord Hewart CJ that it is of "fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done." *Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, Judgement, 21 July 2000, para. 195 (citing *R v. Sussex Justices ex parte McCarthy* [1924] 1 KB 256 at p. 259).

³⁶ When the United Nations Security Council established the Tribunal, it stated in the relevant resolution that it was convinced that "in the particular circumstances of the former Yugoslavia the establishment as an ad hoc measure by the Council of an international tribunal and the prosecution of persons responsible for serious violations of international humanitarian law ... would contribute to the restoration and maintenance of peace". S/RES/827 (1993), 25 May 1993.

conduct this matter, although significant, is not enough, on its own, to preclude addition of General Clark to the Rule 65 *ter* witness list. However, the Trial Chamber's concern regarding the proposed Rule 70 restrictions has led it to decide that it would be inappropriate, at this point in time, to grant the Motion. For the foregoing reasons and pursuant to Rules 54, 70(G), and 89(D) and Articles 20 and 21 of the Statute, the Trial Chamber hereby DENIES the Motion without prejudice.

33. The Chamber notes, 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.

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



Judge Iain Bonomy
Presiding

Dated this sixteenth day of February 2007
At The Hague
The Netherlands

[Seal of the Tribunal]