

IT-03-68-AR73
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**UNITED
NATIONS**



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-03-68-AR73

Date: 26 March 2004

Original: English

IN THE APPEALS CHAMBER

Before:
Judge Theodor Meron, Presiding
Judge Fausto Pocar
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Inés Mónica Weinberg de Roca

Registrar: **Mr. Hans Holthuis**

Decision of: **26 March 2004**

THE PROSECUTOR

v.

NASER ORIĆ

**PUBLIC REDACTED VERSION OF
"DECISION ON INTERLOCUTORY APPEAL
CONCERNING RULE 70" ISSUED ON 24 MARCH 2004.**

Counsel for the Accused:

Mr. Vasvija Vidović
Mr. John Jones

1. Following certification by the Trial Chamber pursuant to Rule 73 of the Rules of Procedure and Evidence of the Tribunal¹ (“Rules”), the Accused Naser Orić (“Accused”) appeals a decision of the Trial Chamber,² in which the Trial Chamber denied his request for the application of Rule 70(F) to information that was to be provided to him.

2. Following inquiries made by the Accused, the provider advised that it was willing to cooperate and assist the Defence in contacting potential Defence Witnesses and in providing the Defence with other information provided that it could be guaranteed that the confidentiality of that information would be protected. It requested that the Accused seek an order from the Trial Chamber pursuant to Rule 70(F). The Accused subsequently filed a motion seeking the application of Rule 70 to the material that was to be provided.³ The Trial Chamber denied the Motion on the ground that the request was premature.⁴

3. Upon the denial of the Accused’s Motion, the provider again informed the Accused that it would only assist the Defence in obtaining the information sought if the Trial Chamber granted an order to protect the confidentiality of that information pursuant to Rule 70(F).⁵ The Accused then filed a motion for reconsideration before the Trial Chamber, annexing a letter from the provider in which it made clear that it would not assist the Accused without the prior grant of an order by the Trial Chamber that Rule 70 would apply to the information supplied.⁶ The Accused requested the Trial Chamber to reconsider his motion, or in the alternative, to certify the issue for appeal. The Trial Chamber chose to certify the issue pursuant to Rule 73(B).⁷

4. Rule 70, in relevant part, provides:

- (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

¹ Decision on Defence Motion for an Order Applying Rule 70 to Specific Information to be Provided to the Defence, issued confidentially and *ex parte* on 25 February 2004, (“Impugned Decision”).

² Urgent Appeal of Decision on Defence Motion for an Order Applying Rule 70 to Specific Information to be Provided to the Defence, 1 March 2004, (“Appeal Brief”).

³ Urgent, Confidential And Ex Parte Defence Motion for an Order Applying Rule 70 to Specific Information to the Provided to the Defence, 23 February 2004 (“Motion”).

⁴ Confidential and Ex Parte Decision on Defence Application for an Order Applying Rule 70 to Specific Information to be Provided to the Defence, 16 February 2004 (“Decision”).

⁵ Appeal Brief, Annex A.

⁶ Urgent, Confidential and Ex Parte Defence Motion for an Order Applying Rule 70 to Specific Information to be Provided to the Defence, 23 February 2004, (“Reconsideration Motion”).

⁷ Impugned Decision, p 2-3.

information and shall in any event not be given in evidence without prior disclosure to the accused.

- (F) The Trial Chamber may order upon an application by the accused or defence counsel that, in the interests of justice, the provisions of this Rule shall apply *mutatis mutandis* to specific information in the possession of the accused.

5. Rule 70(F) says that the Defence may make application for Rule 70 protection to information “in the possession of the accused”. Although the Trial Chamber did not explicitly say so its reasoning may be understood to be that the Motion of the Accused was premature because the information for which the Accused requested the protection of Rule 70(F) was information that the Accused was negotiating to obtain from the provider, not information that he in fact possessed. The Trial Chamber did not address its mind to the circumstance that the potential provider of that information was unwilling to assist the Defence absent an order that recognized the confidentiality of that information, regardless of any issue of further disclosure by the Defence of that information.

6. If Rule 70(F), however, is read in the context of Rule 70 as a whole it becomes apparent that the Trial Chamber erred in adopting such a strict interpretation of Rule 70(F). Under Rule 70(B), information obtained by the Prosecution on a confidential basis is automatically subject to the confidentiality protection of Rule 70. Thus, when requesting a third party to provide it with confidential information the Prosecution can, at that time, guarantee to the provider that the confidentiality of the information will be protected. Rule 70(F) provides that, upon application by the Defence, the provisions of Rule 70 that apply to the Prosecution shall apply *mutatis mutandis* to “specific information in the possession of the accused”. If the protection accorded to the Prosecution is to apply *mutatis mutandis* to the Defence, Rule 70(F) falls to be interpreted as enabling the Defence to request a Trial Chamber that it be permitted to give the same undertaking as the Prosecution to a prospective provider of confidential material that that material will be protected if disclosed to the Defence. The purpose of Rule 70(F) is to encourage third parties to provide confidential information to the Defence in the same way as Rule 70(B) encourages parties to do the same for the Prosecution⁸, regardless of any further disclosure of that confidential information.

7. Read within the context of the Rule therefore, and with its purpose in mind, the reference of Rule 70(F) to “specific information in the possession of an accused” is not a condition of the making of an order that the Rule applies; it is a reference to what the Rule will apply to after the

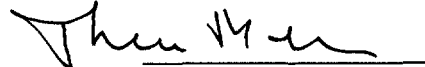
making of an order that it is to apply. The circumstance that the accused is not now in possession of such information is therefore not pertinent.

Disposition

8. For the foregoing reasons, the Appeals Chamber allows the Interlocutory Appeal and sets aside the Impugned Decision. The Motion of the Accused is remitted to the Trial Chamber for further consideration in light of this decision.

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

Done this 26th day of March 2004,
At The Hague,
The Netherlands.



Judge Theodor Meron
Presiding

[Seal of the Tribunal]

⁸ See generally *Prosecutor v Slobodan Milošević*, Case No IT-02-54-AR108bis & AR73.3, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2003, para 19.