



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-95-14-AR72

Date: 14 October 1996

French
Original: English

BEFORE A BENCH OF THE APPEALS CHAMBER

Before: Judge Antonio Cassese, Presiding
Judge Haopei Li
Judge Saad Saood Jan

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 14 October 1996

PROSECUTOR

v.

TIHOFIL also known as TIHOMIR BLAŠKIĆ

**DECISION ON APPLICATION FOR LEAVE
TO APPEAL (PROTECTION OF VICTIMS AND WITNESSES)**

The Office of the Prosecutor

**Mr. Eric Ostberg
Mr. Gregory Kehoe
Mr. Andrew Cayley**

Counsel for the Accused

**Mr. Zvonimir Hodak
Mr. Russell Hayman
Mrs. Nela Pedisić**

I

APPLICATION FOR LEAVE TO APPEAL

1. In an application dated 8 October 1996, the Prosecutor seeks leave to appeal against the Decision of Trial Chamber I, dated 2 October 1996, on the Applications of the Prosecutor dated 24 June, 30 August and 18 September 1996, in respect of the protection of witnesses.

2. The grounds for seeking leave to appeal, as set down in that application, are as follows:

(i) That, in its Decision, the Trial Chamber erred in the exercise of its discretion and “failed to give due weight to the importance of the protection of victims and witnesses and instead took a view of the urgency of proceeding to trial which cannot be justified by reference to accepted international standards pertaining to the permissible length of pre-trial detention”;

(ii) That the Trial Chamber erred in its application of Rule 69 of the Rules of Procedure and Evidence by ordering the full disclosure of prosecution statements “coupled with the sanction that the Prosecutor may not lead at trial the evidence of a witness whose statement has not been so disclosed”;

(iii) That the Trial Chamber erred by dealing with the witnesses the subject of the application *en bloc* and without recourse to Rule 69(B) of the Rules of Procedure and Evidence and that it has thereby “precluded any further consideration of protective measures for individual witnesses, however deserving they may be of the protection of the Tribunal”.

II

RESPONSE TO THE APPLICATION

3. Counsel for the accused, having obtained prior permission from the Bench, filed its response by facsimile on 11 October 1996. The accused opposes the application on the grounds that “the Prosecutor has failed to present any evidence that the implementation of the Trial Chamber’s order will jeopardize the safety of prospective witnesses”. The accused adduces a number of arguments in support of this basic proposition. The accused also comments that the Prosecutor’s application is addressed to the merits of the appeal itself, rather than to the issue of “serious cause”.

4. The accused also contends that the Prosecutor’s request that the Trial Chamber consult with the Victims and Witnesses Unit is improper inasmuch as it is an attempt to circumvent the Trial Chamber’s refusal to engage in *ex parte* communications with the Prosecutor.

5. On these grounds the accused avers that “there is no basis to conclude that serious cause exists which would justify granting the Prosecutor leave to file an interlocutory appeal” and asks that the Prosecutor’s application be denied.

III

SCOPE OF RULE 72(B)(ii)

6. This Rule has now been applied in the case of *Delalic et al.* (IT-96-21-AR72). As the Bench of three Judges noted in the Decision dated 14 October 1996 refusing to grant leave to appeal, a three-fold test of cumulative conditions is to be applied whenever an application for leave to appeal under Rule 72(B)(ii) is concerned:

(1) Does the application relate to one of the issues covered by Rule 73(A)(ii),(iii), (iv),(v)?

(2) Is the application frivolous, vexatious, manifestly ill-founded, an abuse of the process of court or so vague and imprecise as to be unsusceptible of any serious consideration?

(3) Does the application show a “serious cause”, namely does it either show a grave error which would cause substantial prejudice to the accused or is detrimental to the interests of justice, or raise issues which are not only of general importance but are also directly material to the future development of trial proceedings, in that the decision by the Appeals Chamber would seriously impact upon further proceedings before the Trial Chamber?

IV

DISCUSSION

7. The three conditions laid down in the aforementioned Decision in *Delalic et al.* (IT-96-21-AR72), which should be read in conjunction, must be met for the showing of “serious cause” in order for leave to appeal to be granted under Rule 72(B)(ii). Applying the first of these tests, it is readily apparent that the Prosecutor’s application, which relates to Rule 69 of the Rules of Procedure and Evidence of the Tribunal and the protection of victims and witnesses, does not refer to any of the matters specifically mentioned in Rule 73(A) (ii),(iii), (iv),(v).

8. Moreover, the application before us does not, in our opinion, raise a “serious cause” within the meaning of Rule 72(B)(ii). The nature of protection which should be given to a particular witness is primarily a matter for the Trial Chamber to decide. While the Tribunal

has a responsibility, enshrined in Article 22 of the Statute, with regard to the protection of victims and witnesses, it has also to keep in mind the paramount consideration that the accused is entitled to a fair and expeditious trial. For these reasons too, therefore, the application is denied.

9. The Bench notes, however, that the Prosecutor is not precluded from filing new applications for specific protective measures in the Trial Chamber, either in respect of a change in circumstances or for a reduced number of witnesses. In this connection, the Bench points out that Rule 75 provides for a host of measures designed to protect victims and witnesses. Although this Rule relates to trial proceedings proper, *mutatis mutandis* it could also be applied during pre-trial proceedings, as is apparent from the fact that Rule 75(A) provides that protective measures may be ordered by a Judge as well as by a Trial Chamber, and from the fact that Rule 69(C) is expressly subject to Rule 75, and therefore the two Rules may be applied contemporaneously.

10. The Bench also notes that the Prosecutor may consult the Victims and Witnesses Unit, established under Rule 34 of the Rules of Procedure and Evidence, on the issue of which specific protective measures to propose.

V

DISPOSITION

The Bench of the Appeals Chamber,

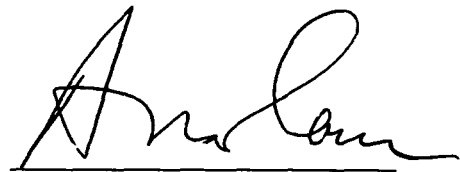
Ruling unanimously,

For the above reasons,

Pursuant to Rule 72(B)(ii) of the Rules of Procedure and Evidence,

REJECTS the application of the Prosecutor for leave to appeal the Decision of Trial Chamber I dated 2 October 1996.

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



Antonio Cassese

President

Dated this 14th day of October 1996

At The Hague

The Netherlands