



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-02-54-T
Date: 18 June 2002
Original: English

IN THE TRIAL CHAMBER

Before: Judge Richard May, Presiding
Judge Patrick Robinson
Judge O-Gon Kwon

Registrar: Mr. Hans Holthuis

Order of: 18 June 2002

PROSECUTOR

v.

SLOBODAN MILOŠEVIĆ

**SECOND DECISION ON PROSECUTION MOTION FOR
PROTECTIVE MEASURES FOR SENSITIVE SOURCE WITNESSES**

The Office of the Prosecutor

Ms. Carla Del Ponte
Mr. Geoffrey Nice
Mr. Dermot Groome

The Accused

Slobodan Milošević

Amici Curiae

Mr. Steven Kay, QC
Mr. Branislav Tapušković
Prof. Mischa Wladimiroff

I. BACKGROUND

1. The Office of the Prosecutor ("Prosecution") filed a confidential and *ex parte* "Prosecution's Additional Motion for Protective Measures for Sensitive Source Witnesses" on 29 May 2002 ("the First Motion"). The Motion seeks protective measures for witnesses in the Bosnia proceedings, who face exceptionally serious risk to their safety and that of their families. There is a reference to three witnesses in the body of the Motion, whilst a fourth witness is identified in the Annexes to the Motion. The three witnesses for whom protection is sought were granted exceptional protection as sensitive witnesses in the *Plavsic* and *Krajisnik* case.
2. On 31 May 2002, the Prosecution filed a "Prosecution Motion for Protective Measures for Sensitive Source Witnesses" ("the Second Motion"). The Second Motion seeks protective measures for an additional witness in the Croatia proceedings not identified in the First Motion, who faces exceptionally serious risk to their safety and that of their families.
3. On 6 June 2002, the Prosecution filed a "Corrigendum to Prosecution's Additional Motion for Protective Measures for Sensitive Source Witnesses" ("the Corrigendum"), in which it clarified the relief sought in the first Motion and referred to four sensitive witnesses.
4. The Motions taken together seek exceptional protective measures for five sensitive witnesses. For these witnesses, the Prosecution seeks delayed disclosure of the statements, identity and exhibits concerning these witnesses ("the material") as well as the granting of pseudonyms, and in particular seeks the following:
 - (a) that disclosure of witness statements to the accused, his appointed associates¹ and *amici curiae* with identifying material redacted may be disclosed on 26 July 2002, approximately four weeks before the commencement of the Croatia and Bosnia parts of the case;

¹ This reference is made with respect to Zdenko Tomanović and Dragoslav Ognjanović, appointed pursuant to the Trial Chamber's "Order" of 16 April 2002. Special mention is made here of order 3 of that Order with respect to the binding nature of protective measures and all other existing orders of the Trial Chamber with respect to these proceedings.
Case No. IT-02-54-T 18 June 2002

I. BACKGROUND

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- (b) that the witnesses may be referred to using the pseudonyms set out in the Annexes to the First and Second Motions throughout the pre-trial and trial phases of these proceedings;
- (c) that the unredacted statements of the witnesses be disclosed to the *amici curiae* not less than 30 days, and to the accused and his appointed associates not less than 10 days, before the witness is expected to testify;² and
- (d) that the accused and his appointed associates be ordered not to disclose the material to third parties except to the extent directly and specifically necessary for the preparation and presentation of the defence case (or, in the case of the *amici curiae*, the extent to which they are assisting the Trial Chamber), and that the accused, his appointed associates and *amici curiae* be required to obtain non-disclosure agreements from third parties as a precondition for release of the material to them.

² There is an application in the Prosecution's First Motion that if the witnesses were to be heard jointly (i.e. before the Chambers hearing the Milosevic case and the Chamber hearing the Plavsic and Krajisnik case) then the 30 day disclosure period should in fairness apply to both proceedings. The Trial Chamber will not at this stage deal such an application, and will proceed on the basis that the Prosecution seeks a 30 day disclosure period with respect to the *amici curiae* and a ten day disclosure period with respect to the accused and his associates.

II. THE LAW

5. The Prosecution relies upon Rules 69, 75 and 79 of the Rules of Procedure and Evidence of the Tribunal ("Rules").
6. What the Trial Chamber must specifically address is whether the Prosecution has satisfied the requirements of Rules 69 and 75. Rule 69 (A) requires the Prosecution to make a showing of "exceptional circumstances" before it will be permitted to redact identifying information from witness statements for victims or witnesses who may be in danger or at risk. Such a showing can only be made on an individual basis and exceptional circumstances must be established with respect to *every witness* the Prosecution seeks to protect through redaction of identifying information.³ The Prosecution has provided reasons for the application for provisional protection for each of the witnesses in the Annexes to the First and Second Motion.
7. The Trial Chamber has already noted that there are several criteria that would need to be considered in respect of applications made under Rule 69 (A) for specific protective measures for witnesses,⁴ including:
 - (a) the likelihood that Prosecution witnesses will be interfered with or intimidated once their identity is made known to the accused and his counsel, but not the public (fears expressed by potential witnesses are not in themselves sufficient to establish a real likelihood that they may be in danger or at risk; what is required to interfere with the rights of the accused in this respect is something more);
 - (b) the extent to which the power to make protective orders can be used to protect individual victims or witnesses in the particular trial, and measures which simply make it easier for the Prosecution to bring cases against other persons in the future; and
 - (c) the length of time before the trial at which the identity of the victims and witnesses must be disclosed to the accused (the time allowed for preparation must be a time *before trial commences* rather than before the witness gives evidence).

³ See Prosecutor v. Milošević, "Decision on Prosecution Motion for Provisional Protective Measures" issued on 19 February 2002 ("First Decision") and "Decision on Prosecution Motion for Protective Measures for Victims and Witnesses" issued on 19 March 2002 ("Second Decision").

⁴ *Ibid.*

8. Rule 69 (C) provides that “the identity of the victim or witness shall be disclosed in sufficient time prior to trial to allow adequate time for the preparation of the defence”, and this obligation is made subject to Rule 75.
9. Rule 75 (A) provides that the Chamber or a Judge of the Chamber may “order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused”. The Trial Chamber has only, at this stage, to determine the applicability of Rule 75 to the extent that non-disclosure extends into the trial. We do not, at this stage, consider the appropriateness of measures for the protection of such witnesses when testifying. The Trial Chamber is seized of Motions with respect to witnesses in the Croatia and Bosnia part of the proceedings and will, in due course, deal with those and any other such applications.
10. It should be noted that the measures sought in respect of the witnesses referred to in the First and Second Motions are extraordinary in nature. They go beyond the normal ambit of Rule 69, pursuant to which it may be appropriate, in exceptional circumstances, to order disclosure to the accused with identifying information redacted until a time prior to the commencement of the trial. What is sought with respect to these witnesses is complete non-disclosure until a time well into the trial. The Trial Chamber will only entertain such measures where well defined justification is established.
11. The Trial Chamber will, therefore, consider whether the protective measures sought for witnesses set out in the Annexes to the Motions are appropriate and duly established in accordance with the relevant criteria set out above, and that the measures are consistent with the rights of the accused.

III. DECISION ON THE PROSECUTION'S MOTION

12. The Prosecution seeks protective measures under Rules 69 and 75 for five witnesses and these applications are supported by the declarations of investigators.
13. The exceptional circumstances warranting the extraordinary measures sought by the Prosecution are said to be the extreme nature of the danger and risk they and/or their families face should it become known that they will testify in these proceedings. In general support of the particular risks facing these witnesses, it is stated that they will testify in relation to matters bearing directly on the criminal responsibility of the accused; matters that relate to high level operations of government agencies, or to perpetrator groups identified in the indictments. Some are seeking relocation in connection with their evidence and delayed disclosure will also facilitate this process. Three of the witnesses are witnesses for whom such measures have been granted in the *Plavsic* and *Krajisnik* proceedings.
14. The Prosecution are seeking four particular measures:
 - (e) that disclosure of witness statements to the accused, his appointed associates and *amici curiae* with identifying material redacted may be disclosed on 26 July 2002, approximately four weeks before the commencement of the Croatia and Bosnia parts of the case;
 - (f) that the witnesses may be referred to using the pseudonyms set out in the Annexes to the First and Second Motions throughout the pre-trial and trial phases of these proceedings;
 - (g) that the unredacted statements of the witnesses be disclosed to the *amici curiae* not less than 30 days, and to the accused and his appointed associates not less than 10 days, before the witness is expected to testify; and
 - (h) that the accused and his appointed associates be ordered not to disclose the material to third parties except to the extent directly and specifically necessary for the preparation and presentation of the defence case (or, in the case of the *amici curiae*, the extent to which they are assisting the Trial Chamber), and that the accused, his appointed associates and *amici curiae* be required to obtain non-disclosure agreements from third parties as a precondition for release of the material to them.

15. With respect to delayed disclosure sought on behalf of these witnesses, the Trial Chamber has applied the criteria set out above and determined that the protective measures sought are appropriate in respect of all witnesses identified, and that such orders are consistent with the rights of the accused. The Trial Chamber again notes that three of the witnesses are witnesses for whom such measures have been granted in the *Plavsic* and *Krajisnik* proceedings.
16. With respect to orders that the accused and his appointed associates not disclose the material to third parties except to the extent directly and specifically necessary for the preparation and presentation of the defence case, and that they obtain non-disclosure agreements before doing so, the Chamber takes the same position it took in the first decision on sensitive source witnesses in this case:

It is noted by the Prosecution that the Trial Chamber has declined in respect of the Bosnia proceedings to order the accused and *amici curiae* to obtain the signing of non-disclosure agreements by third parties before material can be provided to them and the keeping of records of such disclosure. However, it is argued that given the Trial Chamber's statement that it would not be *generally* useful to make such orders and that specific circumstances exist with respect to these witnesses, it is appropriate to make such an order in respect of this application. These specific circumstances are the exceptional security risks attaching to these witnesses and that they are very limited in number. The Trial Chamber accepts that in such circumstances, the making the orders sought in this respect would better facilitate the protection of these sensitive witnesses and would be manageable. Accordingly, these orders will be made.⁵

The Trial Chamber will make such an order in respect of these Motions.

⁵ "First Decision on Protective Measures for Sensitive Source Witnesses", 3 May 2002.
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IV. DISPOSITION

17. For the foregoing reasons, the Trial Chamber **ORDERS** as follows:
- (1) The five witnesses for whom the Prosecution makes applications, identified in the confidential and *ex parte* Annexes to the First and Second Motions, are granted protective measures in accordance with Rules 69 and 75 of the Rules as follows:
 - (a) the witnesses shall be identified and referred to by the pseudonym mentioned in confidential and *ex parte* Annexes;
 - (b) the statements of the witnesses, and exhibits which may be disclosed through those witnesses, redacted so as to remove identifying information, shall be disclosed to the accused, his appointed associates and *amici curiae* by 26 July 2002, unless otherwise ordered by the Trial Chamber;
 - (c) the unredacted statements and related exhibits of the witnesses shall be disclosed to the accused and his appointed associates not less than ten days, and in the case of the *amici curiae* not less than 30 days, before the witness is expected to testify; and
 - (d) the accused and his appointed associates shall not disclose the material to third parties except to the extent directly and specifically necessary for the preparation and presentation of the defence case. The *amici curiae* shall not disclose the material to third parties except to the extent directly and specifically necessary for the assistance of the Trial Chamber. The accused, his appointed associates and *amici curiae* are required to obtain non-disclosure agreements from third parties as a precondition for release of the material to them.⁶

⁶ The Prosecution should make a pro forma agreement available to the parties so that they might comply with it.

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



Richard May
Presiding

Dated this eighteenth day of June 2002
At The Hague
The Netherlands

[Seal of the Tribunal]