



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: 13 March 2003
Original: English

IN THE TRIAL CHAMBER

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

Registrar: Mr. Hans Holthuis

Order of: 13 March 2003

PROSECUTOR

v.

SLOBODAN MILOŠEVIĆ

**DECISION ON PROSECUTION MOTION TO AMEND WITNESS LIST AND
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 Tapušковиć
Prof. Timothy L.H. McCormack

I. BACKGROUND

1. The Office of the Prosecutor (“Prosecution”) filed a partly confidential and *ex parte* “Prosecution’s Motion for Leave to Amend the Witness List and Request Protective Measures for Sensitive Source Witnesses” on 5 February 2003 (“Motion”). The Motion seeks to add 11 witnesses to its witness list for the Croatia and Bosnia part of the trial and remove 34 witnesses from that witness list. It also seeks protective measures for witnesses who, it is said, face exceptionally serious risk to their safety and/or that of their families. Eight of the additional witnesses would seek the protective measures of delayed disclosure, a pseudonym as well as face and voice distortion, and another seeks to testify with a pseudonym and in closed session. Two of the additional witnesses would testify without protective measures. In addition to these witnesses, one witness is proposed as a replacement for a witness already on the witness list and 34 witnesses are identified as witnesses to be deleted from the witness list.
2. The Motion, in respect of the protective measures sought, seeks exceptional measures for nine sensitive witnesses, as follows:
 - (a) that disclosure of unredacted witness statements and related exhibits shall be made 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;
 - (b) that the witnesses shall be referred to by the pseudonyms set out in the Annexes to the Motion;
 - (c) that the accused and his appointed associates be ordered not to disclose the witness statements and related exhibits 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*, to the extent that they have first satisfied the Trial Chamber that it is necessary for the discharge of that role in assisting it), 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 witness statements and related exhibits to them.

3. The *amici curiae* filed the “Amici Curiae Observations on the Prosecution Motion for Leave to Amend the Witness List Dated 5 February 2003” on 14 February 2003 (“Amici Observations”). In their Observations, the *amici* submit that the proposed changes to the witness list are not fair to the accused and should be rejected or, alternatively, should the Motion be granted that the accused be given adequate time to prepare for his defence in respect of the additional witnesses. The *amici* also point out that the Prosecution has inserted new wording with respect to the disclosure restrictions sought, in particular that they must first satisfy the Trial Chamber of the necessity to disclose the material concerned in assisting it. This wording does not appear in any prior decisions of the Trial Chamber.

4. On 21 February 2003, the Prosecution sought leave under Rule 126 *bis* to file a “Prosecution’s Reply to Amici Curiae Observations on the Prosecution Motion for Leave to Amend the Witness List Dated 5 February 2003” (“Reply”), in which the Prosecution responds to some of the *amici*’s observations and asks that the Prosecution be granted the opportunity to make oral argument in respect of any witness about whom the Trial Chamber may have concerns.

II. THE LAW

5. With respect to the protective measures sought, 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.¹ The Prosecution has, in the annexes to the Motion, provided reasons for the application for provisional protection with respect to each of the witnesses and set out statements by investigators familiar with the circumstances of each witness.

Rule 69 – non-disclosure

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, and will not reiterate them here.²
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. It should be noted that the measures sought in respect of the witnesses referred to in the Motion 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 consider whether such justification is established.

¹ See Prosecutor v. Milošević, “Decision on Prosecution Motion for Provisional Protective Measures” issued on 19 February 2002 (“First Decision”); “Decision on Prosecution Motion for Protective Measures for Victims and

Rule 75 – trial-related protective measures

9. Relevantly, Rule 75 provides as follows:

- (A) A Judge or a Chamber may, *proprio motu* or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Section, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused.
- (B) A Chamber may hold an in camera proceeding to determine whether to order:
 - (i) measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related to or associated with a victim or witness by such means as:
 - (a) expunging names and identifying information from the Tribunal's public records;
 - (b) non-disclosure to the public of any records identifying the victim;
 - (c) giving of testimony through image- or voice- altering devices or closed circuit television; and
 - (d) assignment of a pseudonym;
 - (ii) closed sessions, in accordance with Rule 79;
 - (iii) appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television.

Rule 79 provides for closed session hearings as follows:

- (A) The Trial Chamber may order that the press and the public be excluded from all or part of the proceedings for reasons of:
 - (i) public order or morality;
 - (ii) safety, security or non-disclosure of the identity of a victim or witness as provided in Rule 75; or
 - (iii) the protection of the interests of justice.
- (B) The Trial Chamber shall make public the reasons for its order.

10. As established by the Trial Chamber in previous decisions in this case,³ what must be determined is the legal basis for the granting of trial related protective measures under these Rules and whether the Prosecution has satisfied the Chamber, in respect of each witness,

Witnesses" issued on 19 March 2002 ("Second Decision"), and "Second Decision on Protective Measures for Sensitive Witnesses", 6 June 2003.

² Ibid.

³ For example, see "Decision on Prosecution Motion for Trial Related Protective Measures for Witnesses (Bosnia)", 30 July 2002.

that the measures sought are appropriate. Again, the criteria the Chamber must consider have been dealt with in previous decisions in this case and the Chamber will apply them.⁴

III. DISCUSSION

Protective measures

11. The Prosecution seeks protective measures under Rules 69, 75 and 79 for nine witnesses and these applications are supported by the declarations of investigators.
12. 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.
13. The Prosecution are seeking the particular measures set out in paragraph 2 above. With respect to the protective measures sought, save that for closed session, the Trial Chamber has applied the relevant criteria set out above and has determined that they are appropriate for all witnesses identified, and that such orders are consistent with the rights of the accused. The reasons for this are the particular security risks which attach to these witnesses and the important nature of the testimony it is said they will give. The Chamber has, in coming to such conclusion, considered the signed statements of OTP investigators which were filed confidential and *ex parte* setting out in detail the circumstances of each witness.
14. Furthermore, 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 the *amici curiae* do so to the extent necessary to assist the Trial Chamber), and that they obtain non-disclosure agreements before doing so, the Chamber will grant this request, on the basis that it applies to a special and limited category of witnesses.⁵

⁴ Ibid.

⁵ This reflects the consistent position of the Chamber on these matters. See, in this case, "First Decision on Protective Measures for Sensitive Source Witnesses", 3 May 2002. The Trial Chamber considers the concern expressed by the Case No. IT-02-54-T

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15. The above does not apply to the application for closed session testimony by one of the witnesses. That witness applies for closed session on grounds of security. However, the Trial Chamber has stressed that to hold a hearing in closed session is wholly exceptional,⁶ and the reasons set out in the Motion do not establish such exceptional circumstances.

Variation of the witness list

16. The Prosecution seeks to add 11 witnesses to its witness list for the Croatia and Bosnia part of the trial and remove 34 witnesses from that list. In addition to these witnesses, one witness is proposed as a replacement for a witness already on the witness list. The Prosecution correctly recalls the Trial Chamber's ruling that, subsequent to the filing of its pre-trial material for the Croatia and Bosnia part of these proceedings, it would only allow the admission of additional material on good cause being shown. The Prosecution notes in its Motion that it had foreshadowed, as early as April 2002, that it would seek to amend the witness list with respect to a small number of sensitive source witnesses once it had resolved certain security issues. The Chamber accepts that the additional witnesses the Prosecution seeks to add to the witness list, particularly in light of the security issues set out and the fact that 34 other witnesses will be removed from that list, satisfies its requirement that good cause be shown, in that the witnesses have only been interviewed recently and since the original witness list was filed have only recently agreed to testify. The Chamber will therefore allow the application to vary the witness list.

amici curiae in their Observations that the Prosecution has sought to include a new element to the disclosure restrictions (see paragraph 3 above) as justified and will follow its previous wording and not that now sought by the Prosecution.

⁶ See, for example, in this case: "Confidential Decision on Prosecution Motion for Protective Measures for Sensitive Source Witnesses Testifying During the Croatia Phase of the Trial", 17 September 2002, para.15

IV. DISPOSITION

17. For the foregoing reasons, the Trial Chamber **ORDERS** as follows:
- (1) The 11 witnesses identified in Annex A to the Motion may be added to the witness list;
 - (2) The one witness identified in Annex A to the Motion may be substituted on the witness list;
 - (3) The 34 witnesses identified in Annex A to the Motion may be deleted from the witness list;
 - (4) As to the protective measures sought, the witnesses identified in Annex A to the Motion as requesting protective measures shall be granted those measures specifically sought (pseudonyms, face and voice distortion and), and in respect of those witnesses
 - (a) disclosure of unredacted witness statements and related exhibits shall be made 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;
 - (b) the accused and his appointed associates shall not disclose the witness statements and related exhibits 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
 - (c) the accused, his appointed associates and *amici curiae* shall obtain non-disclosure agreements from third parties (as provided by the Prosecution) as a precondition for release of the witness statements and related exhibits to them.
 - (5) The request for closed session testimony is rejected.

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



Richard May
Presiding

Dated this thirteenth day of March 2003
At The Hague
The Netherlands

[Seal of the Tribunal]