



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: 1 April 2003  
Original: English

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**IN THE TRIAL CHAMBER**

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

**Registrar:** Mr. Hans Holthuis

**Order of:** 1 April 2003

**PROSECUTOR**

v.

**SLOBODAN MILOŠEVIĆ**

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**DECISION ON PROSECUTION MOTION FOR PROTECTIVE MEASURES  
(CONCERNING A HUMANITARIAN ORGANISATION)**

**PUBLIC VERSION OF A CONFIDENTIAL DECISION FILED 13 MARCH 2003**

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**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  
Mr. Timothy L.H. McCormack

**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 (“International Tribunal”),

**BEING SEISED OF** a confidential “Prosecution’s Motion for Protective Measures”, dated 10 June 2002 (“Motion”),<sup>1</sup> in which the Prosecution seeks ten protective measures for three proposed witnesses who are former employees of a humanitarian organisation,<sup>2</sup> such measures constituting a precondition for the humanitarian organisation’s consent to allow the testimony pursuant to Rule 70 (B) of the Rules,<sup>3</sup> including the requirement for the testimony to be given in closed session and with pseudonyms,<sup>4</sup>

**NOTING** the confidential “Observations by the Amici Curiae on the Prosecution’s Motion for Protective Measures”, dated 27 June 2002 (“Amici Observations”),<sup>5</sup> in which it is submitted that the information provided does not establish any basis to determine that there are risks to the witnesses concerned (the relevant requirement under the Tribunal’s jurisprudence for protection); the protection of other unspecified persons is not a proper ground for the measures sought, and in particular the measures sought are a blanket protection for all witnesses and non-witnesses connected with the humanitarian organisation, which is at the disproportionate expense of the accused’s rights under Article 21 of the Statute,<sup>6</sup>

**NOTING** the various confidential procedural filings and the Scheduling Orders issued by the Trial Chamber in respect of this matter,<sup>7</sup>

<sup>1</sup> This Motion concerns evidence of a witness who had been in the employment of a humanitarian organisation and has been edited so as to exclude any reference to the name of that organisation, which is the subject of orders to protect its confidentiality.

<sup>2</sup> At the oral hearing on this matter, the Prosecution stated that it intends, in fact, to call only one of those three witnesses. Transcript of 25 February 2003 (“T”), pp. 16769-16770.

<sup>3</sup> The Motion attaches a letter from the protected humanitarian organisation, and references to the writer and its content have therefore been omitted.

<sup>4</sup> At the oral hearing of this matter, the Prosecution confirmed that nothing less than closed session would protect the interests of the humanitarian organisation (T. 16781), and the Trial Chamber will proceed on the basis that lesser protective measures would not be considered by the humanitarian organisation as a basis for allowing the witness to testify.

<sup>5</sup> The title of these Observations has been edited for the same reasons set out in footnote 1 above.

<sup>6</sup> Whilst the Amici Observations includes to arguments concerning the applicability of Rule 70 to the Motion, during the oral hearing Mr. Kay stated that, as the Rule 70 Appeals Decision came after the Amici Observations, the *amici* no longer pressed any of their arguments made on this matter.

<sup>7</sup> These Scheduling Orders are all confidential and relate to scheduling of submissions and hearings concerning the issues relevant to this Decision.

**NOTING** the submissions of the Prosecution, accused, *amici curiae* and representatives of the humanitarian organisation made at the oral hearing of this matter on 25 February 2003,<sup>8</sup>

**CONSIDERING** that, whilst the application is made in part pursuant to Rule 70, following the Rule 70 Appeals Decision, this provision is only noteworthy in respect of the Motion insofar as it is stated that the protective measures sought are necessary to obtain the consent of the humanitarian organisation, as an information provider, for the witness to testify in this trial,<sup>9</sup>

**NOTING** the relevant provisions of the Statute of the International Tribunal (“Statute”), as follows:

**Article 21**  
**Rights of the accused**

...

2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute.

...

**Article 22**  
**Protection of victims and witnesses**

The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of *in camera* proceedings and the protection of the victim’s identity.

**NOTING** the relevant provisions of the Rules of Procedure and Evidence of the International Tribunal (“Rules”), as follows:

**Rule 75**  
**Measures for the Protection of Victims and Witnesses**

(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:

<sup>8</sup> Whilst representatives of the humanitarian organisation attended the hearing and responded to queries from the Chamber, they made the position of the humanitarian organisation at the hearing clear by stating: “...it was our position that we are not here to advocate for the ability of [this humanitarian organisation] to appear to testify. That, as we perceive, is not our function. And it was not our intention to address the Court, whether through the Prosecution or through any other party. It was our intention to be here to be available to respond to questions. Let me, in general, state that our reasons for requiring protective measures are, in our view, set forth in [our] letter...”

<sup>9</sup> See the Motion, p. 2.

- (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 Closed Sessions**

(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.

**CONSIDERING** that this Trial Chamber has exercised great care in granting closed session testimony due to its regards for the rights of the accused to a fair and public hearing, explicitly stated in Article 21 of the Statute, and accordingly has granted closed session testimony only in very limited circumstances, including where extraordinary risks attach to the witness's own safety or that of his or her family,<sup>10</sup>

**CONSIDERING** that the Prosecution makes this application in order for the humanitarian organisation to grant the witness permission (as a Rule 70 information provider) to testify in this trial<sup>11</sup> and that this

<sup>10</sup> 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; and, in respect of K21, a ruling in which the Trial Chamber reconsidered an order granting the witness the protection of closed session testimony on the basis that the grounds for the protection were too remote, both with respect to threats made and with respect to the fears expressed by that witness for family members.

<sup>11</sup> T. 16772, 16774.

application is neither made because the witness himself objects to testifying in open session nor because there are personal security concerns for the witness,<sup>12</sup>

**CONSIDERING** that there is no suggestion by the Prosecution or the humanitarian organisation that what is sought is any form of privilege belonging to the humanitarian organisation against compulsion to testify, rather the application is made because of security concerns for the current and future personnel of the humanitarian organisation that arise if its mandate is perceived to be compromised, such perception of compromise stemming from public disclosure that a former staff member of the humanitarian organisation testified in this trial regarding information obtained during his employment with that organisation,<sup>13</sup>

**CONSIDERING** that whilst Rule 75 contemplates the extension of protection to “persons related to or associated with a victim or witness”, such an association and such a risk contemplated must be sufficiently proximate to the witness to warrant protective measures, particularly the extraordinary protective measure of closed session testimony,

**CONSIDERING** that whilst the Chamber acknowledges the work of the humanitarian organisation and protection of its current and future personnel are important interests which warrant consideration, and accepts that personnel of the humanitarian organisation have been the target of attacks and intimidation both in Bosnia and elsewhere,<sup>14</sup> in respect of this witness, the interests sought to be protected are too remote and do not outweigh the accused’s right to a fair and public hearing,<sup>15</sup>

<sup>12</sup> This application differs materially from that which was the subject of a Decision relied on by the Prosecution: *Prosecutor v. Blaškić*, “Decision of Trial Chamber I on Prosecutor’s Requests of 5 and 11 July (sic) 1997 for Protection of Witnesses”, IT-95-14-PT, 10 July 1997. In the application before that Chamber, protection was sought and granted on behalf of two witnesses who – the Chamber accepted – would be “seriously threatened should their identity be disclosed to the public and the media”, para.10. Therefore, whilst it was considered that the safety of staff of the humanitarian organisation would also be threatened by disclosure of the identity of the identified witnesses, there was a real threat attaching to the witnesses for whom protection was in fact sought. In this respect, the application before this Chamber is distinguishable from that underpinning the decision in the *Blaškić* case.

<sup>13</sup> See the letter from the humanitarian organisation annexed to the Motion; submissions made on the point by the Prosecution (T. 16774-16776); and clarification of the position by representatives of the humanitarian organisation: “we are aware of another situation where a privilege has been claimed. However, at the highest levels of [the humanitarian organisation], there was great consideration given to concerns for an obligation at times to offer cooperation where that cooperation was sought, in the interests of justice. But I assure you, Your Honour, that this was a decision that was very carefully taken.” (T. 16797-16798).

<sup>14</sup> Relevant references are made, for example, in the letter from the humanitarian organisation annexed to the Motion. The Chamber accepts these assertions, but finds them, and others pertaining to the humanitarian organisation personnel in other theatres of conflict, too remote to the issue of whether this witness should be granted the protective measures sought.

<sup>15</sup> In this respect, the Chamber takes note of the submission made by Mr. Kay, *amicus curiae*, concerning the protection sought for the witness: “It’s not personal to him, and those associated or related are so remote from the issue, they’re not sufficiently proximate to the issue to have put their safety in any way at risk and require protective measures. In our submission, 75(B) is dealing with a more proximate kind of situation with each witness or victim, persons related or associated with them, in a tangible form. To say that someone in [the humanitarian organisation] in Namibia or Togo or

**CONSIDERING** that given the position of the Prosecution and the humanitarian organisation that nothing less than a closed session testimony would protect the interests of the organisation,<sup>16</sup> the Trial Chamber need not proceed to discuss the granting of other protective measures,

**PURSUANT TO** Rules 54, 75 and 79 of the Rules

**HEREBY DENIES THE MOTION**

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



Richard May  
Presiding

Dated this first day of April 2003  
At The Hague  
The Netherlands

[Seal of the Tribunal]

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elsewhere would hereby be threatened as a result of this witness giving evidence publicly, in our submission that is too remote from him to require the injunction of this Court. It's not specific to the case and these proceedings." (T. 16793)  
<sup>16</sup> T. 16781.