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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: IT-05-85-Misc 2

Date: 6 April 2005

Original: English

THE PRESIDENT OF THE TRIBUNAL

Before: Judge Theodor Meron, President

Registrar: Mr Hans Holthuis

Decision of: 6 April 2005

**DECISION ON REGISTRAR'S SUBMISSION ON A REQUEST FROM THE OFFICE OF THE
CHIEF PROSECUTOR OF BOSNIA AND HERZEGOVINA PURSUANT TO RULE 33(B)**

The Office of the Prosecutor
Ms Carla del Ponte

The Government of Bosnia and Herzegovina
Per: The Embassy of Bosnia and Herzegovina to the Netherlands, The Hague.

1. On 31 March 2005, pursuant to Rule 33(B) of the Rules of Evidence and Procedure (“Rules”), the Registrar filed before me a submission seeking advice on the proper response to be made to a request from the Office of the Chief Prosecutor of Bosnia and Herzegovina for access to material subject to protective measures imposed by Chambers of this Tribunal.¹

2. Rule 33 provides as follows:

Rule 33

Functions of the Registrar

(A) The Registrar shall assist the Chambers, the plenary meetings of the Tribunal, the Judges and the Prosecutor in the performance of their functions. Under the authority of the President, the Registrar shall be responsible for the administration and servicing of the Tribunal and shall serve as its channel of communication.

(B) The Registrar, in the execution of his or her functions, may make oral and written representations to the President or Chambers on any issue arising in the context of a specific case which affects or may affect the discharge of such functions. Including that of implementing judicial decisions, with notice to the parties where necessary.

(C) The Registrar shall report regularly on his or her activities to the Judges meeting in plenary and to the Prosecutor.

3. In filing his submission, the Registrar states that, while the issue does not relate to the exercise of his functions in the context of a specific case, it is an issue that relates to many of the cases heard at the Tribunal, and that the interests of justice warrant the President’s considering the issues raised in the motion. It is upon this basis that I have determined to address the issues raised in the submission.

Background

4. On 22 February 2005, the Registry received a request from the Senior Legal Advisor to the Chief Prosecutor of Bosnia and Herzegovina seeking the assistance of the Registry in obtaining access to evidence from trial proceedings at the ICTY in *Prosecutor v Radoslav Brđanin* and *Prosecutor v Momcilo Krajišnik*. The material sought was identified as falling within the following categories:

¹ Registrar’s Submission on a Request From the Office of the Chief Prosecutor of Bosnia and Herzegovina Pursuant to Rule 33 (B) With Confidential Ex Parte Annex, 31 March 2005 (“Registrar’s Submission”).

- (i) copies of transcripts of evidence given by witnesses who testified, either wholly or partly in closed or private session;
- (ii) copies of transcripts of witnesses who testified in open session;
- (iii) copies of tapes containing the testimony in the witnesses' own language
- (iv) certified copies of documentary evidence exhibited under seal at trial
- (v) certified copies of documentary evidence exhibited at trial.

5. In making her request to the Registry, the BiH Chief Prosecutor stated that the assistance of the Registry was needed to gain access to the material because some of it was subject to protective measures issued by a Trial Chamber, and she was without standing to seek a variation of those measures before a Trial Chamber.

6. In his submission, the Registrar states that he has complied with the request by supplying all the public materials but that he is unable to fulfil the request with respect to the material subject of protective measures as the Registry is also without standing to seek a variation of those protective measures from the Trial Chambers pursuant to Rule 75 of the Rules. The Registrar says that he has consulted with the Office of the Prosecutor with respect to the request and that the Prosecutor is in favour of the Registrar's supplying the materials sought. The Prosecutor has further expressed her view that the Registry is the appropriate body to be addressed by the BiH Chief Prosecutor for implementation of the Request.

7. Without explicitly saying so, the Registrar queries whether the Registry is the appropriate organ of the Tribunal to seek to implement the request. He draws my attention to the fact that providing materials to external parties is a resource-intensive task for the Registry and that the Registry has limited resources available to be assigned to such tasks. He further states that, "While the Registry is aware of what material is confidential and what is not, it has no information on what material comes from a Rule 70 provider, and it is ill-equipped to assess what portions of confidential record are sensitive for witness protection purposes".²

8. The Registrar submits that the request of the BiH Prosecutor should nevertheless be accommodated, and my advice is sought as to how this issue may be resolved.

² Registrar's Submission, par 5.

Analysis

9. For the purpose of proceedings at this Tribunal, only parties have standing to make submissions to a Chamber. Rule 2 defines parties for the purpose of proceedings at the Tribunal as “The Prosecutor and the Defence”. Pursuant to Rule 74 of the Rules, a Chamber may grant standing to other persons to be heard at the Tribunal as *amicus curiae*, if the Chamber considers “it is desirable for the proper determination of the case” to hear a State, organisation or person “on any issue specified by the Chamber”. The only circumstances in which a Chamber may confer standing on the Registrar to make submissions are those in which a motion is brought before a Chamber seeking that Chamber’s review of an administrative decision that the Registrar has taken. This is not the circumstance here, and, as the Registrar has himself conceded, he has no standing under the Rules to make submissions to a Chamber seeking a variation of protective measures issued by a Chamber pursuant to Rule 75 of the Rules.

12. Protective measures granted by a Chamber are in most instances granted at the request of one of the parties. The Rule authorising the Chamber to grant such measures derives from the statutory obligation placed upon the Tribunal to ensure adequate protection of victims and witnesses in its proceedings. For a grant of such measures to be accorded to a witness, the Chamber must be satisfied that there is some objective basis justifying the witness’ fear of giving public evidence warranting the imposition of the protective measures.

13. Rule 75(F) provides that once such measures have been granted by a Chamber those measures

shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal (the “second proceedings”) unless and until they are rescinded, varied or augmented in accordance with the procedure set out in this Rule;

If such measures are to be rescinded, varied or augmented, the procedure of Rule 75(G) must be followed. It provides that:

A party to the second proceedings seeking to rescind, vary or augment protective measures ordered in the first proceeding must apply:

(i) to any Chamber, however constituted, remaining seised of the first proceedings; or

(ii) if no Chamber remains seised of the first proceedings, to the Chamber seised of the second proceedings.

Once such an application has been made, Rule 75 (H) and (I) set out the procedure to be followed by the Chamber in determining that application:

(H) Before determining an application under paragraph (G)(ii) above, the Chamber seised of the second proceedings shall obtain all relevant information from the first proceedings, and shall consult with any Judge who ordered the protective measures in the first proceedings, if that Judge remains a Judge of the Tribunal.

(I) An application to a Chamber to rescind, vary or augment protective measures in respect of a victim or witness may be dealt with either by the Chamber or by a Judge of that Chamber, and any reference in this Rule to "a Chamber" shall include a reference to "a Judge of that Chamber".

14. As is clear from the procedure of Rule 75, the Tribunal takes its statutory obligation to ensure the protection of witnesses and victims seriously; that protection continues for all time unless varied by subsequent order on the application of a party to another proceeding at the Tribunal. There is no clear mechanism under Rule 75 for a Chamber that issued protective measures in relation to a proceeding at the Tribunal to seek to vary those protective measures for the purposes of disclosure to a proceeding in another jurisdiction. Indeed, it is not apparent, in light of the positive statutory obligation imposed upon the Tribunal to protect victims and witnesses, that it would be proper for a Chamber to authorise variation of protective measures to allow disclosure to other judicial forums, without first consulting those witnesses on that disclosure.

15. While the Registrar has sought my advice on this issue, I do not consider that I can provide a solution for the following reasons. First, while the Office of the Prosecutor has stated to the Registrar its view that the material should be made available to the BiH Chief Prosecutor, I do not consider that the Tribunal's statutory obligation to the protection of victims and witnesses permits such disclosure, absent a process of consultation with those victims and witnesses granted protective measures by this Tribunal. Second, I do not consider that the Registry is the appropriate organ to be dealing with such requests. Protective measures are issued and varied at the request of parties to the proceedings. The parties are the persons most intimately involved with the victims and witnesses and, in many instances, the parties have secured the testimony of reluctant victims and witnesses by securing protective

measures from the Chambers. In this circumstance, the parties have a continuing obligation to those victims and witnesses to ensure that protection remains. If any variation is to occur, particularly in relation to proceedings outside of this Tribunal, those victims and witnesses must be afforded an opportunity to be heard.

16. While the Tribunal is committed to assisting other judicial institutions in the prosecution of persons responsible for breaches of international humanitarian law in the former Yugoslavia, and in particular the Special War Crimes Chamber of the Bosnia and Herzegovina Court, it is also committed to maintaining the integrity of its own proceedings. If protective measures issued by this Tribunal are to be varied, the procedure to be followed is that provided by Rule 75 of the Rules. Pursuant to that Rule, it is only one of the parties, defined in Rule 2 as the Prosecution and Defence, who can make an application to a Chamber for variation of measures imposed. Applying this Rule to the current situation, the request of the BiH Prosecutor for access to non-public material should have been directed to the Prosecutor and not the Registrar.

17. Whether or not a Chamber will allow such variation is a matter for the Chamber concerned to determine. As a practical matter, if the BiH Prosecutor, as a result of her investigations, is aware of witnesses who have given evidence at the Tribunal that are willing to testify in proceedings at the BiH Court, then that information should be made clear to the Prosecutor in any further requests she may make.

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

Dated this 6th day of April 2005,
At The Hague,
The Netherlands.



Judge Theodor Meron
President

[Seal of the Tribunal]