



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-04-81-PT

Date: 16 November 2006

Original: English

IN THE TRIAL CHAMBER

Before: Judge Patrick Robinson
Judge Krister Thelin
Judge Frank Höpfel

Registrar: Mr. Hans Holthuis

Decision of: 16 November 2006

PROSECUTOR

v.

MOMČILO PERIŠIĆ

**DECISION ON PROSECUTION'S MOTION FOR LEAVE TO MAKE DELAYED
DISCLOSURE IN RESPECT OF CERTAIN WITNESSES**

Office of the Prosecutor

**Mr. Mark Harmon
Ms. Susan Somers**

Counsel for Momčilo Perišić:

Mr. James Castle

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 (“Tribunal”),

NOTING the partly *ex parte* and confidential “Prosecution’s Motion for Leave to Make Delayed Disclosure in Respect of Certain Witnesses” (“Motion”), dated 25 October 2006, in which the Prosecution requests, pursuant to Rules 54, 66, 69 and 75 of the Tribunal’s Rules of Procedure and Evidence (“Rules”) that (a) the unredacted statements of MP003, MP004 and MP014 shall be disclosed to the Defence no later than 30 days before the witness in question is expected to testify; and (b) the names and unredacted statements of the witnesses identified in Annex B shall be disclosed to the Defence as soon as the relevant governments have granted their consent to such disclosure, subject to any further order for protective measures,

NOTING the Prosecution’s submission that “the exceptional circumstances and the security risks set out in the Annex A ... establish a real possibility of interference with the witnesses ... if their identities are disclosed to the Defence at this time”,¹

NOTING that the Defence filed the “Momčilo Perišić’s Reply to the Prosecution’s Motion for Leave to Make Delayed Disclosure in Respect of Certain Witnesses” on 10 November 2006, two days outside the time allowed for filing a response to a motion pursuant to Rule 126 *bis* of the Rules, without justification,

FINDING, therefore, that the Chamber must disregard the Defence response to the Motion,

NOTING the Trial Chamber’s Order of 11 October 2006 (“Order”), in which the Chamber ordered the Prosecution, *inter alia*, to disclose, no later than 25 October 2006, all witness statements in its possession which fall within the scope of Rule 66(A)(ii) of the Rules or, within that timeframe, apply to the Chamber for any protective measures that may justify the non-disclosure of the witness statements,

NOTING that Article 20 of the Tribunal’s Statute (“Statute”) provides that the trial must be conducted with full respect of the rights of the accused and due regard for the protection of victims and witnesses; Article 21 sets out rights of the accused, including the right to be informed promptly and in detail in a language which the accused understands of the nature and cause of the charge

¹ Motion, para. 6.
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against him, and to have adequate time and facilities for the preparation of his defence; Article 22 requires the Tribunal to provide for the protection of victims and witnesses in its Rules,

NOTING that delayed disclosure of the identity of a witness is governed by Rule 69 of the Rules, which provides, in relevant part:

(A) In exceptional circumstances, the Prosecutor may apply to a judge or Trial Chamber to order non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal.

[...]

(C) Subject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence.

RECALLING that, in accordance with the Trial Chamber's jurisprudence, three factors must be considered when delayed disclosure is requested under Rule 69(A):

- 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;
- b. the distinction between measures to protect individual victims or witnesses in the particular trial, which are permissible under the Rule, and measures which make it easier for the Prosecution to bring cases against other persons in the future, which are not; 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 time *before trial commences* rather than before the witness gives evidence).²

RECALLING FURTHER that when considering granting protective measures, "fears expressed by potential witnesses are not in themselves sufficient to establish a real likelihood that they may be in danger or at risk" and that something more is required to interfere with the rights of the accused in this respect;³ A curtailment of an accused's rights as a consequence of granting a measure of anonymity must be justified by a genuine fear for the safety of the witness or the members of his or her family,⁴

² *Prosecution v. Brđanin and Talić*, Case No. IT-99-36-PT, Decision on Motion by Prosecution for Protective Measures, 3 July 2000 ("Brđanin & Talić Decision"), paras. 22–33. See also *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Provisional Protective Measures Pursuant to Rule 69, 19 February 2002 ("Milošević Rule 69 Decision"), para. 26; *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-PT, Decision on Confidential Prosecution Motions for Protective Measures, 26 October 2004, p. 4.

³ *Prosecutor v. Milošević*, Case No. IT-02-54-T, First Decision on Prosecution Motion for Protective Measures for Sensitive Source Witnesses, 3 May 2002, para. 4. See further *Prosecutor v. Prlić et al.*, Case No. IT-04-74-PT, Order to Grant Protective Measures to Eleven Sensitive Witnesses, 5 October 2005, p. 3; *Prosecutor v. Tadić*, Case No. IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995 ("Tadić Decision"), paras. 62–66.

⁴ *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-PT, Decision on Confidential Prosecution Motions for Protective Measures and Non-Disclosure and Confidential Annex A, 9 March 2005 ("Mrkšić et al. Decision"), pp. 4 and 5. See Case No. IT-04-81-PT

CONSIDERING that the Prosecution must demonstrate that there is an objectively grounded risk to the security and welfare of each witness for which it is requesting protective measures or the witness's family, should it become publicly known that the witness is about to give or has given evidence,⁵

FINDING that the Prosecution has not sufficiently demonstrated, by the information contained in Annex A, that there is an objectively grounded risk to the security and welfare of each witness contained in Annex A or the witness's family that would justify the granting of delayed disclosure until 30 days before the witness is expected to testify,⁶ as requested, but that the Trial Chamber is satisfied that delayed disclosure for the witnesses contained in Annex A should be granted until no later than 30 days before the commencement of trial,

RECALLING the Work Plan that was prepared in accordance with Rule 65 *ter*(D)(ii) of the Rules and set out in the Order, by which this case will be trial ready by 30 April 2007,

CONSIDERING that the basis for the Prosecution's application for delayed disclosure for the witnesses contained in Annex B pursuant to Rules 54, 66, 69 and 75 is misguided and by making a request for delayed disclosure until such a time as "the relevant governments have granted their consent to such disclosure" the Prosecution is, in fact, invoking Rule 70 (B) of the Rules,

FINDING that the application for delayed disclosure for the Rule 70 witnesses should be treated as a motion for an extension of time by which these witnesses' identities and unredacted statements must be disclosed to the Defence and that the deadline by which the disclosure of the identities and statements of the Rule 70 witnesses whom the Prosecution will seek to call during its case-in-chief shall be 2 February 2007,

also *Prosecutor v. Limaj et al.*, Case No. IT-03-66-PT, Confidential Decision on the Prosecutor's Motion for Protective Measures Regarding Disclosure, 30 September 2003, pp. 5-6.

⁵ *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-PT, Decision on Prosecution Sixth Motion for Protective Measures, 1 June 2006 ("*Milutinović et al.* Decision on Sixth Motion"), para. 21; *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Decision on the Prosecution's Motion for Protective Measures at Trial, 22 November 2004, para. 6; *Milošević* Rule 69 Decision, paras. 25-26; *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Trial Related Protective Measures for Witnesses (Bosnia), 30 July 2002, para. 5; *Tadić* Decision, paras. 62-66.

⁶ Trial Chambers have generally considered a period of 30 days before the commencement of trial as an appropriate time by which the Prosecution must disclose the witnesses' identities and statements. See *Milutinović et al.* Decision on Sixth Motion, para. 25; *Prosecutor v. Milutinović et al.*, Case No. IT-99-37-PT, Decision on Prosecution's Motions for Protective Measures, 17 July 2003, p. 4; *Milošević* Rule 69 Decision, paras. 27-28; *Mrkšić et al.* Decision, p. 4.

PURSUANT TO Rules 54, 66 and 70 of the Rules, the Trial Chamber hereby,

GRANTS the Motion, in part, and

ORDERS that the Prosecution shall disclose the unredacted statements of MP003, MP004 and MP014 by no later than 30 days before the commencement of trial,

ORDERS that the Prosecution must disclose the identities and the unredacted witness statements of the Rule 70 witnesses contained in Annex B by no later than 2 February 2007 or remove the witnesses from its witness list.

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



Judge Patrick Robinson
Presiding

Dated this sixteenth day of November 2006
At The Hague
The Netherlands

[Seal of the Tribunal]