



International Tribunal for the Prosecution of
Persons Responsible for Serious Violations of
International Humanitarian Law Committed in
the Territory of Former Yugoslavia since 1991

Case No. IT-98-29/1-T

Date: 12 March 2007

Original: English

IN TRIAL CHAMBER III

Before: Judge Patrick Robinson, Presiding
Judge Antoine Kesia-Mbe Mindua
Judge Frederik Harhoff

Registrar: Mr. Hans Holthuis

Decision of: 12 March 2007

PROSECUTOR

v.

DRAGOMIR MILOŠEVIĆ

**DECISION ON PROSECUTION'S APPLICATION FOR
RULE 70 CONDITIONS FOR TESTIMONY OF
WITNESS W-46**

The Office of the Prosecutor:

Mr. Alex Whiting
Mr. Stefan Waespi
Ms. Carolyn Edgerton
Mr. John Docherty

Counsel for the Accused:

Mr. Branislav Tapušković
Ms. Branislava Isailović

TRIAL CHAMBER III (“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”);

BEING SEISED of the “Prosecution Application for Rule 70 Conditions for Testimony of Witness W-46,” filed confidentially on 1 March 2007 (“Application”);

NOTING that in the Application the Prosecution explains that the Government of Witness W-46 (“Witness”) has authorised him to testify before the Tribunal, provided that the following conditions are met:

1. restriction of cross-examination to matters contained in the interview of the witness;
2. a representative of the Government of the Witness be present during the testimony of the witness and be permitted to intervene should matters of national security arise;
3. the witness is to testify in closed session and under a pseudonym;
4. no dissemination of the testimony of the Witness without the permission of the Government of the Witness.¹

NOTING that the Prosecution submits that the conditions requested by Government of the Witness do not impede a fair trial, as the Defence will have a full and complete opportunity to cross-examine the Witness on matters contained in the witness’ evidence-in-chief, which will be based on the interview of the Witness;²

NOTING the Response filed confidentially by the Defence on 5 March 2007, in which the Defence challenges the limitation of cross-examination, which the Defence contends “contravenes Rule 90 (H) (i)” of the Rules of Procedure and Evidence (“Rules”);³

NOTING that Rule 70 (C) of the Rules provides that, if after obtaining the consent of the provider, the Prosecutor elects to present evidence that has been obtained under the Rule, the Trial Chamber, notwithstanding Rule 98 of the Rules, may not order either party to produce additional evidence received from the provider, nor may the Trial Chamber summon the provider or order their attendance for the purpose of obtaining such additional evidence;

¹ Application, para. 3.

² Application, para. 7.

³ Defence Submission in Response to Prosecution’s Application for Rule 70 Conditions for Testimony of Witness W-46, filed confidentially on 5 March 2007, translation provided on 8 March 2007.

NOTING that Rule 70 (D) provides that if the Prosecutor calls a witness to introduce in evidence any information provided under this Rule, the Trial Chamber may not compel that witness to answer any question relating to the information or its origin, if the witness declines to answer on the grounds of confidentiality;

NOTING that Rule 70 (E) ensures the right of an accused to challenge evidence presented by the Prosecution shall remain unaffected subject only to the limitations contain in paragraphs (C) and (D) of the Rule;

CONSIDERING that the Defence only objects to the condition limiting the cross-examination of the Witness;

CONSIDERING that the right to cross-examination is not absolute, but is subject to the duty of Trial Chambers to ensure a fair and expeditious trial pursuant to Article 20 (1) of the Statute.⁴

CONSIDERING that in exercising its duty to ensure a fair and expeditious trial, a Trial Chamber may limit the subject matter of the cross-examination on several grounds, including on the grounds of lack of relevance or on the grounds of needless consumption of time;

CONSIDERING that the purpose of Rule 70 (B) to (G) is to encourage States, organisations and individuals to share sensitive information with the Tribunal;⁵

CONSIDERING that Rule 70 proceeds on the basis that States, organisations and individuals have a genuine interest in protecting the information in their possession, which is confidential in nature, and therefore may invoke Rule 70 to ensure protection of such information by requiring limitations on the subject matter of the testimony of a witness or on the dissemination of the witness' testimony;

CONSIDERING that the interview of the Witness covers a wide range of topics relevant to the present case and touches upon matters that, as may be inferred from the cross-examination of previous witnesses, appear to be of importance to the Defence;

CONSIDERING that the interview of the Witness provides sufficient basis for the Defence to conduct a thorough cross-examination on matters relevant to the present case, and that the right of

⁴ See, e.g., *Prosecutor v. Zdravko Mucić et al.*, Case No. IT-96-21-T, Decision on the Motion of the Joint Request of the Accused Persons Regarding the Presentation of Evidence, dated 24 May 1998.

⁵ *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR108bis & AR73.3, Decision on the Interpretation and Application of Rule 70, 23 October 2002, para. 19.

the Accused to cross-examine the Witness pursuant to Rule 90 (H)(i) of the Rules will not be unfairly limited by being restricted to matters contained in the interview of the witness;

CONSIDERING that, although Rule 70 does not make provision for an order to allow representatives from the Government of a witness to be present during the proceedings, it is within the discretion of a Trial Chamber to make such an order;⁶

FOR THE FOREGOING REASONS,

PURSUANT TO Rules 54 and 70 of the Rules,

HEREBY GRANTS the Application, and

ORDERS that Witness W-46 will testify with the following measures:

1. Witness W-46 will testify under pseudonym and in closed session;
2. the cross-examination of Witness W-46 is limited to matters contained in the interview and the examination-in-chief of the Witness;
3. a representative of the Government of Witness W-46 is allowed to be present during the testimony of the witness but should not intervene unless matters of national security arise;
4. the testimony of Witness W-46 will not be disseminated without prior consent of the Government of the witness.

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



Judge Patrick Robinson
Presiding

Dated this twelfth day of March 2007

At The Hague

The Netherlands

[Seal of the Tribunal]

⁶ *Ibid.*, para. 33.