



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: 3 May 2002
Original: English

IN THE TRIAL CHAMBER

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

Registrar: Mr. Hans Holthuis

Order of: 3 May 2002

PROSECUTOR

v.

SLOBODAN MILOŠEVIĆ

**FIRST DECISION ON PROSECUTION MOTION 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 Tapušković
Prof. Mischa Wladimiroff**

I. BACKGROUND

1. The Office of the Prosecutor ("Prosecution") filed a confidential and *ex parte* "Prosecution Motion for Protective Measures for Sensitive Source Witnesses" on 5 April 2002 ("the instant Motion"). The Motion seeks protective measures for witnesses in the Bosnia and Croatia proceedings, who face exceptionally serious risk to their safety and that of their families. The Prosecution seeks delayed disclosure of the statements, identity and exhibits concerning these witnesses ("the material") as well as the granting of pseudonyms, and in particular seeks the following:
 - (a) disclosure of witness statements to the accused, his appointed associates¹ and *amici curiae* with identifying material redacted may be disclosed 30 days prior to a firm trial date for the commencement of hearing the Croatia charges (for witnesses it is proposed will testify concerning the Croatia charges alone or the Bosnia and Croatia charges together);
 - (b) disclosure of witness statements to the accused, his appointed associates and *amici curiae* with identifying material redacted may be disclosed 30 days prior to a firm trial date for the commencement of hearing the Bosnia charges (for witnesses it is proposed will testify concerning the Bosnia charges alone);
 - (c) that the witnesses may be referred to using the pseudonyms set out in Annexes A and B to the instant Motion throughout the pre-trial and trial phases of these proceedings;
 - (d) that the unredacted statements of the witnesses be disclosed 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; and
 - (e) that the accused and his appointed associates be ordered not to disclose the material 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 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 material to them.

¹ This reference is made with respect to Zdenko Tomanović and Dragoslav Ognjanović, appointed pursuant to the Trial Chamber's "Order" of 16 April 2002. Special mention is made here of order 3 of that Order with respect to the binding nature of protective measures and all other existing orders of the Trial Chamber with respect to these proceedings.

II. THE LAW

2. The Prosecution relies upon Rules 69 and 75 of the Rules of Procedure and Evidence of the Tribunal ("Rules").
3. The Trial Chamber has already ruled with respect to the need for the Prosecution to make out a case for particular protective measures on a witness by witness basis for Rule 69 (A) to be satisfied.² This Rule provides that non-disclosure of the identity of a victim or witness who may be in danger or at risk may "in exceptional circumstances" be ordered until such person is brought under the protection of the Tribunal. Rule 69 (C) provides that, 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". In its Decision, the Trial Chamber noted that there were several criteria that would need to be considered in respect of applications made under Rule 69 (A) for specific protective measures for witnesses, including:
 - (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 extent to which the power to make protective orders can be used to protect individual victims or witnesses in the particular trial, and measures which simply make it easier for the Prosecution to bring cases against other persons in the future; 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).
4. The Prosecution itself referred to a further passage from the Decision of the Trial Chamber in the *Brdanin* case, in which it was held that fears expressed by potential witness were not in themselves sufficient to establish a real likelihood that they may be in danger or at risk. What is required to interfere with the rights of the accused in this respect is something

² See "Decision on Prosecution Motion for Provisional Protective Measures" issued on 19 February 2002 ("First Decision") and "Decision on Prosecution Motion for Protective Measures for Victims and Witnesses" issued on 19 March 2002 ("Second Decision").
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more.³ The Trial Chamber sees this as an important element of the first criterion set out above.

5. Furthermore, Rule 75 (A) provides that the Chamber or a Judge of the Chamber may “order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused”. The Trial Chamber has only, at this stage, to determine the applicability of Rule 75 to the extent that non-disclosure extends into the trial of the Bosnia and Croatia indictments. We do not, at this stage, consider the appropriateness of measures for the protection of such witnesses when testifying. The Trial Chamber will, of course, hear any applications in this respect when made at the appropriate time. The Trial Chamber will, therefore, consider whether the protective measures sought are appropriate and duly established in accordance with the relevant criteria set out above, and that the measures are consistent with the rights of the accused.
6. The Prosecution applications concerning witnesses set out in its confidential and *ex parte* Appendices A and B will be assessed on these criteria.

³ *Prosecutor v. Brđanin and Talić*, “Decision on Motion by Prosecution for Protective Measures”, Case No. IT-99-36-PT, 3 July 2000 (“Brđanin Decision”), para. 31.
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III. DECISION ON THE PROSECUTION'S MOTION

7. The Prosecution seeks protective measures under Rules 69 and 75 for 36 witnesses and these applications are supported by the declarations of investigators set out in confidential and *ex parte* Annex C to the instant Motion.
8. 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. Some are seeking relocation in connection with their evidence and delayed disclosure will also facilitate this process.
9. The Prosecution are seeking three particular measures:
 - (a) that the witnesses be referred to throughout the entire proceedings by pseudonym;
 - (b) that the statements of the witnesses not be disclosed at all until 30 days before a firm trial date of the charges set out in the Croatia indictment (for witnesses whom it is proposed will testify concerning the Croatia charges alone or the Bosnia and Croatia charges together) and 30 days prior to a firm trial date for the commencement of hearing the Bosnia charges (for witnesses it is proposed will testify concerning the Bosnia charges alone);
 - (c) that when the statements are disclosed in unredacted form, they be disclosed 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.

Furthermore, the Prosecution seek orders that the accused and his appointed associates be forbidden from disclosing the material 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 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 material to them.

10. With respect to delayed disclosure sought on behalf of these witnesses identified in confidential and *ex parte* Annexes A and B to the instant Motion, the Trial Chamber has applied the criteria set out above and determined that the protective measures sought under Rules 69 and 75 are appropriate in respect of all witnesses identified and that such orders are consistent with the rights of the accused. The Trial Chamber further notes that it has already made similar orders with respect to witnesses giving evidence concerning the Kosovo indictment in these proceedings.
11. With respect to the staggered disclosure of the statements of witnesses depending on whether they are to testify with respect to the Croatia or Bosnia indictment, the Trial Chamber notes that it has, in the past, declined to distinguish between the proposed start of the hearing of charges in the Croatia indictment and the Bosnia indictment, and has ordered unredacted disclosure pursuant to Rule 69 to take place by 26 July 2002 (based on the proposed commencement of the Croatia and Bosnia parts of the proceedings of 26 August 2002). Whilst these witnesses have special security concerns, the orders the Chamber makes protect against disclosure of the identity of the witnesses until shortly before they are to testify. Staggered disclosure based upon the commencement of the hearing of charges concerning the Croatia and Bosnia indictments is undesirable, and the Trial Chamber will require disclosure of redacted statements of all the witnesses set out in Annexes A and B by 26 July 2002, unless otherwise ordered.
12. Finally, the Prosecution seeks orders that the accused and his appointed associates be ordered not to disclose the material 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). Furthermore, orders are sought 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 material to them. It is noted by the Prosecution that the Trial Chamber has declined in respect of the Bosnia proceedings to order the accused and *amici curiae* to obtain the signing of non-disclosure agreements by third parties before material can be provided to them and the keeping of records of such disclosure. However, it is argued that given the Trial Chamber's statement that it would not be *generally* useful to make such orders and that specific circumstances exist with respect to these witnesses, it is appropriate to make such an order in respect of this application. These specific circumstances are the exceptional security risks attaching to these witnesses and that they are very limited in number. The Trial Chamber accepts that in such circumstances, the making the orders

sought in this respect would better facilitate the protection of these sensitive witnesses and would be manageable. Accordingly, these orders will be made.

IV. DISPOSITION

13. For the foregoing reasons, the Trial Chamber **ORDERS** as follows:

- (1) The 36 witnesses for whom the Prosecution makes applications, identified in confidential and *ex parte* Annexes A and B of the instant Motion, are granted protective measures in accordance with Rules 69 and 75 of the Rules as follows:
 - (a) the witnesses shall be identified and referred to by the pseudonym mentioned in confidential and *ex parte* Annexes;
 - (b) the statements of the witnesses, and exhibits which may be disclosed through those witnesses, redacted so as to remove identifying information, shall be disclosed to the accused, his appointed associates and *amici curiae* by 26 July 2002, unless otherwise ordered by the Trial Chamber;
 - (c) the unredacted statements and related exhibits of the witnesses shall be disclosed to the accused and his appointed associates not less than ten days, and in the case of the *amici curiae* not less than 30 days, before the witness is expected to testify; and
 - (d) the accused and his appointed associates shall not disclose the material to third parties except to the extent directly and specifically necessary for the preparation and presentation of the defence case. The *amici curiae* shall not disclose the material to third parties except to the extent directly and specifically necessary for the assistance of the Trial Chamber. The accused, his appointed associates and *amici curiae* are required to obtain non-disclosure agreements from third parties as a precondition for release of the material to them.⁴

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



Richard May
Presiding

Dated this third day of May 2002
At The Hague
The Netherlands

[Seal of the Tribunal]

⁴ Such an agreement is set out in Annex D to the instant Motion. This document is currently under seal and the Prosecution should make this available to the parties so that they might comply with it.