



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: 25 July 2002

Original: ENGLISH

IN THE TRIAL CHAMBER

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

Registrar: Mr. Hans Holthuis

Decision of: 25 July 2002

PROSECUTOR

v.

SLOBODAN MILOŠEVIĆ

**PUBLIC VERSION OF THE CONFIDENTIAL DECISION
ON THE PROSECUTION'S MOTION TO GRANT
SPECIFIC PROTECTION PURSUANT TO RULE 70**

Office of the Prosecutor:

Mr. Geoffrey Nice
Mr. Dirk Ryneveld
Ms. Hildegaard Uertz-Retzlaff
Mr. Dermot Groome

The Accused:

Slobodan Milošević

Amici Curiae:

Mr. Steven Kay
Mr. Branislav Tapušković
Mr. Michail Wladimiroff

This is the public and redacted version of the Trial Chamber's Confidential "Decision on the Prosecution's Motion to Grant Specific Protection Pursuant to Rule 70" issued today, 25 July 2002.

1. On 30 May 2002 the Office of the Prosecutor ("Prosecution") applied in open session for the Trial Chamber to grant an order that the representative of a supplying country be present in court during the evidence of a particular witness, that the Prosecution's questioning be limited to a detailed outline agreed by the supplying government and that the scope of cross-examination be limited to the scope of direct examination: and that there should be an order in advance of the testimony to that effect.¹
2. In private session on 10 June 2002 the Prosecution clarified the position as follows. The witness concerned is a [...]. The authorisation for his giving of evidence is conditioned on the obtaining from the Trial Chamber of an order prior to his giving of evidence that allows for government attorneys to attend the hearing inside the courtroom and to advise the witness as necessary. The need for the lawyers to be present is to deal with issues of national security which may arise and to deal "with compliance with the Rule 70 agreement itself."² If the pre-condition is met, the witness would give evidence [...].³
3. In its confidential written submission "Prosecution Submission in Relation to Rule 70" of 3 July 2002 ("Prosecution Submission"), the Prosecution added that the witness, [...] ("Witness"), and the information he may be able to provide were identified to the Prosecution confidentially by the [...] Government ("Government") for the purposes of generating new evidence subject to the terms of Rule 70 of the Rules of Procedure and Evidence ("Rules").⁴ (The oral and written submissions will be referred to together as the "Prosecution's Motion").

¹ Transcript page ("T.") 5953.

² T. 6570-72, private session.

³ T. 6571, private session. Confidential "Prosecution Submission in Relation to Rule 70", 3 July 2002, para. 22.

⁴ Prosecution Submission, para. 1.

4. The Prosecution thus relies on Rule 70 of the Rules,⁵ which provides that the Prosecutor may not disclose, without consent, the initial information, or its origin, provided on a confidential basis (and which has been used solely for the purpose of generating new evidence),⁶ but if the Prosecutor elects “to present as evidence any testimony, document or other material so provided” the Trial Chamber “may not order either party to produce additional evidence received from the person or entity providing the initial information”;⁷ and 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 grounds of confidentiality.”⁸
5. In the Trial Chamber’s view this Rule clearly sets out a regime for the protection of those who provide confidential information or “leads” which allow the Prosecutor to pursue lines of inquiry; and if the Prosecutor chooses to introduce this information into evidence (in whatever form is appropriate) further protection is provided.⁹

⁵ Rule 70 is entitled “Matters not Subject to Disclosure” and the relevant parts read:

- (A) [...]
- (B) If the Prosecutor is in possession of information which has been provided to the Prosecutor on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information and shall in any event not be given in evidence without prior disclosure to the accused.
- (C) If, after obtaining the consent of the person or entity providing information under this Rule, the Prosecutor elects to present as evidence any testimony, document or other material so provided, the Trial Chamber, notwithstanding Rule 98, may not order either party to produce additional evidence received from the person or entity providing the initial information, nor may the Trial Chamber for the purpose of obtaining such additional evidence itself summon that person or a representative of that entity as a witness or order their attendance. A Trial Chamber may not use its power to order the attendance of witnesses or to require production of documents in order to compel the production of such additional evidence.
- (D) 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 grounds of confidentiality.
- (E) The right of the accused to challenge the evidence presented by the Prosecution shall remain unaffected subject only to the limitations contained in paragraphs (C) and (D).
- (F) [...]
- (G) Nothing in paragraph (C) or (D) above shall affect a Trial Chamber’s power under Rule 89 (D) to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

⁶ Rule 70(B).

⁷ Rule 70(C) (emphasis supplied).

⁸ Rule 70(D) (emphasis supplied).

⁹ The arguments of the *Amicus Curiae* at the hearing on 5 July 2002 were to the effect that Rule 70 is placed in the section of the Rules dealing with pre-trial proceedings and is designed to ensure that

6. The Prosecution submits that the qualification in Rule 70(B) that the information must have been used “solely for the purpose of generating new evidence” is intended to apply to the exemption from disclosure and has no application to the position at trial which is governed by Rule 70(C) and (D).¹⁰ Thus, the reference to the word “testimony” in Rule 70(C) makes it clear that the information referred to in that part of the Rule is not the same as the information to which Rule 70(B) applies.¹¹ According to the Prosecution the phrase “any testimony, document or other material so provided” in Rule 70(C) is intended as a reference to “provided on a confidential basis” from Rule 70(B).¹² The Prosecution further submits that Trial Chamber II in *Brdanin and Talić* was wrong to interpret the phrase “has been used solely for the purpose of generating new evidence” as qualifying the information under Rule 70(B), (C) and (D).¹³
7. The Trial Chamber is unable to accept this submission. As the words emphasised in paragraph 4, above, show, there is a continuity throughout the Rule. The reference in Rule 70(C) to the information “so provided” is a clear reference to the information referred to in Rule 70(B), as is the reference to “the information” in Rule 70(D). For these reasons the Prosecution’s submission is rejected.
8. During the oral hearing in closed session on 5 July 2002 the Prosecution also argued that the object of the Rule was to ensure that the provider of information can be confident that the terms upon which the witness had been provided would be respected.¹⁴ They relied on Decisions of the three Trial Chambers of the Tribunal in *Blaškić, Kordić and Čerkez*, and *Brdanin and Talić*¹⁵ and said that the

information can be shared with the Office of the Prosecutor without fear of disclosure, *i.e.* it is the “lead” which is protected in trial. T. 7619-21, closed session.

¹⁰ Prosecution Submission, paras. 9 - 14.

¹¹ *Ibid.*, para. 14.

¹² *Ibid.*

¹³ *Ibid.*, para. 16, referring to *Prosecutor v. Brdanin and Talić*, Case No. IT-99-36-T, “Public Version of the Confidential Decision on the Alleged Illegality of Rule 70 of 6 May 2002”, 23 May 2002, paras. 19 and 21.

¹⁴ T. 7609-10, closed session.

¹⁵ *Prosecutor v. Blaškić*, Case No. IT-95-14-T, “Decision of Trial Chamber I on the Prosecutor’s Motion for Video Deposition and Protective Measures”, 13 November 1997; *Prosecutor v. Kordić and Čerkez*, Case No. IT-94-14/2-T, Confidential and *Ex Parte* “Order on Prosecution Request for Ruling Concerning the Testimony of a Witness”, 31 May 1999; *Prosecutor v. Brdanin and Talić*, Case No. IT-99-36-T, “Public Version of the Confidential Decision on the Alleged Illegality of Rule 70 of 6 May 2002”, 23 May 2002.

Government had conditioned its relationship with the International Tribunal in reliance upon the *Blaškić* Decision.¹⁶

9. On the other hand, the *Amicus Curiae* argued at the same hearing that Rule 70 cannot be used as a policy instrument to allow a third party to control the admission of evidence in a trial.¹⁷ Rather, the *Amicus Curiae* submitted in their written observations, it is for the Prosecution to satisfy the Trial Chamber that Rule 70(B) applies: if not, the conditions requested are an unwarranted interference in the running of proceedings by the Trial Chamber. For witnesses who do not fall into the special Rule 70 category the usual rules of cross-examination should apply and participation by lawyers for a third party should be used sparingly.¹⁸
10. The Trial Chamber is not satisfied, on the material presented, that the initial information in this case was provided to allow the Prosecutor to pursue lines of inquiry or solely for the purpose of generating new evidence. Rather than information, it was the provision of a witness who the Prosecution could have found in any case, and who is corroborating evidence about [...] which the Prosecution already had. Therefore, the Trial Chamber does not find that Rule 70(B) applies.
11. Nevertheless, the Trial Chamber will review the authorities relied upon by the Prosecution to examine the approach taken by the Trial Chambers in relation to Rule 70. In this connection it should be noted that States have legitimate national security concerns which international tribunals must address, as do national jurisdictions by way of public interest immunity or other means. This is directly addressed in Rule 54*bis* of the Rules which concerns orders directed to States for the production of documents.
12. The view of the State in question is that Rule 70 provides it with the right to impose conditions it deems appropriate on the testimony of a witness.¹⁹ It should, however, be emphasised that it is not only this Government which is affected by

¹⁶ T. 7611-13, 7617-18, closed session.

¹⁷ T. 7622, closed session.

¹⁸ Confidential "Observations by the *Amici Curiae* upon the Use of Rule 70", 17 June 2002, paras. 13 – 16.

¹⁹ On 13 June 2002, the Prosecution read out in court (in private session) the position of the Government in this matter. T. 6945-48, private session.

this question: it will affect any government providing information in these proceedings. It should also be noted that it is not only questions of national security which may give rise to States' concerns: information may also be sensitive or confidential and in need of protection on other grounds, e.g. security of an individual; protection of sources of information; or, to ensure effectiveness of ongoing operations or not to jeopardise them.

13. The starting point in the authorities is the *Blaškić* Decision of 13 November 1997.²⁰ In that case Trial Chamber I applied Rule 70 in circumstances very similar to the instant case. The Trial Chamber pointed out (in a passage on which the Prosecution relies) that the exceptions from disclosure in Rule 70 "permit the use, as and when appropriate, of certain information which, in the absence of explicit provisions, would either not have been provided to the Prosecutor or have been unusable on account of its confidential nature or origin".²¹ The Trial Chamber held that the information in that case had been obtained under Rule 70 and that the condition of confidentiality was satisfied. It did not consider it necessary to decide whether the information, obtained confidentially, must also have been used solely for the purpose of generating new evidence, since it found that the initial information had enabled the Prosecutor to obtain, from the witness, information which the witness might otherwise have been unwilling to provide and, hence, the information had been used solely for the purpose of generating new evidence.²² But the Trial Chamber did note that the initial information might become evidence if it is introduced as such at the trial or it might generate new evidence: in the latter case, in principle, new evidence would not be entitled to protection under Rule 70 as its provisions protect the initial information and its origin but not any new evidence collected.²³ In conclusion the Trial Chamber granted the Prosecution's motion, applied Rule 70(D), limited the scope of cross-examination to the scope of direct examination (which, itself, had been approved by the government) and allowed a government representative to be present and to

²⁰ *Prosecutor v. Blaškić*, Case No. IT-95-14-T, "Decision of Trial Chamber I on the Prosecutor's Motion for Video Deposition and Protective Measures", 13 November 1997. (In one place of this Decision, it is stated that it was issued on 11 November 1997).

²¹ *Ibid.*, para. 10; Prosecution Submission, para. 6.

²² *Ibid.*, paras. 17 - 21.

²³ *Ibid.*, para. 22.

address the Chamber. The Trial Chamber also allowed the witness to give evidence in closed session.²⁴

14. On 31 May 1999 in *Kordić and Čerkez* Trial Chamber III ruled on a motion from the Prosecution seeking a ruling as to whether a serving diplomat of [another] government of might be called as a witness and whether the provisions of Rule 70 might be applied to the witness.²⁵ The Trial Chamber was not persuaded of the applicability of Rule 70 but was satisfied that the relief requested by the Prosecution was appropriate and therefore permitted a representative of the government to be present in the courtroom and restricted cross-examination to matters arising from the evidence-in-chief (subject to the overriding discretion of the Trial Chamber). This witness, too, was allowed to give evidence in closed session.²⁶
15. The final Decision is that of Trial Chamber II in *Brdanin and Talić*.²⁷ This Decision is not of immediate assistance in the present case since it concerns the right of the Defence to obtain material passed to the Prosecutor pursuant to Rule 70. However, in a passage on which the Prosecution relies the Trial Chamber said that the function of Rule 70 is akin to the concept of public interest immunity available in some systems of law, which has been used to protect the identity of informers for their own safety as well as to ensure that the authorities have a continuous supply of information from these sources. "In addition such immunity is regularly extended when disclosing certain information to the defence might jeopardise the security of police or military operations."²⁸
16. Based on the above review, it appears that no settled practice has been established in the International Tribunal. To argue that would be to rely on one authority, *Blaškić*, and it is to be noted that this Trial Chamber declined to apply Rule 70 in

²⁴ *Ibid.*, para. 38. In the same case, Trial Chamber I also made orders limiting the scope of testimony of two witnesses whom the Trial Chamber itself summoned and allowing two government representatives to be present in each case; but the Trial Chamber stated in each case that Rule 70 could not be applied in the circumstances. *Prosecutor v. Blaškić*, Case No. IT-95-14-T, "Decision of Trial Chamber I on Protective Measures for General Philippe Morillon, Witness of the Trial Chamber", 12 May 1999; *Prosecutor v. Blaškić*, Case No. IT-95-14-T, "Decision of Trial Chamber I on Protective Measures for Mr. Jean-Pierre Thebault, Witness of the Trial Chamber", 13 May 1999.

²⁵ *Prosecutor v. Kordić and Čerkez*, Case No. IT-94-14/2-T, Confidential and *Ex Parte* "Order on Prosecution Request for Ruling Concerning the Testimony of a Witness", 31 May 1999.

²⁶ *Ibid.*

²⁷ *Prosecutor v. Brdanin and Talić*, Case No. IT-99-36-T, "Public Version of the Confidential Decision on the Alleged Illegality of Rule 70 of 6 May 2002", 23 May 2002.

Kordić and Čerkez. On the other hand, it is clear that an expectation has grown up on the part of States that information could be provided confidentially by them to the Prosecutor which would then be treated confidentially and this would involve special arrangements being made to limit the evidence at trial.

17. The expectation of States that their national security concerns will be addressed by the International Tribunal is reinforced by the regime under the Rome Statute of the International Criminal Court ("Rome Statute"). It should be noted that the International Tribunal is not bound by the rules of the International Criminal Court, but that it can seek guidance from these rules, where appropriate.²⁹ Article 93(4) of the Rome Statute confirms the right of States to deny a request for assistance "only if the request concerns the production of any documents or disclosure of evidence which relates to its national security." The protection of national security information is governed by Article 72 of the Rome Statute: Article 72(4) permits a State the right to intervene if it learns that its information or documents "are being, or are likely to be, disclosed at any stage of the proceedings, and it is of the opinion that disclosure would prejudice its national security interests". The Article thus sets out procedures for resolving the matter through co-operative means.³⁰ In the event that no such resolution is reached (and the evidence is relevant and necessary for the establishment of the guilt or innocence of the accused), the Court may, pursuant to Article 72(7)(b)(i), order the disclosure of the information.³¹ However, one commentator has stated that there are few situations in which the Court would order such disclosure of national security information: so long as the information is in the possession of the Prosecutor under a confidentiality agreement under Article 54(3)(e), or the State

²⁸ *Ibid.*, para. 18.

²⁹ In 1998 in *Furundžija* Trial Chamber II noted that although the Rome Statute had not yet entered into force, it was adopted by an overwhelming majority of States and that in many areas the Rome Statute "may be regarded as indicative of legal views, i.e. *opinio juris* of a great number of States." It also stated that "[d]epending on the matter at issue, the Rome Statute may be taken to restate, reflect or clarify customary rules or crystallise them, whereas in some areas it creates new law or modifies existing law. At any event, the Rome Statute by and large may be taken as constituting an authoritative expression of the legal views of a great number of States." *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, "Judgement", 10 December 1998, para. 227. The Appeals Chamber approved this finding in *Prosecutor v. Tadić*, Case No. IT-94-1-A, "Judgement", 15 July 1999, para. 223. It should be noted that pursuant to Article 126, the Rome Statute of the International Criminal Court entered into force on 1 July 2002.

³⁰ Article 72(5) of the Rome Statute.

³¹ Article 72(7) of the Rome Statute.

invokes its ground of refusal under Article 93(4), the Court cannot order disclosure.³²

18. No specific Rule applies to this situation in the Rules of the International Tribunal. However, in such situations, the Trial Chamber is satisfied that a State has a right to specific measures for the giving of evidence by a witness, for purposes of protecting information which the State considers to be prejudicial to its security interests (hereafter referred to as "confidential information"). The practice of the International Tribunal supports this right, as well as the Rome Statute, although protective measures by the Trial Chambers have varied. This is a practice which the Trial Chamber approves and will apply. This can best be done by limiting the evidence of the Witness to relevant and non-confidential matters and in this exceptional circumstance, by applying Rule 90(H) restrictively to limit the cross-examination. Accordingly, in order to protect the security interests of the Government which has provided confidential information to the Prosecution, the Trial Chamber will rule that:

- (a) the examination-in-chief shall be tailored by the Prosecution to exclude any confidential information;
- (b) in cross-examination the accused will not be permitted to ask questions and seek information beyond that provided in the subject matter of the evidence-in-chief;
- (c) questions as to credibility will be permitted provided that the answers are not liable to reveal confidential information.

19. In this connection it should be noted that any potential injustice to the accused by restricting the cross-examination can be addressed by the exclusion under Rule 89(D) of any evidence.

20. Two representatives of the Government may be present in Court during the testimony of the Witness. In the circumstances of this case, their concerns may be

³² D.K. Piragoff in "The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results", Ed. R.S. Lee, 1999, p. 292. See also Rule 82 of the Rules of Procedure and Evidence of the International Criminal Court.

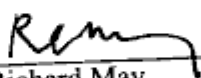
voiced to the Trial Chamber by the Prosecution, and there is no need for them to address the Court.

DISPOSITION

21. For the foregoing reasons the Trial Chamber **GRANTS** the Prosecution's Motion in part, in that it **DECIDES** that:

- (a) the examination-in-chief shall be tailored by the Prosecution to exclude any confidential information;
- (b) in cross-examination the accused will not be permitted to ask questions and seek information beyond that provided in the subject matter of the evidence-in-chief;
- (c) questions as to credibility will be permitted provided that the answers are not liable to reveal confidential information;
- (d) two representatives of the Government may be present in the courtroom during the testimony of the Witness.

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


Richard May
Presiding

Dated this twenty-fifth day of July 2002
At The Hague
The Netherlands

[Seal of the Tribunal]