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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 No. IT-02-54-T
Date: 10 November 2009
Original: English

IN A SPECIALLY APPOINTED CHAMBER

Before: Judge O-Gon Kwon, Presiding
Judge Bakone Justice Moloto
Judge Christoph Flügge

Registrar: Mr. John Hocking

Decision of: 10 November 2009

PROSECUTOR

v.

SLOBODAN MILOŠEVIĆ

PUBLIC REDACTED VERSION

**DECISION ON APPLICATION OF THE PROSECUTOR
OF THE TRIBUNAL FOR VARIATION OF
PROTECTIVE MEASURES**

The Office of the Prosecutor
Mr. Serge Brammertz

Prosecutor's Office of Bosnia and Herzegovina

Government of Bosnia and Herzegovina

THIS SPECIALLY APPOINTED CHAMBER (“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”) is seized of the “Prosecutor’s application for variation of protective measures with confidential and *ex parte* Annexes A and B”, filed confidentially and *ex parte* on 18 September 2009 (“Application”), and hereby renders its decision thereon.

I. Procedural history

1. On 23 September 2009, the President of the Tribunal assigned this Chamber to consider the Application.¹
2. On 7 October 2009, the Chamber ordered the Registry Victims and Witnesses Section (“VWS”) pursuant to Rule 75(J) of the Rules of Procedure and Evidence (“Rules”) to contact witnesses B-1116, B-1447 and B-1449 to seek their independent consent with respect to the disclosure of their confidential information.²
3. On 10 October 2009 the VWS filed a first submission concerning B-1447 and B-1449.³ On 12 October 2009 the VWS filed an additional submission concerning B-1116, whom it had been unable to contact within the deadline prescribed by the Chamber’s Order of 7 October 2009.⁴

II. Submissions

4. The Prosecution requests variation of protective measures granted to B-1116, B-1447 and B-1449 in the *Slobodan Milošević* case so that it may disclose to the Prosecutor’s Office of Bosnia and Herzegovina (“POBiH”) the statements, transcripts, exhibits and other material related to these three witnesses.⁵ The Prosecution seeks to disclose this information in fulfilment of its obligation, pursuant to the Tribunal’s Completion Strategy which requires assistance to be given to national judicial authorities, to transfer “Category II” cases to domestic jurisdictions.⁶ These are cases which

¹ Order assigning a Chamber to consider an application by the Prosecution for the variation of protective measures, filed confidentially and *ex parte* on 23 Sep 2009.

² Order on application pursuant to Rule 75 filed by the Office of the Prosecutor of the Tribunal for variation of protective measures, filed confidentially and *ex parte* on 7 Oct 2009, p. 2.

³ Rule 33(B) submission in compliance with the “Order on application pursuant to Rule 75 filed by the Office of the Prosecutor of the Tribunal for variation of protective measures” dated 7 October 2009, filed confidentially and *ex parte* on 9 Oct 2009.

⁴ Rule 33(B) submission in compliance with the “Order on application pursuant to Rule 75 filed by the Office of the Prosecutor of the Tribunal for variation of protective measures” dated 7 October 2009, filed confidentially and *ex parte* 12 Oct 2009.

⁵ Application, para. 1. The Chamber notes that according to the information contained in Confidential Annex A to the Application, none of the Witnesses provided *viva voce* testimony in the *Slobodan Milošević* trial.

⁶ Application, paras 2, 12.

were investigated by the Prosecution but in relation to which an indictment was not issued. The Prosecution submits that the information provided by the Witnesses is of importance to a Category II case concerning the further investigation and prosecution of serious crimes [REDACTED].⁷

5. The Prosecution submits that the transfer of Category II cases is a key component of the Completion Strategy.⁸ It explains that “[f]or the purposes of identification and selection of material relevant for a Category II case, the OTP reviews all available investigative material previously collected by the OTP” and “[...] reviews all evidence admitted in related ICTY cases to determine its relevance to the crimes committed by the identified suspects”.⁹ In so doing it “identifies all protective measures ordered in respect of the witnesses relevant to a Category II Case” and that “[b]ound by such court orders, the OTP can only hand over non-confidential material to national authorities.”¹⁰

6. In the Prosecution’s view, “[s]uccessful implementation of the completion strategy requires that the OTP is in a position to transfer all available material relevant to a Category II Case, including the information and evidence provided by protected witnesses.”¹¹ Therefore, according to the Prosecution, unless the protective measures are varied prior to the transfer of information, the casefile of the Category II case remains incomplete because the Prosecution “cannot reveal the relevance or content of the entire evidentiary material to the national prosecutors.”¹² In this respect it submits that the incomplete transfer will delay “any attempt of the receiving authorities to quickly get a full picture including the relevance of protected witness material” and “hinders national authorities to conduct an investigation in an efficient and appropriate manner.”¹³

7. The Prosecution submits it has sought and secured the consent of the Witnesses for the disclosure of their identity and the release of their witness material to the POBiH.¹⁴ In addition, the Prosecution has included undertakings by the Chief Prosecutor of the POBiH Marinko Jurčević and the Government of Bosnia and Herzegovina (“Government of BiH”) represented by the Minister of Justice Slobodan Kovač with respect to ensuring the protection of the Witnesses and maintaining the confidentiality of the information provided by them.¹⁵ The Prosecution notes that it is “the only

⁷ Application, paras 2, 4, 13.

⁸ Application, para. 6.

⁹ Application, para. 9.

¹⁰ Application, para. 10.

¹¹ Application, para. 11.

¹² Application, para. 11.

¹³ Application, para. 11.

¹⁴ Application, para. 14 and confidential and *ex parte* Annex A.

¹⁵ Application, para. 15 and confidential and *ex parte* Annex B.

authority with access to the entire material”, which includes “various categories of restricted and classified material as well as witness material protected by ICTY Court orders.”¹⁶

III. Discussion

8. The Application was filed by the Prosecution pursuant to Rule 75 and the Chamber was appointed to review the Application pursuant to this Rule.¹⁷ As the Application concerns a request by the Prosecution for the variation of protective measures for the purpose of transferring confidential material relating to a Category II case, it may be distinguished from requests made by parties in other jurisdictions pursuant to Rule 75(H) for variation of protective measures in respect of cases heard before the Tribunal.

9. Prior to the entry into force on 12 July 2007 of Rule 75(H) as it currently reads, third-party applicants would seek the Prosecution’s assistance in obtaining confidential material of witnesses who have testified in proceedings before the Tribunal. In such situations, the Prosecution would apply on their behalf pursuant to Rule 75 for variation of protective measures. The Prosecution was considered to have a legitimate purpose for making the requests in view of United Nations Security Council Resolutions 1503 and 1534, which encourage assistance to domestic jurisdictions prosecuting violations of international humanitarian law in the former Yugoslavia.¹⁸

10. The Chamber notes that the Prosecution has made several such applications concerning Category II cases following the entry into force of Rule 75(H) and that Chambers seized of these applications have taken different approaches.¹⁹ This difference revolves around the question of whether or not – in light of the amendment of Rule 75(H) – it would be appropriate for the external applicant that contacted the Prosecution for assistance to file an application of its own after having

¹⁶ Application, para. 9.

¹⁷ This Chamber as currently composed was specially appointed to deal with applications pursuant to Rule 75(H)(iii) of the Rules.

¹⁸ United Nations Security Council Resolutions 1503/2003 (S/RES/1503 (2003)) and 1534/2004 (S/RES/1534 (2004)). See, for example, *Prosecutor v. Naletilić and Martinović*, Case No. IT-09-34-A, Decision on the Prosecutor’s application for variation of protective measures, filed confidentially and *ex parte* on 6 March 2007 (“*Naletilić and Martinović* Decision”), para. 7; *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-A, Decision on the Prosecutor’s applications for variation of protective measures, filed confidentially and *ex parte* on 12 April 2007 (“*Blagojević and Jokić* Decision”, paras 15-16; *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on the Prosecution’s application for variation of protective measures, filed confidentially and *ex parte* on 1 June 2007, para. 10.

¹⁹ *Prosecutor v. Momčilo Krajišnik*, Case No. IT-99-36-A, Decision on Prosecutor’s application for variation of protective measures submitted on behalf of the Prosecutor’s Office of Bosnia and Herzegovina, filed confidentially and *ex parte* on 4 March 2008 (“*Krajišnik* Decision”); *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on application of the Prosecutor of the Tribunal for variation of protective measures in order to release confidential information to the Prosecutor’s Office of Bosnia and Herzegovina, filed confidentially and *ex parte* on 4 April 2008 (“*Milošević* Decision”); *Prosecutor v. Radoslav Brdanin*, Case No. IT-99-36-A, Decision on confidential and *ex parte* Prosecution application for variation of protective measures (“*Brdanin* Decision”), filed confidentially and *ex parte* on 20 June 2008.

been provided with “sufficient information” with respect to the material in possession of the Prosecution.²⁰

11. This Chamber considers that the process of transfer of confidential case material related to Category II cases should be a practical one, while at the same time taking due regard of the protection granted to witnesses by the Tribunal. In such situations, where persons who may be subject of protective measures have not testified before the Tribunal, it is not to be expected that an external applicant would know what confidential material the Prosecution may have in its possession which may be relevant to a domestic case. An application by the Prosecution is, thus, the most practical approach with respect to the transfer of Category II case material to domestic jurisdictions. The Chamber considers that the legal basis for such a variation is found in Rule 75 which, as the general rule, governs measures for the protection of victims and witnesses. This interpretation of Rule 75 is supported by the above-mentioned Security Council Resolutions, which state that national institutions prosecuting violations of international humanitarian law in the former Yugoslavia are to be assisted in their work.²¹

12. While Rule 75(H) does not apply to requests made by the Prosecution for the transfer of Category II case material, the Chamber deems it appropriate that a number of the procedural safeguards set out in this provision be applied analogously to such requests.

13. First, the Chamber considers that VWS is to be involved pursuant to Rule 75(J) in ascertaining whether the witnesses in question consent to the variation of protective measures being sought. The Tribunal is under a statutory obligation to ensure that proceedings are conducted with due regard to the protection of victims and witnesses.²² It is noted that this obligation requires that prior to any variation of protective measures granted to a witness, in particular in relation to a proceeding in another jurisdiction, that witness must be given an opportunity to be heard.²³ Witnesses are not the property of any party and the Chamber, therefore, considers that the VWS, as

²⁰ *Krajišnik* Decision, para. 7; *Brdanin* Decision, paras 4-5; cf. *Milošević* Decision, paras 4-5.

²¹ S/RES/1503 (2003), pp 2-3: “*Recalling and reaffirming* in the strongest terms the statement of 23 July 2002 made by the President of the Security Council (S/PRST/2002/21), which endorsed the ICTY’s strategy for completing investigations by the end of 2004, all trial activities at first instance by the end of 2008, and all of its work in 2010 (ICTY Completion Strategy) (S/2002/678), by concentrating on the prosecution and trial of the most senior leaders suspected of being most responsible for crimes within the ICTY’s jurisdiction and transferring cases involving those who may not bear this level of responsibility to competent national jurisdictions, as appropriate, as well as the strengthening of the capacity of such jurisdictions”. See also *Milošević* Decision, para. 4; see also *Prosecutor v. Slobodan Milošević*, Case no. IT-02-54-T, Decision on Prosecution application for variation of protective measures, 18 May 2005, para. 6.

²² Article 22 of the Tribunal’s Statute. See also *Prosecutor v. Kordić and Cerkez*, Case no. IT-95-14/2-A, Decision on the Prosecutor’s application for variation of protective measures, filed confidentially and *ex parte* on 5 Sep 2006, para. 4.

²³ President’s “Decision on Registrar’s submission on a request from the Office of the Chief Prosecutor of Bosnia and Herzegovina pursuant to Rule 33(B)”, Case No. IT-05-85-Misc.2, 6 Apr 2005, paras 14-17.

a neutral and non-party section specifically tasked with providing protection and support to witnesses appearing before the Tribunal, is best placed to contact witnesses who are the subject of Prosecution requests.

14. Secondly, the Chamber deems it appropriate to consult any Judge who ordered the protective measures of the witness and who remains a Judge of the Tribunal before determining an application by the Prosecution, in the manner described in Rule 75(I). Thirdly, the Chamber considers that Rule 75(J) may be considered in the determination of an application where a witness does not consent to the variation sought. Thus, the Chamber may, if it considers that there is a compelling showing of exigent circumstances or where a miscarriage of justice would otherwise result, in exceptional circumstances order the variation of protective measures *proprio motu*. The Chamber considers that this provision is of particular relevance in situations such as the present, where the United Nations Security Council has mandated the Tribunal to assist domestic jurisdictions in their work.

15. Finally, the Chamber finds that in conformity with the obligations of member States of the United Nations under Article 29 of the Statute, the Prosecution should be required to submit with its application assurances provided by the judicial authorities that will receive the confidential material, as well as by the relevant government, that they will maintain the confidentiality of the material and ensure the protection of the witness or witnesses. The Chamber recalls that the Prosecution has submitted such undertakings with requests made prior to the entry into force of Rule 75(H) and does not see any reason why this procedure should be varied.

16. The Chamber emphasises that the procedure set out above is to be applied strictly to the transfer of Category II materials, the existence of which an external applicant is not by definition in a position to know about. This procedure does not replace the procedure as set out in Rule 75(H) as applied to requests made by external applicants for variation of protective measures of witnesses or materials relating to cases heard before the Tribunal.

17. Against this background, the Chamber finds that the Prosecution has demonstrated a legitimate purpose for seeking the variation of protective measures for the witnesses subject of the Application. Turning now to the current Application, the Chamber notes the Prosecution submission that it contacted the Witnesses and that they consent to the variation of their protective measures.²⁴ However, as stated above the Chamber deemed it appropriate to order VWS to ascertain whether the Witnesses consent to the variation of their protective measures. VWS has informed the Chamber that B-1449 agrees to the variation of the protective measures and the

disclosure of identity, contact information and witness material to the POBiH.²⁵ However, VWS also informs the Chamber that B-1116 and B-1447 do not consent to the variation of the protected measures.²⁶

18. The Chamber also sought the views of Judge Patrick Robinson, who was on the bench that ordered protective measures at issue in the Application and who remains a Judge of the Tribunal. Judge Robinson conveyed to the Chamber that he would have no objection to the variation of protective measures of B-1449. With respect to B-1116 and B-1447, who do not consent to the variation of their protective measures, Judge Robinson is of the view that a cautious approach must be taken with regard to witnesses who have refused consent.

19. On the basis of the information before it and in consideration of Rule 75(J), the Chamber is not convinced that exigent circumstances have been shown to exist or that a miscarriage of justice would result if the confidential information of B-1116 and B-1447 would not be provided to the POBiH. The Application will, therefore, be denied in this respect.

20. With respect to B-1449 the Chamber notes that this witness consents to the variation of protective measures sought in the Application and therefore finds it appropriate to grant this request. The Chamber notes that this witness did not testify before the Tribunal and that none of the witness's materials were sought for admission into evidence pursuant to Rule 92 *bis*. While on the basis of the information provided by the Prosecution it is not clear what other "material"²⁷ in addition to the witness's name and contact details it wishes to transfer to the POBiH, the Chamber will authorise the Prosecution to provide any material that the Prosecution has in its possession which the witness has provided to it.

III. Disposition

21. Pursuant to Articles 22, 29 of the Statute, Rules 54 and 75 of the Rules, and in acknowledgement of the Prosecution's duty to assist domestic jurisdictions as underscored by United Nations Security Council Resolutions 1503 and 1534, the Chamber:

GRANTS the Application IN PART;

²⁴ Application, para. 14.

²⁵ Rule 33(B) submission in compliance with the "Order on application pursuant to Rule 75 filed by the Office of the Prosecutor of the Tribunal for variation of protective measures" dated 7 October 2009, filed confidentially and *ex parte* on 9 Oct 2009; Rule 33(B) submission in compliance with the "Order on application pursuant to Rule 75 filed by the Office of the Prosecutor of the Tribunal for variation of protective measures" dated 7 October 2009, filed confidentially and *ex parte* on 12 Oct 2009.

²⁶ *Ibid.*

²⁷ Application, confidential and *ex parte* Annex A.

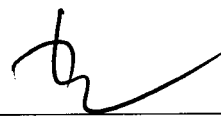
VARIES the protective measures of B-1449;

ORDERS as follows:

- (i) The Prosecution may release to the POBiH the identity and contact details of B-1449 and any other material and information that the witness has provided to the Prosecution and which is subject of his protective measures;
- (ii) The information and material disclosed shall be released to POBiH for the further investigation of the "Category II" case relating to [REDACTED] for which the material is being made available, and any trial proceedings that may result from the investigation of the suspects identified in this Category II case;
- (iii) The POBiH shall treat the disclosed information and material as confidential in accordance with existing provisions and agreements; in particular, no information regarding the fact that the B-1449 cooperated with the Tribunal or the information which he provided to the Prosecution shall be disclosed to any other party unless POBiH obtains assurances under threat of criminal sanction that this party will strictly maintain the confidentiality of this information;
- (iv) The Chief Prosecutor of the POBiH and the Government of BiH shall comply, upon release of the requested information and material to the POBiH, with the conditions in this Decision and as stated in their written undertakings contained in confidential and *ex parte* Annex B to the Application;
- (v) Should the POBiH wish to rescind, vary, or augment the protective measures for B-1449 in respect of information or material provided to the POBiH by the Prosecution, the POBiH shall apply to the Office of the President of the Tribunal and request the appropriate relief pursuant to Rule 75(H); and

DENIES the Application in relation to B-1116 and B-1447, without prejudice to the Prosecution filing a subsequent reasoned application addressing in detail the particular circumstances surrounding the relevant Category II case which justify variation of the protective measures which apply to B-1116 and B-1447 despite their lack of consent for such variation.

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



Judge O-Gon Kwon
Presiding

Dated this tenth day of November 2009

At The Hague

The Netherlands

[Seal of the Tribunal]