



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: 17 April 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: 17 April 2002

PROSECUTOR

v.

SLOBODAN MILOŠEVIĆ

**THIRD DECISION ON PROSECUTION MOTION FOR PROTECTIVE
MEASURES FOR VICTIMS AND WITNESSES PURSUANT TO RULE 69(A)**

The Office of the Prosecutor

Ms. Carla Del Ponte
Mr. Geoffrey Nice

Ms. Hildegard Uertz-Retzlaff
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 motion with *ex parte* appendices entitled "Prosecution Motion for Protective Measures for Victims and Witnesses Pursuant to Rule 69(A)" on 5 April 2002 ("the instant Motion"). The Motion seeks specific provisional protective measures for witnesses whose statements form part of the supporting material for the Bosnia Indictment as well as permission to withhold unredacted disclosure of such witnesses until 30 days prior to a firm trial date of the charges set out in the Bosnia Indictment in these proceedings. It follows an initial request by the Prosecution for provisional protective measures;¹ a Decision by the Trial Chamber on that Motion;² a request by the Prosecution for further time to contact witnesses³, an Order by the Trial Chamber granting the Prosecution more time⁴ and a second substantive decision on an application for particular protective measures.⁵

¹ "Prosecution Motion for Provisional Protective Measures Pursuant to Rule 69" on 4 January 2002 ("First Motion") and "Prosecution Motion for Provisional Protective Measures Pursuant to Rule 69: Prosecution Response to Order for Further Submissions" ("Second Motion"), which together made up the initial request.

² "Decision on Prosecution Motion for Provisional Protective Measures" issued on 19 February 2002 ("the Decision").

³ "Prosecution Request for Further Time to Contact Witnesses", filed on 1 March 2002 ("Further Time Request").

⁴ Decision on Prosecution Request for Further Time to Contact Witnesses" issued on 5 March 2002 ("Further Time Order").

⁵ "Decision on Prosecution Motion for Protective Measures for Victims and Witnesses" issued on 19 March 2002 ("the Second Decision").

II. THE LAW

2. The Prosecution relies Rule 69 of the Rules of Procedure and Evidence of the Tribunal ("Rules").
3. The Trial Chamber, having already made its orders with respect to the need for the Prosecution to make out a case for particular protective measures on a witness by witness basis, now considers the applications made in the instant Motion. Rule 69 (A) 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 refers to a further passage from the Decision of the Trial Chamber in the *Brđanin* 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 more.⁶ The Trial Chamber sees this as an important element of the first criterion set out above.

⁶ *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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5. The Prosecution applications concerning witnesses set out in its confidential and *ex parte* Appendix A will be assessed on these criteria.

III. DECISION ON THE PROSECUTION'S MOTION

6. The Prosecution seeks protective measures under Rule 69 (A) for 23 witnesses. Of those, a detailed application is made in respect of only three. Two of the three witnesses for whom specific applications for protective measures are made are supported by the declarations of investigators set out in confidential and *ex parte* Appendix B to the instant Motion. The Prosecution has been unable to contact the other 20 witnesses, despite efforts to locate them through the Agency for Information and Documentation in Bosnia and Herzegovina ("AID").
7. The Prosecution submits that these applications are based on a genuine danger or risk attaching to these particular witnesses and not simply to make it easier for the Prosecution to bring cases against other persons in the future.
8. With respect to protective measures sought on behalf of the three witnesses identified in confidential and *ex parte* Appendix A to the instant Motion, the Trial Chamber has applied the criteria set out above and determined that the Prosecution has satisfied the Chamber that protective measures under Rule 69 (A) are appropriate in respect all three witnesses.
9. With respect to the further 20 witnesses not contacted, the Prosecution submits that they should be granted protective measures under Rule 69 (A) despite the absence of an application setting out the grounds, if any, for such a request. It is argued that the Trial Chamber has acknowledged its affirmative duty to protect victims and witnesses, that exceptional circumstances exist in such a case involving large numbers of witnesses who could not be contacted despite diligent effort and that such an order would not prejudice the accused at a time when the trial of these charges is not likely to commence for many months. It is stated that the Prosecution would continue its efforts to contact these witnesses and, if able to do so, would immediately disclose the statements to the accused if the witness was not in fact in danger or at risk.
10. The Trial Chamber accepts that the Prosecution has had considerable difficulty contacting these witnesses and that diligent efforts to do so have been made by it. However, it is also noted that we gave a generous extension of time in which to contact witnesses, which has now expired, and that in the Further Time Order we expressly stated: "there will be no further extensions given with respect to the Trial Chamber's orders". The Prosecution will

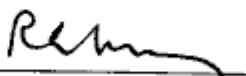
be required forthwith to make unredacted disclosure to the accused of the further 20 witnesses in question.

11. Finally, as stated in the Second Decision, the Trial Chamber believes that a period of 30 days prior to the timetabled trial date is an appropriate time within which the Prosecution must disclose the statements of witnesses granted protective measures under Rule 69 (A). The Chamber previously ordered that the Prosecution will be required to disclose the statements of witnesses relevant to the Bosnia indictment in unredacted form on 1 June 2002. The Prosecution now seeks an order that unredacted disclosure of all witnesses granted protective measures pursuant to Rule 69 (A) be made 30 days before a firm date of trial of the Bosnia charges. This request is in effect a request to vary the Chamber's previous order. The Trial Chamber provided in its previous order that the date for unredacted disclosure may be shifted if the Croatia and Bosnia parts of the trial were to commence on a later date (thus the words "unless otherwise ordered" were employed with reference to the deadline ordered). The Chamber notes that it currently envisages the Croatia and Bosnia parts of the trial will commence on 26 August 2002. Therefore, the Chamber will vary its previous order and the Prosecution will be required to make unredacted disclosure of all statements concerning witnesses granted protection pursuant to Rule 69 (A) by 26 July 2002, unless we order otherwise. Furthermore, the Trial Chamber reiterates that its order relates to the commencement of the Croatia and Bosnia parts of the trial and contemplates that unredacted disclosure will be made with respect to the two indictments at the same time, rather than on a staggered basis.

IV. DISPOSITION

12. For the foregoing reasons, the Trial Chamber **ORDERS** as follows:
- (1) The three witnesses for whom the Prosecution makes detailed applications, identified in confidential and *ex parte* Appendix A of the instant Motion, are granted provisional protective measures in accordance with Rule 69 and under the same conditions as set out in the Second Decision.
 - (2) The other twenty witnesses identified in confidential and *ex parte* Appendix A to the instant Motion will not be granted the protective measures sought and the Prosecution is ordered to disclose their unredacted statements forthwith.
 - (3) The statements of all witnesses for whom protective measures are granted pursuant to Rule 69 (A) shall be disclosed to the accused in unredacted form by 26 July 2002, unless otherwise ordered by the Trial Chamber.

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


Richard May
Presiding

Dated this seventeenth day of April 2002
At The Hague
The Netherlands

[Seal of the Tribunal]