

**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 AR108bis.2
Date: 20 September 2005
Original: English

THE APPEALS CHAMBER

Before: Judge Theodor Meron, President
Judge Fausto Pocar
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Wolfgang Schomburg

Registrar: Mr Hens Holthuis

Decision: 20 September 2005

PROSECUTOR

v.

SLOBODAN MILOŠEVIĆ

CONFIDENTIAL

**DECISION ON SERBIA AND MONTENEGRO'S REQUEST
FOR REVIEW**

The Office of the Prosecutor:
Ms. Carla Del Ponte
Mr. Geoffrey Nice QC

The Accused
Mr. Slobodan Milošević

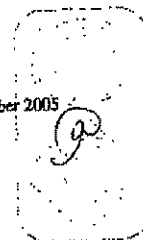
Court Assigned Counsel:
Steven Kay, QC
Ms. Gillian Higgins

**Government of Serbia and
Montenegro**
H.E. Rasim Ljajić
Ms. Sanja Milinković

Case No.: IT-02-54-AR108bis.2

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20 September 2005



1. Serbia and Montenegro has filed a request for a review of the Trial Chamber's decision rejecting its request for protective measures pursuant to Rule 54bis of the Rules of Procedure and Evidence ("Rules").¹ The Request is filed pursuant to Rule 108bis of the Rules.

Background

2. On 18 July 2005, the Trial Chamber by oral decision rejected an application by Serbia and Montenegro that evidence relating to personnel files of the Republika Srpska Army "VRS" be heard in closed session. The Trial Chamber found that the interest that Serbia and Montenegro sought to protect was not a vital national interest or a national security interest and, as such, could not justify the imposition of the protective measures sought.²

3. While Serbia and Montenegro made their application to the Trial Chamber pursuant to Rule 54bis, the personnel files of the VRS had been supplied by Serbia and Montenegro to the Prosecution voluntarily. They were not produced in response to an order of the Tribunal pursuant to Rule 54. Accordingly, Serbia and Montenegro's application was made after the documents had been submitted and not prior to its provision of them as envisaged by Rule 54bis. In earlier proceedings, the Trial Chamber had expressed its view that the protections of Rule 54bis should be available to a State which has provided documents voluntarily to the Tribunal. The Trial Chamber reasoned that a State should not be placed in a less advantageous position with respect to seeking protection for disclosed material because it had provided evidence in response to a Prosecution request to do so and not in conformity with a Rule 54 order for production.³ It was upon this basis that the Trial Chamber entertained the application pursuant to Rule 54bis.⁴

4. At the hearing, Serbia and Montenegro stated the following:

...the objective of our appearance before you today is to present arguments that will support our proposal to have protective measures granted in respect of the documents which the Prosecution wishes to bring into the proceedings. This has to do with national

¹ Confidential Serbia and Montenegro's Notification of the Request for Review of the Trial Chamber's Decision on Serbia and Montenegro's Request for Protective Measures Pursuant to Rule 54bis, Dated 11 July 2005, 1 August 2005 (Request for Review of the Decision of the Trial Chamber of 18 July 2005, Pursuant to Rule 108bis ("Request")).

² Trial Chamber Oral Decision Transcript Monday 18 July 2005, Closed Session T 42390-42391 (Transcript); (The Chamber reject the motion that portions of the personnel files identified in the annex to Serbia and Montenegro's motion be examined in closed session. The Chamber does not accept that Serbia and Montenegro's interest in the ICJ proceedings referred to qualifies either as a vital national interest or a national security interest, and thus we are not satisfied that disclosure of the files would be prejudicial either to Serbia and Montenegro's vital national interests or its national security interests"); ("Impugned Decision").

³ Transcript 42373. This was the Prosecution summary of the Trial Chamber's reasoning that was not disputed by the Trial Chamber.

⁴ Transcript 42393.

5. In response to the arguments presented, the Prosecution stated that it would not oppose the application of reasonable protective measures if disclosure of the material did impugn the national security interests of Serbia and Montenegro but questioned whether the Rules actually permit a Chamber to impose protective measures to protect "vital national interests" as well as national security interests.⁶ However, it argued that even if Rule 54bis did protect vital national interests, Serbia and Montenegro's interests in litigation before the ICJ was not a vital national interest of Serbia and Montenegro for the purpose of proceedings before the Tribunal. In its view, therefore, the claim of Serbia and Montenegro could not constitute reasonable grounds at law for the issuance of protective measures pursuant to Rule 54bis.⁷

6. After hearing the parties, the Trial Chamber ruled as follows:

The Chamber rejects the motion that portions of the personnel files identified in the annex to Serbia and Montenegro's motion be examined in closed session. The Chamber does not accept that Serbia and Montenegro's interest in the ICJ proceedings referred to qualifies either as a vital national interest or a national security interest, and thus we are not satisfied that disclosure of the files would be prejudicial either to Serbia and Montenegro's vital national interests or its national security interests.⁸

7. Following the Chamber's ruling, Serbia and Montenegro asked that the implementation of the decision be suspended to allow them to appeal under Rule 108bis of the Rules. The Prosecution undertook not to cross-examine on the material that day and Serbia and Montenegro subsequently filed a motion for a stay of the decision.⁹ The Trial Chamber issued a decision rejecting the motion for a stay on the basis that it had ruled on 19 July 2005 that "cross-examination will not deal with the contested material until the Appeals Chamber has pronounced on the matter", and a stay was therefore unnecessary.¹⁰

Competence of the Appeals Chamber

8. Rule 54bis (C) provides that a decision by a Judge or a Trial Chamber under paragraph (B) or (E) shall be subject to Appeals Chamber review under Rule 108bis or appeal. Rule 54bis(B) concerns the situation where a Judge or a Trial Chamber rejects a request for an order to a State to produce documents, and Rule 54bis (E) concerns the situation where a request for an order has been granted by a Judge or Trial Chamber without the State concerned being heard. Where that occurs,

⁶ Transcript 42378.

⁷ Transcript 42383-42384.

⁸ Transcript 42390-42391.

⁹ Confidential Serbia and Montenegro's Request for Temporary Stay of the Trial Chamber's Decision on Serbia and Montenegro's Request for Protective Measures Pursuant to Rule 54bis, Dated 11 July 2005, 19 July 2005.

Rule 54bis (E) (iii) provides that "a State may, within fifteen days of the service of the order, apply by notice to the Judge or Trial Chamber to have the order set aside, on the grounds that disclosure would prejudice national security interests".

9. In the circumstances of this case, the Appeals Chamber must first determine whether it is competent under the Rules to consider the Request for Review. This is because the application of Serbia and Montenegro to the Trial Chamber was not made in response to an order to produce documents pursuant to Rule 54 of the Rules requesting that it be relieved of the obligation to disclose pursuant to Rule 54bis (E). Rather, as already stated, Serbia and Montenegro had provided the documents to the Prosecution voluntarily and after that production, requested that protective measures be applied by the Trial Chamber pursuant to Rule 54bis. The Chamber heard Serbia and Montenegro as a matter of courtesy and not pursuant to an obligation to do so under that Rule.¹⁰ The Appeals Chamber finds that the Trial Chamber was in error in doing so. As a court of law, the Trial Chamber was obliged to find a basis for its competence to hear the matter under the Tribunal's Statute and Rules.

10. The Appeals Chamber considers that the Trial Chamber was correct to note that it had no explicit legal obligation under Rule 54bis to hear Serbia and Montenegro's application for protective measures under the circumstances of this case. However, the Appeals Chamber finds that the Trial Chamber's competence to consider the application may be implicitly inferred from Rule 54bis when read together with Article 29 of the Statute and Rule 39 of the Rules. Article 29(1) of the Statute obliges States to co-operate with the Tribunal, which includes the Prosecution, in its investigation of persons accused of committing serious violations of international humanitarian law. Under Rule 39(i) and (iii), in the conduct of its investigations, the Prosecution may seek the assistance of any State authority in its collection of evidence. Where a State does not comply with a request for assistance from the Prosecution, the Prosecution may request an order from a Trial Chamber to direct a State to produce certain evidentiary documents pursuant to Rule 39(iv) and Rule 54bis (E). Where such an order is issued, a State may contest it on grounds that disclosure of the documents would prejudice national security interests under Rule 54bis (E) (iii) and (F). Should the Trial Chamber nonetheless order the State to produce the documents, it may direct that appropriate protective measures be applied to allow for disclosure of the documents while still protecting the interests of the State under Rule 54bis (I).

¹⁰ Decision on Serbia and Montenegro Request for Temporary Stay of Trial Chamber Decision on Request for Protective Measures, 20 July 2005, para.7.

¹¹ Transcript 42393.

11. It is clear that the Tribunal's Rules have been intentionally drafted to incorporate safeguards for the protection of certain State interests in order to encourage States in their fulfilment of their cooperation obligations under the Tribunal's Statute and Rules. In light of the object and purpose of the Rules in this regard, the Appeals Chamber finds that where a State cooperates voluntarily with the Prosecution's request under Rule 39 in the production of documents without requiring the Prosecutor to seek an order from a Trial Chamber compelling that State to do so under Rule 39(iv) and Rule 54bis (E), a Trial Chamber may still, pursuant to Rule 54bis (I), direct for appropriate protective measures to be applied to the documents in the protection of a State's demonstrated national security interests. Whether the documents are being disclosed by the State voluntarily pursuant to the Prosecutor's request under Rule 39 or following a Trial Chamber's order under Rule 54bis (E), is irrelevant to this issue. To interpret the Rules otherwise, Rule 7D protections aside, would discourage States from voluntarily cooperating with the Prosecutor under Rule 39 in the first place and would result in States only providing documents pursuant to a Trial Chamber's order in which protective measures may then be incorporated. Such a result could not have been intended under the Tribunal's Statute and Rules wherein States are encouraged to cooperate without undue delay with the Tribunal in the interests of justice.

12. In sum, the Appeals Chamber finds that a Trial Chamber has implicit authority pursuant to Article 29 of the Statute and Rule 39 and Rule 54bis to direct the application of appropriate protective measures to documents produced by a State, whether voluntarily or pursuant to an order of the Trial Chamber, in the interests of protecting a State's demonstrated national security interests. Accordingly, the Appeals Chamber considers that it has competence in this case to consider Serbia and Montenegro's Request for Review of the Impugned Decision under Rule 108bis of the Rules.

Arguments in Support of Request for Review

13. Rule 108bis provides:

(A) A State directly affected by an interlocutory decision of a Trial Chamber may, within fifteen days from the date of the decision, file a request for review of the decision by the Appeals Chamber if that decision concerns issues of general importance relating to the powers of the Tribunal.

(B) The party upon whose motion the Trial Chamber issued the impugned decision shall be heard by the Appeals Chamber. The other party may be heard if the Appeals Chamber considers that the interests of justice so require.

In its Request, Serbia and Montenegro presents two arguments, which it says demonstrate that its Request falls within the ambit of Rule 108bis. The first is the Trial Chamber erred by rejecting its

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12. In sum, the Appeals Chamber finds that a Trial Chamber has implicit authority pursuant to Article 29 of the Statute and Rule 39 and Rule 54bis to direct the application of appropriate protective measures to documents produced by a State, whether voluntarily or pursuant to an order of the Trial Chamber, in the interests of protecting a State's demonstrated national security interests. Accordingly, the Appeals Chamber considers that it has competence in this case to consider Serbia and Montenegro's Request for Review of the Impugned Decision under Rule 108bis of the Rules.

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Subsequently, the Trial Chamber rejected the application for protective measures on that basis. The approach of the Trial Chamber accords with the practice of this Tribunal and requires no further clarification by the Appeals Chamber.

16. With regard to the second argument, most of the decisions referred to by Serbia and Montenegro in support of this argument in its Request relate to different materials than those under consideration in this decision.¹⁶ One decision of a duty judge issued on 3 December 2003, granted protective measures to the material that is the subject of this decision.¹⁷ However, that decision was subsequently vacated by the Appeals Chamber and the matter was referred to a Trial Chamber.¹⁸

17. In its application for protective measures in relation to the other material that was the subject of the Decisions referred to, Serbia and Montenegro did make the same arguments to the Trial Chamber that protective measures were necessary because of its vital national interest in the proceedings against it at the ICJ. While that was not the only argument made, it appears from both of the Decisions of the Trial Chamber that it did accept that Serbia and Montenegro's interest in the proceedings at the ICJ was a vital national interest that justified the imposition of protective measures under Rule 54bis. In the Decisions, the Trial Chamber found that public disclosure of some of the material would prejudice the national security interests of Serbia and Montenegro and that public disclosure of the remainder would prejudice its vital national interests.¹⁹ Judge Robinson dissented from the finding of prejudice to vital national interests in both Decisions. Therefore, in the present appeal, the effect of the Trial Chamber's Impugned Decision was to reject an argument that it had previously found to be a sufficient basis for the grant of protective measures pursuant to Rule 54bis.

18. On the basis of the foregoing, the Appeals Chamber is satisfied that the second argument of Serbia and Montenegro does concern an issue of general importance relating to the powers of the Tribunal under Rule 108bis (A). That issue is whether Rule 54bis does empower a Trial Chamber to grant protective measures over disclosure of material that impinges upon a State interest other than a national security interest.

Protection From Disclosure Under Rule 54bis

¹⁶ Confidential Decision on Serbia and Montenegro's Request for Protective Measures Pursuant to Rule 54bis, 30 July 2003 and Ninth Decision on Applications Pursuant to Rule 54bis of Prosecution and Serbia and Montenegro, 15 October 2003 ("Decisions") relate to 12 binders of the FRY Supreme Defence Council stenographic notes and minutes. The material that is the subject of this decision for review involves personnel files of VJ officers.

¹⁷ *Prosecutor v Mladić*, Case No:IT-95-5/18 Confidential Decision on Serbia and Montenegro's Application Pursuant to Rule 54bis, 3 December 2003.

¹⁸ *Prosecutor v Mladić*, Case No:IT-95-5/18-AR54bis, Confidential and *Ex parte*, Decision on Prosecution Appeal Under Rule 54bis, 9 December 2004.

¹⁹ Decisions, pages 3-4, 3.

19. Rule 54bis allows a party to apply to a Judge or a Trial Chamber for an order under Rule 54 that a State produce documents or information. If that application is granted by the Judge, a State may, pursuant to Rule 54bis (E)(iii) and 54bis (F), apply to have the order set aside or object to the order "on the grounds that disclosure would prejudice its national security interests". In addition, Rule 54bis (I) provides that an order under the Rule may provide for the provision of documents by a State "under appropriate arrangements to protect its interests, which may include those arrangements specified in paragraphs (F) (ii) or (G)". The concern of Rule 54bis (I) is the production of the documents, such that arrangements made to produce those documents can be made to protect the State's interests. The use of the term "interest", rather than "national security interest", in subpara (I) should be read in light of the subparts in Rule 54bis to which it refers, and all of those subparts say "national security interests". On a plain reading of the Rule, therefore, the interests it protects are national security interests only.

20. In finding in its Decisions that "the jurisprudence of the International Tribunal shows that it is not only questions of national security that warrant protection under Rule 54bis of the Rules, but also other vital national interests that may warrant such protection"²⁰ the Trial Chamber referenced a disposition in a decision rendered in *Blaškić* which stated that: "States are not allowed, on the claim of national security interests, to withhold documents and other evidentiary material requested by the International Tribunal; however, practical arrangements may be adopted by a Trial Chamber to make allowance for legitimate and bona fide concerns of States".²¹ This statement does not support the finding of the Trial Chamber. Read in the context of the *Blaškić* Decision as a whole, the statement means that while States cannot refuse to cooperate with the Tribunal on grounds of national security interests, the Tribunal can put mechanisms into place to protect those national security interests when issuing orders for disclosure.

21. The Trial Chamber also referenced a decision in the *Milošević* case regarding the scope of Rule 70 in its Decisions.²² Again, the Trial Chamber's reliance was misplaced. The *Milošević* Decision was specifically concerned with the procedure of Rule 70 and not measures for protection available under Rule 54bis.²³ Rule 70 allows a State to provide material to the Prosecution on a confidential basis and establishes a regime for protection of the confidential nature of the disclosure. But this fact is not relevant to the interpretation of Rule 54bis. Rule 54bis is solely

²⁰ Decisions, page 4, 3.

²¹ *Blaškić* Decision, page 57.

²² Decisions, page 3,3.

²³ *Prosecutor v Milošević* Case No: IT-02-54-T Public Version of the Confidential Decision on the Prosecution's Motion to Grant Specific Protection Pursuant to Rule 70, 25 July 2002 ("*Milošević* Decision").

concerned with providing for the protection of national security interests as a basis for States to object to an order for production under that Rule.

22. The Appeals Chamber is satisfied that the earlier Decisions, to the extent that they referenced vital national interests as warranting protection pursuant to Rule 54bis, erroneously extended the protections available under Rule 54bis. However, the Appeals Chamber is concerned that those earlier Decisions did give rise to a legitimate expectation on behalf of Serbia and Montenegro that similar material would benefit from the same types of protections. If Serbia and Montenegro had known that such protections would not be available, it may have sought to invoke the protections of Rule 70 when providing the material at issue in this case voluntarily to the Prosecution. The restrictions of that Rule may have prevented the Prosecution from using the material at all in evidence at trial.

23. Accordingly, while the Appeals Chamber is not satisfied that the Trial Chamber erred in concluding that Serbia and Montenegro's interest in the ICJ proceedings was not a legitimate claim of a national security interest warranting the imposition of protective measures pursuant to Rule 54bis it does not consider that it is fair to Serbia and Montenegro in the circumstances of this case to dismiss their claim for protective measures upon that basis. In general, the question of protective measures is an issue that falls squarely within the discretion of the relevant Chamber, but in the extraordinary circumstances of this case, the Appeals Chamber finds it necessary to intervene. Accordingly, the Appeals Chamber remits this matter to the Trial Chamber for the imposition of protective measures to protect the material from disclosure in public session. This does not, however, prevent the Trial Chamber from varying those protective measures should circumstances warrant that variation in the future pursuant to Rule 75 of the Rules.

Disposition

24. On the basis of the foregoing, this matter is remitted back to the Trial Chamber for the imposition of protective measures to protect the material that is subject of this Request including preventing its disclosure in public session.

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

Done this 20th day of September 2005

At The Hague
The Netherlands


Theodor Meron Presiding

[Seal of the Tribunal]

