

**UNITED  
NATIONS**

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International Tribunal for the  
Prosecution of Persons  
Responsible for Serious Violations of  
International Humanitarian Law  
Committed in the Territory of  
Former Yugoslavia since 1991

Case No. IT-94-1-T  
Date: 14 November 1995  
Original: English

**IN THE TRIAL CHAMBER**

**Before:** Judge McDonald, Presiding  
Judge Stephen  
Judge Vohrah

**Registrar:** Mrs. Dorothee de Sampayo Garrido-Nijgh

**Decision:** 14 November 1995

**PROSECUTOR**

v.

**DUŠKO TADIĆ A/K/A "DULE"**

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**DECISION ON THE PROSECUTOR'S MOTION REQUESTING  
PROTECTIVE MEASURES FOR WITNESS L**

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**The Office of the Prosecutor:**

**Mr. Grant Niemann**

**Ms. Brenda Hollis**

**Counsel for the Accused:**

**Mr. Michail Wladimiroff  
Mr. Milan Vujin**

## I. INTRODUCTION

On 31 July 1995 the Prosecutor filed a Motion For Orders for Protective Measures for Witness of Crimes Alleged in Counts 1 through 3, Amended Indictment ("the Motion") requesting protective measures for a witness who is referred to by the letter L. The Motion consisted of twelve separate prayers. On 28 September 1995 the Defence filed its Response objecting in part to the requested protective measures, relying on this Trial Chamber's majority Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses of 10 August 1995 ("the *Protective Measures Decision*") which granted protective measures to six witnesses in respect of the very first motion for protective measures filed on 18 May 1995 by the Prosecutor. On 6 October 1995 the Prosecutor filed his Reply to the Response of the Defence, enclosing an amended set of eleven prayers, taking into account the *Protective Measures Decision*.

As was requested by the Prosecutor, and with the agreement of the Defence, the Motion was heard *in camera* on 25 October 1995 and the decision on the Motion was reserved to this day.

**THE TRIAL CHAMBER, HAVING CONSIDERED** the written submissions and oral arguments of the parties,

**HEREBY ISSUES ITS DECISION.**

## II. DISCUSSION

### A. Factual Background

1. The accused is charged with crimes arising out of a series of incidents which are alleged to have occurred in the Opstina of Prijedor between May and December 1992. These charges relate to events at the Omarska, Keraterm and Trnopolje camps, an incident arising out of the surrender of the Kozarac area in May 1992 and events in the villages of Jaskići and Sivci in June 1992. The charges involve the commission of serious violations of international humanitarian law including, *inter alia*, forcible sexual intercourse or rape, wilful killing or murder, wilfully causing grave suffering or serious injury, persecution, deportation, torture, cruel treatment and the commission of inhumane acts. These acts are alleged to constitute grave breaches of the Geneva Conventions of 12 August 1949 as recognised by Article 2 of the Statute of the International Tribunal ("the Statute"), violations of the laws or customs of war as recognised by Article 3 of the Statute and crimes against humanity as recognised by Article 5 of the Statute.

2. Witness L was employed as a guard at Trnopolje Camp in which capacity he committed serious crimes for which he has been convicted by a court in Bosnia-Herzegovina in a trial of which neither the proceedings nor the decision have been made public because he was tried as a minor. He is said to be a material witness in respect of counts 1 to 3 of the amended indictment against the accused. The Prosecutor seeks protective measures in order to protect witness L's relatives who still remain in the former Yugoslavia, in areas controlled by Bosnian Serb authorities. Witness L fears that co-perpetrators who are still at large and their associates would harm him and members of his family should they find out that he intends to testify in this case.

### B. The Pleadings

3. As indicated, the Motion was filed on 31 July 1995 before the issuance of the *Protective Measures Decision* and in its original twelve prayers sought both confidentiality and anonymity in respect of witness L. In the *Protective Measures Decision*, this Trial Chamber laid down

criteria for the granting of protective measures to victims and witnesses. On 28 September 1995 the Defence filed its Response objecting in part to the requested protective measures relating to witness L, relying on *the Protective Measures Decision*. On 6 October 1995 the Prosecutor filed his Reply to the Response of the Defence with an amended set of eleven prayers, taking into account the criteria laid down in *the Protective Measures Decision*, resulting in the withdrawal of the prayers relating to the request for the anonymity of witness L.

4. In the new set of prayers, the Prosecutor has sought eleven protective measures in respect of witness L, as follows:

- “(1) That the name, address, whereabouts, and other identifying data concerning the person given pseudonym L, a material witness to crimes alleged in Counts 1-3 of the amended indictment, shall not be disclosed to the public or to the media.
- (2) That all hearings to consider the issue of protective measures for witness L shall be in closed session, however, edited recordings and transcripts of the hearings shall be released to the public and media after review by the Office of the Prosecutor.
- (3) That the name, address, whereabouts of, and identifying information concerning, witness L shall be sealed and not included in any of the Tribunal’s public records.
- (4) That, to the extent the name, address, whereabouts of, or other identifying data concerning, witness L is contained in existing public documents of the Tribunal, that name and other identifying data shall be expunged from those documents.
- (5) That Tribunal documents identifying witness L shall not be disclosed to the public or the media.
- (6) That the testimony of witness L shall be heard in closed session; however, edited recordings and transcripts of the session(s) shall be released to the public and the media after review by the Office of the Prosecutor.
- (7) That the pseudonym L shall be used whenever referring to this witness in Tribunal proceedings, and in discussions among parties to the trial.
- (8) That the name of witness L shall be disclosed to the defence no earlier than one month in advance of a firm trial date.
- (9) That no identifying data concerning witness L, other than his name and position at Trnopolje camp, shall be disclosed to the defence or the

accused, and that the names, addresses, whereabouts, and other identifying data concerning witness L's relatives shall not be disclosed to the defence or the accused.

- (10) That the accused, the defence attorneys, and their representatives who are acting pursuant to their instructions or requests, shall not disclose the name of witness L, or any other identifying data they may discover, concerning witness L to the public or to the media, except to the limited extent such disclosure to members of the public is necessary to adequately investigate the witness. Further order that such necessary disclosure be done in such a way as to minimize the risk of the witness's name being divulged to the public at large or to the media.
- (11) That the accused, the defence counsel, and their representatives who are acting pursuant to their instructions or requests, shall notify the Office of the Prosecutor of any requested contact with witness L or the relatives of witness L, and that the Office of the Prosecutor shall make arrangements for such contact as is determined may be necessary."

5. During oral arguments the Prosecutor applied for the addition of another prayer requesting that the public and the media not photograph, video-record or sketch witness L when he is entering or leaving or while he is in the International Tribunal building. No objection was taken by the Defence to the inclusion of this additional prayer.

6. The requested protective measures in summary seek: non-disclosure of information relating to witness L to the public and the media; non-disclosure to the accused and defence counsel of some personal particulars relating to witness L and all particulars relating to witness L's relatives; and delayed disclosure to the Defence of the name of witness L.

7. In essence, the Prosecutor's contention is that the protective measures are necessary because witness L fears that the safety of his family members who remain in areas controlled by Bosnian Serb authorities may be jeopardised by reprisal action should information which the Prosecutor seeks to protect be disclosed, as such disclosure could lead to their identification by Bosnian Serb forces and authorities. The reason given is that witness L's past position in Trnopolje camp and his present willingness to testify against the accused make him a traitor in the eyes of his co-perpetrators, of whom those at large would have no hesitation in harming or intimidating witness L's family.

8. The Defence, apparently after reading the redacted statements of witness L, in its Response of 28 September 1995, agreed to protective measures prohibiting the disclosure of the identity of witness L to the public and the media but requested that the Trial Chamber dismiss the request for non-disclosure of identifying data concerning witness L and, more specifically, Prayers 6 and 7, as set out in the original list of prayers, relating to the giving of testimony by one-way closed circuit television, and by voice- and image-altering devices or non-transmission of witness L's image to the Defence. These two prayers were withdrawn in the amended prayers in the Response as set out above.

9. At the hearing of the Motion on 25 October 1995, the Defence argued at first that protective measures should not be available to witness L because of his criminal background but, in the course of the oral arguments, in reiterating its willingness to support "any reasonable measure to respect credible interests of witnesses", raised no substantial objections to Prayer 9 which consists, as set out in paragraph 4 above, of two limbs, firstly, for non-disclosure to defence counsel or to the accused of identifying data other than the name and position at Trnopolje camp of witness L and, secondly, for non-disclosure of the names, addresses, whereabouts of, and other identifying data concerning witness L's relatives. The Defence, however, did intimate that it needed to know the time taken by witness L for travel from his residence to the camp in order to reconstruct the time-frame within which witness L operated and requested that it be supplied with this information, without the means of transportation having to be specified. The Prosecutor raised no objection to this request. In the event, the only disagreement between the Parties arose from Prayer 8 relating to the release of witness L's name to the Defence no earlier than one month before the firm date of trial. The Defence has asked for the name to be released immediately.

10. This Trial Chamber would like to point out that, in its view, a person does not cease to qualify for the protective measures available to a witness under the Rules just because he has a criminal record. Witness L's criminal record may affect his credibility as a witness but this is a matter to be determined at the trial itself and has no bearing on his status as a witness to whom protective measures may be available.

### C. Applicable Provisions

11. The power to provide appropriate protection for victims and witnesses during the proceedings is derived from provisions of Articles 20 and 22 of the Statute and Rules 69, 75 and 79 of the Rules of Procedure and Evidence (“the Rules”). As was stated in the *Protective Measures Decision*, this Trial Chamber, in fulfilling its affirmative obligation to provide such protection, has to interpret the provisions within the context of its own unique legal framework in determining where the balance lies between the accused’s right to a fair and public trial, the right of the public to access of information and the protection of victims and witnesses. How the balance is struck will depend on the facts of each case.

### D. Reasons For Decision

#### 1. Agreement Of The Parties

12. As has been noted, witness L was a guard at Trnopolje camp where he committed serious crimes for which he has been tried and convicted by a court in Bosnia-Herzegovina. In the *Protective Measures Decision* this Trial Chamber laid down five criteria which have to be met before anonymity may be granted to a potential witness, namely: the existence of real fear for the safety of the witness or of the family of the witness; the testimony must be important enough to the Prosecutor’s case to make it unfair to compel the Prosecutor to proceed without it; there must be no prima facie evidence that the witness is untrustworthy; there is no protection programme for the witness or the family of the witness, or any such programme is ineffective; and there must be no undue prejudice caused to the accused.

13. The Prosecutor has very correctly conceded that witness L’s conviction in Bosnia-Herzegovina and his participation in crimes allegedly with the accused can be regarded as constituting an extensive criminal background which, because it fails to meet the third criterion,

disqualifies witness L from seeking non-disclosure of his identity. Accordingly, in his Reply, the Prosecutor has withdrawn his request for anonymity and has instead sought only confidentiality and non-disclosure of identifying data concerning witness L, other than his name and position at Trnopolje camp. The Prosecutor has explained that the kind of identifying data concerning witness L which the Prosecutor has sought to withhold from the Defence is witness L's date and place of birth, his parents' names and address, his previous address and such like which could result in the Defence learning the identity of members of witness L's family.

14. As already stated, except for Prayer 8 relating to delayed disclosure of the name of witness L to the Defence, the Defence did not oppose the other prayers, including the additional prayer made orally for an order prohibiting the public and media from photographing, video-recording and sketching witness L whilst he is in the precincts of the International Tribunal. The Parties agreed that with regard to Prayer 9, the Prosecutor will provide information regarding the time it took witness L to travel to the camp from his residence without more.

15. In order to establish whether the restriction on his right to examine or have examined witnesses against him is in accordance with the notion of a fair trial, this Trial Chamber must balance the interests of the accused and those of witness L. If it could be shown that there is good reason to think that non-disclosure of information would result in substantial prejudice to the accused, the balance would incline in favour of the accused and disclosure of information should be directed. No such prejudice has been shown to exist in this case. On the contrary, the Defence, after reading the redacted statements of witness L, did not find it necessary to be supplied with the information the Prosecutor wants to withhold except for the information regarding the time taken for travel from witness L's residence to the camp, which the Prosecutor is willing to supply.

16. With regard to the limitation of the accused's right to a public trial, this Trial Chamber has to ensure that the curtailment of the accused's right to a public hearing is justified by a genuine fear for the safety of members of witness L's family in the situation of ongoing conflict in the territory of the former Yugoslavia. This Trial Chamber is of the view that the grounds on which the Prosecutor has based his application for the protective measures concerning confidentiality, and to which the Defence has agreed, are well-founded. In balancing the interests of the accused, the public and witness L, this Trial Chamber considers that the public's



right to information and the accused's right to a public hearing must give way to confidentiality in light of the affirmative obligation under the Statute and the Rules to afford protection to victims and witnesses. This Trial Chamber must take into account witness L's fear of the serious consequences to members of his family if information which may lead to their identification is made known to the public or the media.

17. This Trial Chamber is fortified in the view that the accused will not be deprived of a fair trial by the protective measures asked for by the Prosecutor and agreed to by the Defence for the reasons given by the Prosecutor, namely: that defence counsel and the accused will know the name of witness L; that witness L will be present to testify in person; that the Judges, defence counsel and the accused will be able to observe the demeanour of witness L; and that the Defence will be given the opportunity of cross-examining witness L on his evidence except with regard to matters which may result in the names and whereabouts of members of his family being revealed.

18. In the result, this Trial Chamber is of the considered view that the measures sought by the Prosecutor and agreed to by the Defence are appropriate and, accordingly, makes an order in terms of the prayers sought, namely Prayers 1 to 7, 9 to 11 and the oral prayer. It is further ordered that the Prosecutor shall furnish the Defence with the information relating to the time that was taken by witness L to travel from his residence to the camp.

## 2. Release Of The Identity Of Witness L

19. In the remaining Prayer 8, as pointed out, the Prosecutor has requested that the name of witness L be disclosed to the Defence no earlier than one month in advance of the firm date of trial. The Defence seeks that the name of witness L be released immediately. The Defence has attempted to argue that the question as to when the name of witness L is to be released makes it, in effect, an anonymity issue to which the five criteria set out in the *Protective Measures Decision* are applicable and contended that, since witness L has not met at least the third criterion, as conceded by the Prosecutor, he should not be entitled to delayed disclosure of his name. This Trial Chamber finds no merit in this argument. These criteria apply to qualify or

disqualify a witness from receiving anonymity *per se* but what, in fact, has been sought is not non-disclosure of witness L's name but merely its delayed release.

20. The Prosecutor's request for delayed release of witness L's name is based on a real concern for the safety of members of his family. Witness L has expressed great fear for the safety of members of his family, so much so that he has deliberately not communicated with them, not even through the International Committee of the Red Cross, in case through such communication their whereabouts could be traced and reprisal action taken in the context of the ongoing conflict in the territory of the former Yugoslavia. We accept the Prosecutor's argument that delay in the release of witness L's name will minimise the risk of harm to his family.

21. When then should witness L's name be released to the Defence? Rule 67(A) requires that a witness's name shall be released "[a]s early as reasonably practicable and in any event prior to the commencement of the trial". In exceptional circumstances, where the disclosure of the identity of the witness needs to be postponed, Rule 69(C) stipulates that the witness's identity be released "in sufficient time prior to the trial to allow adequate time for preparation of the defence." In the view of this Trial Chamber, and in the particular circumstances of this case, disclosure of the identity of witness L not less than thirty (30) days before the firm trial date should be regarded as allowing adequate time for preparation of the defence. The Trial Chamber is satisfied that the Prosecutor has shown exceptional circumstances to exist in the present case to warrant delayed disclosure. This Trial Chamber therefore orders in respect of Prayer 8 that the name of witness L be released not less than thirty (30) days before the firm trial date.

#### **E. Release Of Edited Recordings**

22. In the *Protective Measures Decision*, it was directed (at paragraph 87) that edited recordings and transcripts of the *in camera* proceedings concerned were to be released to the media and that the editing would be co-ordinated by the Victims and Witnesses Unit under the overall control of the Trial Chamber. However, in Prayers 2 and 6 of the Motion, a request has

been made for the editing of the recordings and transcripts of the *in camera* proceedings relating to witness L to be carried out solely by the Office of the Prosecutor. The reason given is that the Office of the Prosecutor is most familiar with the facts of the case and the witnesses' circumstances. No objection has been raised by the Defence to this request. There is merit in this request but, as the Victims and Witnesses Unit has an important role in protecting the interests of victims and witnesses by virtue of Rules 34, 69(B) and 75(A), the Trial Chamber is of the view that such editing should be done by the Office of the Prosecutor in consultation with the Victims and Witnesses Unit subject, of course, to the overall control of this Trial Chamber and it is so ordered.

### III. DISPOSITION

For the foregoing reasons, **THE TRIAL CHAMBER**, being seized of the Motion filed by the Prosecutor, and

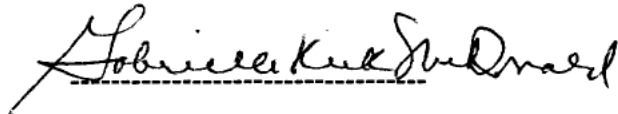
**PURSUANT TO RULE 75,**

**HEREBY ORDERS AS FOLLOWS:**

- (1) the name, address, whereabouts of, and other identifying data concerning the person given pseudonym L, shall not be disclosed to the public or to the media;
- (2) all hearings to consider the issue of protective measures for witness L shall be in closed session, however, edited recordings and transcripts of the session(s) shall be released to the public and to the media after review by the Office of the Prosecutor in consultation with the Victims and Witnesses Unit;
- (3) the name, address, whereabouts of, and identifying data concerning witness L shall be sealed and not included in any of the public records of the International Tribunal;
- (4) to the extent the name, address, whereabouts of, or other identifying data concerning witness L is contained in existing public documents of the International Tribunal, that information shall be expunged from those documents;
- (5) documents of the International Tribunal identifying witness L shall not be disclosed to the public or to the media;
- (6) the testimony of witness L shall be heard in closed session; however, edited recordings and transcripts of the session(s) shall be released to the public and to the media after review by the Office of the Prosecutor in consultation with the Victims and Witnesses Unit;

- (7) the pseudonym L shall be used whenever referring to this witness in proceedings before the International Tribunal and in discussions among parties to the trial;
- (8) no identifying data concerning witness L, other than his name and position at Trnopolje camp and the time taken for travel by witness L from his residence to the camp, shall be disclosed to the defence counsel or to the accused, and the names, addresses, whereabouts of, and other identifying data concerning witness L's relatives shall not be disclosed to the defence counsel or to the accused;
- (9) the name of witness L and the information relating to the time taken for travel by witness L from his residence to the camp shall be disclosed to the Defence not less than thirty (30) days in advance of a firm trial date;
- (10) the accused, the defence counsel, and their representatives who are acting pursuant to their instructions or request, shall not disclose the name of witness L, or any other identifying data they may discover concerning witness L, to the public or to the media, except to the limited extent such disclosure to members of the public is necessary to investigate the witness adequately. Any such disclosure shall be made in such a way as to minimise the risk of the witness's name being divulged to the public at large or to the media;
- (11) the accused, the defence counsel, and their representatives who are acting pursuant to their instructions or requests, shall notify the Office of the Prosecutor of any requested contact with witness L or the relatives of witness L, and the Office of the Prosecutor shall make arrangements for such contact as is determined may be necessary; and

- (12) the public and the media shall not photograph, video-record or sketch witness L while he is in the precincts of the International Tribunal;



Gabrielle Kirk McDonald

Presiding Judge

Dated this fourteenth day of November 1995

At The Hague

The Netherlands

[Seal of the Tribunal]