

26-JUNE-96

9162

D 9162-9148

MFm

UNITED
NATIONS



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: 25 June 1996

Original: ENGLISH AND FRENCH

IN THE TRIAL CHAMBER

**Before: Judge Gabrielle Kirk McDonald, Presiding
Judge Ninian Stephen
Judge Lal C. Vohrah**

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision: 25 June 1996

PROSECUTOR

v.

DUŠKO TADIĆ A/K/A "DULE"

**DECISION ON THE DEFENCE MOTIONS TO
SUMMON AND PROTECT DEFENCE WITNESSES, AND
ON THE GIVING OF EVIDENCE BY VIDEO-LINK**

The Office of the Prosecutor:

Mr. Grant Niemann

Ms. Brenda Hollis

Counsel for the Accused:

**Mr. Michail Wladimiroff
Mr. Steven Kay**

Mr. Alphons Orie

I. INTRODUCTION

Pending before the Trial Chamber is the Motion to Summon and Protect Defence Witnesses ("Motion") filed by the Defence on 18 April 1996. The Defence filed two corrigenda to the Motion on 25 April 1996 and on 2 May 1996 respectively. On 1 May 1996 the Prosecutor filed a Response to the Motion ("Response") objecting in part to the requested relief. Also pending before the Trial Chamber in connection with this Motion is the Defence Motion on the Giving of Evidence by Video-Conference Link filed on 20 March 1996. The Prosecutor filed his Response to this motion on 27 March 1996.

Oral arguments on the motions were heard on 3 May 1996. The requests dealing with protective measures for Defence witnesses were heard *in camera* while the other requests were heard in open court. The Trial Chamber gave an oral decision on the motions on 7 May 1996, reserving the written decision to a later date.

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 opština 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*, wilful killing, murder, wilfully causing grave suffering or serious injury, persecution, 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. According to the Defence, its witnesses are exposed to serious risk of reprisals. Indeed, the Defence contends that the very fact of contact between potential witnesses and the Defence has resulted in threats to witnesses. Even when their testimony is innocuous, witnesses are often fearful of arrest by the Prosecutor. Consequently, witnesses are often unwilling or fearful to come to the seat of the International Tribunal to testify. Furthermore, there are allegations that cooperation by the authorities in opština Prijedor with the International Tribunal is lacking.

B. The Pleadings

3. The Defence seeks five categories of relief. First, it requests that the Trial Chamber summon fourteen (14) witnesses to appear at the seat of the International Tribunal to testify and summon other witnesses at a location other than the seat of the International Tribunal to provide testimony by means of video-link. Second, it requests that the Trial Chamber issue orders for the safe conduct of four (4) witnesses to travel to the seat of the International Tribunal and testify before the Trial Chamber or, in the alternative, that the Trial Chamber

allow these witnesses to give testimony by means of video-link. Third, it requests that the Trial Chamber order the giving of testimony by ten (10) witnesses by video-link. Fourth, the Trial Chamber is asked to protect the identity of eight (8) witnesses from disclosure to the public and the media, *i.e.* confidentiality. Fifth, the Defence requests that the name and other identifying information concerning three (3) witnesses be withheld from the Prosecutor, *i.e.* anonymity. During oral argument the Defence joined the Prosecutor in his request to conduct part of the trial in or near opština Prijedor as an alternative to video-link testimony.

4. The Prosecutor agrees to the request of the Defence to summon certain witnesses but opposes the requests for safe conduct, confidentiality, and anonymity. The Prosecutor asserts that the requests for safe conduct, video-link testimony and the measures protecting the identity of certain witnesses from disclosure to the public and the media lack specificity and that the request for anonymity does not satisfy the criteria set out in the *Prosecutor v. Tadic*, No. IT-94-1-T, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses of 10 August 1995, ICTY Tr.Ch. II ("*Protective Measures Decision*").

1. Summons

5. Rule 54 of the Rules of Procedure and Evidence of the International Tribunal ("the Rules") provides that the Trial Chamber "may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary . . . for the preparation or conduct of the trial."

6. The Prosecutor agrees to the request by the Defence for witnesses for the Defence to be summoned. Considering that the Prosecutor joins in the request and pursuant to Rule 54, the Trial Chamber will issue summonses for the witnesses identified in the Motion as witnesses 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 22, 25, 26, 27 and 28. Witness 16 will be summoned when his address becomes known to the Trial Chamber.

7. The summons shall provide instructions relating to identification, insofar as possible, specify the time and place for the appearance, and shall set out the penalty for

non-compliance. It shall also indicate the approximate allowances payable and the travelling and subsistence expenses which are reimbursable or pre-paid. See European Convention on Mutual Assistance in Criminal Matters, 20 Apr. 1959, Art. 10 (2), Europ. T. S. No. 99 ("European Convention").

2. Safe Conduct

8. The Defence requests the Trial Chamber to provide for the safe conduct of four (4) of its witnesses in order to secure their attendance at the seat of the International Tribunal. In the alternative, the Defence requests that these witnesses should be heard by means of video-link. Orders for safe conduct are not specifically provided for by either the Statute or the Rules. An order in terms can, however, be made under the general power of Rule 54.

9. Orders for safe conduct as provided for between countries protect a person from prosecution and restriction of liberty in the requesting country in relation to acts which preceded his departure from the requested country for purposes of appearing and testifying in response to a request. 3 Michael Abbell & Bruno A. Ristau, *International Judicial Assistance: Criminal (Evidence)* § 12-4-4(13) (1995). Safe conduct provisions have been included in nearly all treaties of mutual assistance and several multilateral agreements. An example of a general safe conduct provision in a multilateral treaty is contained in section 1 of Article 12 of the European Convention which provides:

A witness or expert, whatever his nationality, appearing on a summons before the judicial authorities of the requesting Party shall not be prosecuted or detained or subjected to any other restriction of his personal liberty in the territory of that Party in respect of acts or convictions anterior to his departure from the territory of the requested Party.

10. States have issued orders for safe conduct in order to secure the attendance of witnesses from areas beyond their jurisdiction. The International Tribunal finds itself at present in a similar situation because it does not have a police force of its own to secure the presence of witnesses at the seat of the International Tribunal.

11. As stated above, the Defence requests, as an alternative to safe conduct, that the witnesses concerned be heard by means of video-link. The evidentiary value of testimony of a witness who is physically present is weightier than testimony given by video-link. The physical presence of a witness at the seat of the International Tribunal enables the Judges to evaluate the credibility of a person giving evidence in the courtroom. Moreover, the physical presence of the witness at the seat of the International Tribunal may help discourage the witness from giving false testimony.

12. It must be borne in mind that an order for safe conduct grants only a very limited immunity from prosecution. Immunity is granted with respect to crimes within the jurisdiction of the International Tribunal committed before coming to the International Tribunal and only for the time during which the witness is present at the seat of the International Tribunal for the purpose of giving testimony. The Trial Chamber regards this limited restriction on the powers of the Prosecutor reasonable in light of the importance for the administration of justice of having the witnesses physically present before this Trial Chamber. Moreover, the Defence has stated that testimony by these witnesses is innocuous. Furthermore, witnesses who the Defence claims will provide evidence which is vital to its case, will not appear before the Trial Chamber unless granted safe conduct. In these circumstances, the Trial Chamber holds the view that granting the request for safe conduct is appropriate and in the interest of justice.

13. The Trial Chamber acknowledges the need to provide guidelines with respect to the procedure to be followed when witnesses appear before the International Tribunal pursuant to an order for safe conduct. First, the summons served on the witnesses shall contain the clause that safe conduct does not bar prosecution for offences which the witness might commit after his departure from his home country. *See* Council of Europe Recommendation No. R (83) 12 of the Committee of Ministers Concerning Safe Conduct for Witnesses in Application of Article 12.1 of the Eur. Conv. on Mutual Assistance in Criminal Matters (23 Sept. 1983).

14. Additionally, the safe conduct shall be limited in time. The safe conduct will commence fifteen (15) days before the witness is to appear before the International

Tribunal. The safe conduct will remain applicable for a period of fifteen (15) consecutive days from the date when the presence of the witness is no longer required by the International Tribunal. In case of illness which prevents the witness from leaving the Netherlands, the fifteen (15) day period will commence when the witness is able to travel again. If the witness is detained because of a crime he allegedly committed while in the Netherlands for the purpose of giving testimony, the fifteen (15) day period will start to run from the day he is released from prison.

15. The Trial Chamber orders that, while in the Netherlands for the purpose of appearing before the International Tribunal to testify, witnesses 3, 7, 14 and 20, shall not be prosecuted, detained or subjected to any other restriction of their personal liberty in respect of acts or convictions prior to their departure from their home country. The immunity shall cease when the witness, having had for a period of fifteen (15) consecutive days from the date when his presence is no longer required by the International Tribunal an opportunity of leaving, has nevertheless remained in the Netherlands, or having left it, has returned. See European Convention Art. 12 (3).

16. During oral argument the Defence requested the Trial Chamber to include within the order for safe conduct, protection in the countries through which the witnesses travel to reach the International Tribunal. The Trial Chamber, however, declines the request of the Defence to issue such a general order for immunity of persons in transit for the purpose of appearing before the International Tribunal.

3. Video-Link Testimony

17. The Defence requests that the Trial Chamber allow the giving of testimony by video-link in order to secure the evidence of witnesses who are unwilling to come to the seat of the International Tribunal. The Defence envisages the giving of evidence through a live television link with the courtroom which will enable all persons concerned to see, hear and communicate with the witness, even though he is not physically present.

18. The Defence relies on both Rule 4 and Rule 71 (D) in support of its request for video-link testimony. Rule 4 provides that "A Chamber may exercise its functions at a place other than the seat of the Tribunal, if so authorised by the President in the interests of justice." This Rule envisages the Trial Chamber sitting away from the seat of the International Tribunal and does not cover the reception of video-link testimony from a location elsewhere. Rule 71 (D) is not intended to provide for the giving of testimony by video-link but is concerned with the admission of evidence taken by deposition for subsequent use at trial. However, because of the extraordinary circumstances attendant upon conducting a trial while a conflict is ongoing or recently ended, it is in the interest of justice for the Trial Chamber to be flexible and endeavour to provide the Parties with the opportunity to give evidence by video-link.

19. It cannot be stressed too strongly that the general rule is that a witness must physically be present at the seat of the International Tribunal. The Trial Chamber will, therefore, only allow video-link testimony if certain criteria are met, namely that the testimony of a witness is shown to be sufficiently important to make it unfair to proceed without it and that the witness is unable or unwilling to come to the International Tribunal. The Defence has demonstrated the link between each witness and the time-frame in which the alleged crimes took place thereby satisfying the Trial Chamber that the witnesses are sufficiently important to the accused's defence of alibi. In the affidavits concerning witnesses 1, 4, 5, 6, 13, 26 and 28, the Defence declares that these witnesses fear arrest by the Prosecutor and are therefore unwilling to come to the seat of the International Tribunal. Accordingly, the Trial Chamber will allow the giving of video-link testimony by each of these witnesses subject to the conditions set out in paragraph 22 and provided that the necessary equipment is made available to the Tribunal.

20. The Defence also requests that witnesses 9, 22 and 27 be granted leave to give their testimony by means of video-link. However, the affidavits filed by the Defence in relation to these witnesses do not fulfil the criteria set out above. The affidavit submitted by the Defence in respect of witness 9 does not state that the witness is unwilling to come to the seat of the International Tribunal. That submitted in respect of witness 22 gives no reason for the unwillingness of the witness to come to the seat of the International Tribunal. With

regard to witness 27, it is not clear whether the witness requires this measure as the Defence has not as yet been able to interview him. For these reasons the Trial Chamber is not inclined to allow testimony to be given by these witnesses by means of video-link. However, the Trial Chamber is willing to consider any supplementary affidavits concerning these witnesses if filed before 25 July 1996.

21. The evidentiary value of testimony provided by video-link, although weightier than that of testimony given by deposition, is not as weighty as testimony given in the courtroom. Hearing of witnesses by video-link should therefore be avoided as far as possible. The Trial Chamber appreciates the difficult circumstances under which the parties have to labour. Nevertheless, it is preferable for the Trial Chamber to have the benefit of the physical presence of the witnesses at trial. For this reason and because orders for safe conduct will afford these witnesses the same protection as giving testimony by video-link and is less disruptive of the trial process, the Trial Chamber grants leave to the Defence to amend its Motion to request, where appropriate, orders for safe conduct instead of orders permitting testimony by video-link, before 25 July 1996.

22. The Trial Chamber acknowledges the need to provide for guidelines to be followed in order to ensure the orderly conduct of the proceedings when testimony is given by video-link. First, the party making the application for video-link testimony should make arrangements for an appropriate location from which to conduct the proceedings. The venue must be conducive to the giving of truthful and open testimony. Furthermore, the safety and solemnity of the proceedings at the location must be guaranteed. The non-moving party and the Registry must be informed at every stage of the efforts of the moving party and they must be in agreement with the proposed location. Where no agreement is reached on an appropriate location, the Trial Chamber shall hear the parties and the Registry, and make a final decision. The following locations should preferably be used: (i) an embassy or consulate, (ii) offices of the International Tribunal in Zagreb or Sarajevo, or, (iii) a court facility. Second, the Trial Chamber will appoint a Presiding Officer to ensure that the testimony is given freely and voluntarily. The Presiding Officer will identify the witnesses and explain the nature of the proceedings and the obligation to speak the truth. He will inform the witnesses that they are liable to prosecution for perjury in case of false testimony, will

administer the taking of the oath and will keep the Trial Chamber informed at all times of the conditions at the location. Third, unless the Trial Chamber decides otherwise, the testimony shall be given in the physical presence only of the Presiding Officer and, if necessary, of a member of the Registry technical staff. Fourth, the witnesses must, by means of a monitor, be able to see, at various times, the Judges, the accused and the questioner; similarly the Judges, the accused and the questioner must each be able to observe the witness on their monitor. Fifth, a statement made under solemn declaration by a witness shall be treated as having been made in the courtroom and the witness shall be liable to prosecution for perjury in exactly the same way as if he had given evidence at the seat of the International Tribunal.

23. The Prosecutor in his Response requests the Trial Chamber to change the location of the trial to opština Prijedor at some time during the proceedings. During the oral arguments the Defence joined in this request as an alternative to video-link testimony. The Trial Chamber does not think it is necessary to change the location of the trial as the measures allowed by this Decision are sufficient to secure the testimony of Defence witnesses.

4. Confidentiality

24. 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. As was stated in the *Protective Measures Decision*, the 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 to information and the protection of victims and witnesses. How the balance is struck will depend on the facts of each case. See *Prosecutor v. Tadic*, No. IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Witness L of 14 Nov. 1995 ICTY Tr. Ch. II ("*Witness L Decision*") para. 11; *Prosecutor v. Tadic*, No. IT-94-1-T, Decision on the Prosecutor's

Motion Requesting Protective Measures for Witness P of 15 May 1996 ICTY Tr. Ch. II (“*Witness P Decision*”) para. 6; and *Protective Measures Decision, passim*.

25. As this Trial Chamber has pointed out previously, it has to ensure that the curtailment of the public nature of the hearing is justified by circumstances such as the giving of evidence by victims of sexual assault and genuine fear for the safety of the witness or members of his family. See *Protective Measures Decision* para. 42; *Witness L Decision* para. 16; and *Witness P Decision* para. 7. The right to a public trial is not only a right of the accused. The world community has a right to be informed of the proceedings before the International Tribunal. Similarly, the Prosecutor has an interest in the trial being conducted in public.

26. In his Response, the Prosecutor asserted that prior media contact by a witness should exclude such a witness from the protection of his identity from disclosure to the public and the media. However, the Trial Chamber disagrees; prior media contact does not necessarily exclude a witness from being granted the measures protecting his identity from disclosure to the public and the media. The Trial Chamber must take into account the witnesses’ fear of potentially serious consequences to them and to their family members if information which may lead to their identification is made known to the public or the media. In light of the general confirmation by the Prosecutor that the fear of reprisal entertained by witnesses who will testify before the International Tribunal is well founded (Response at 8) the Trial Chamber finds that the Defence’s request is appropriate with respect to the witnesses who have indicated fear of reprisals upon their return home.

27. Therefore, the Trial Chamber grants the measures protecting the identity of witnesses 8, 9, 10, 15 and 24 from disclosure to the public and the media. The Trial Chamber denies these protective measures to witness 23 as the Defence has not submitted an affidavit on her behalf. The Trial Chamber also denies these protective measures to witnesses 26, 27 and 28 because no fear of reprisals against them or members of their family was expressed nor any other circumstances justifying such measures. However, these decisions will be reviewed should the Defence submit supplementary affidavits of these witnesses before 25 July 1996. The Defence asserted that fear of reprisals should be regarded implicitly to be

part of all the affidavits submitted on the witnesses' behalf. The Trial Chamber concludes, however, that for a witness to qualify for protection of his identity from disclosure to the public and the media, this fear must be expressed explicitly by the witness and based on circumstances which can objectively be seen to cause fear.

5. Anonymity

28. In addition to requesting confidentiality and video-link testimony for witnesses 26, 27 and 28, the Defence requests that the names and other identifying information regarding these witnesses be not disclosed to the Prosecutor. Anonymity cannot be granted to witness 27 as the Defence has not interviewed him and thus his need for protection has not been established. With respect to witnesses 26 and 28, the *Protective Measures Decision* sets out five criteria that must be met in order for a request for anonymity to succeed. One of the criteria for granting anonymity is that the measures taken should be strictly necessary and that if a less restrictive measure can secure the required protection, that measure should be applied. See *Protective Measures Decision* para. 66. Witnesses 26 and 28 expressed fear of arrest by the Prosecutor. Fear of arrest, unlike the fear of retaliation expressed by the witnesses for whom the Trial Chamber has granted anonymity, can be obviated by the granting of less restrictive measures, e.g., by providing for safe conduct or for the giving of testimony by means of video-link. Indeed, the Defence request for video-link testimony in respect of these witnesses has already been granted. The Trial Chamber is therefore of the view that the fear of witnesses 26 and 28 has been met by way of affording the opportunity to testify by way of video-link and, accordingly, denies the request for anonymity.

III. DISPOSITION

For the foregoing reasons, **THE TRIAL CHAMBER**, being seized of the motions filed by the Defence, **ORDERS AS FOLLOWS:**

PURSUANT TO RULE 54,

- (1) witnesses 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 22, 25, 26, 27 and 28 shall be summoned;
- (2) witnesses 3, 7, 14 and 20, while in the Netherlands for the purpose of appearing before the International Tribunal to testify, shall not be prosecuted, detained or subjected to any other restriction of their personal liberty in respect of acts or convictions prior to their departure from their home country. The immunity shall commence fifteen (15) days before the witness is to appear before the International Tribunal and cease when the witness, having had for a period of fifteen (15) consecutive days from the date when his presence is no longer required by the International Tribunal an opportunity of leaving, has nevertheless remained in the Netherlands, or having left it, has returned; and
- (3) witnesses 1, 4, 5, 6, 13, 26 and 28 may give testimony through video-link provided that the necessary equipment can be made available to the Tribunal and subject to the conditions set out in this Decision.

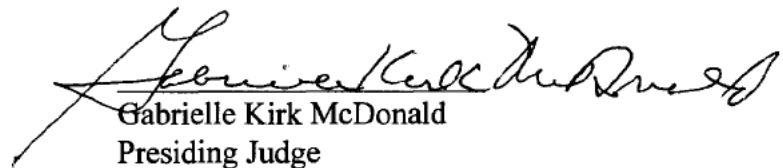
PURSUANT TO RULE 75,

- (4) the name, address, whereabouts of, and other identifying data concerning witnesses 8, 9, 10, 15 and 24 shall not be disclosed to the public or to the media;

- (5) all hearings to consider the issue of protective measures for witnesses 8, 9, 10, 15 and 24 shall be in closed session, however, edited recordings and transcripts of the session(s) shall, if possible, be released to the public and to the media after review by the Defence in consultation with the Victims and Witnesses Unit;
- (6) the name, address, whereabouts of, and identifying data concerning witnesses 8, 9, 10, 15 and 24 shall be sealed and not included in any of the public records of the International Tribunal;
- (7) to the extent the name, address, whereabouts of, or other identifying data concerning witnesses 8, 9, 10, 15 and 24 is contained in existing public documents of the International Tribunal, that information shall be expunged from those documents;
- (8) documents of the International Tribunal identifying witnesses 8, 9, 10, 15 and 24 shall not be disclosed to the public or to the media;
- (9) the testimony of witnesses 8, 9, 10, 15 and 24 shall be heard in closed session; however, edited recordings and transcripts of the session(s) shall, if possible, be released to the public and to the media after review by the Defence in consultation with the Victims and Witnesses Unit;
- (10) pseudonyms shall be used whenever referring to witnesses 8, 9, 10, 15 and 24 in proceedings before the International Tribunal and in discussions among parties to the trial;
- (11) the names of witnesses 8, 9, 10, 15 and 24 shall be released to the Prosecutor immediately;

- (12) the Prosecutor and his representatives who are acting pursuant to his instructions or requests shall not disclose the names of witnesses 8, 9, 10, 15 and 24, or any other identifying data concerning these witnesses, 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;
- (13) the Prosecutor and his representatives who are acting pursuant to his instructions or requests shall notify the Defence of any requested contact with witnesses 8, 9, 10, 15 and 24 or the relatives of witnesses 8, 9, 10, 15 and 24, and the Defence shall make arrangements for such contact as may be determined necessary; and
- (14) the public and the media shall not photograph, video-record or sketch witnesses 8, 9, 10, 15 and 24 while they are in the precincts of the International Tribunal.

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



Gabrielle Kirk McDonald
Presiding Judge

Dated this twenty-fifth day of June 1996
At The Hague
The Netherlands

[Seal of the Tribunal]