

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: 31 July 1996

Original: ENGLISH AND FRENCH

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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 of: 31 July 1996

PROSECUTOR

v.

DUŠKO TADIĆ A/K/A "DULE"

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

The Office of the Prosecutor:

Mr. Grant Niemann
Mr. Alan Tieger

Ms. Brenda Hollis
Mr. Michael Keegan

Counsel for the Accused:

Mr. Michail Wladimiroff
Mr. Alphons Orie
Mr. Steven Kay

I. INTRODUCTION

Pending before the Trial Chamber is the Motion For Protective Measures for Witness R ("the Motion") filed by the Prosecutor on 15 July 1996. The Motion consists of eleven separate prayers.

The Motion was heard *in camera* on 16 July 1996. The Defence conceded to all prayers contained in the Motion. At the hearing the Trial Chamber gave an oral decision granting the Motion, reserving the written decision on the Motion 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 the opština 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*, 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. Members of witness R's family are still living in areas of Bosnia-Herzegovina under the control of the Bosnian Serb authorities. Witness R fears for their safety if it is found out that he has testified in this case.

B. The Pleadings

3. The Prosecutor in the Motion has requested the Trial Chamber to grant eleven protective measures in respect of witness R as follows:

- (1) the name, address, whereabouts of, and other identifying data concerning the person given the pseudonym R shall not be disclosed to the public or to the media;
- (2) all hearings to consider the issue of protective measures for witness R shall be in closed session, however, edited recordings or transcripts of the session(s) shall, if possible, 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 to ensure that no information leading to the possible identification of the witness is disclosed;

- (3) the name, address, whereabouts of, and identifying data concerning witness R 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 R 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 R shall not be disclosed to the public or the media;
- (6) the pseudonym R shall be used whenever referring to this witness in proceedings before the International Tribunal and in discussions among parties to the trial;
- (7) the testimony of the witness R shall be held in closed session or, if the witness is willing to appear in open court, his testimony may be given using image and voice altering devices to the extent necessary to prevent his identity from becoming known to the public or to the media;
- (8) if witness R's testimony is given in closed session, edited recordings and transcripts of the session(s) shall, if possible, 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 to ensure that no information leading to the possible identification of the witness is disclosed;
- (9) the accused, the defence counsel, and their representatives who are acting pursuant to their instructions or requests, shall not disclose the name of witness R or other identifying data concerning witness R 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;
- (10) 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 R or the relatives of witness R, and the Office of the Prosecutor shall make arrangements for such contact as may be determined necessary; and
- (11) the public and the media shall not photograph, video-record or sketch witness R while he is in the precincts of the International Tribunal.

4. During oral argument the Prosecutor stated that witness R had indicated that he is willing to testify in open session if his image can be altered but that his voice need not be altered. As amended, the requested protective measures seek non-disclosure of information relating to witness R to the public and the media. In essence, the Prosecutor's contention is that the protective measures are necessary because witness R has a justified fear for the safety of family members who remain in areas under the control of the Bosnian Serb authorities.

C. Applicable Provisions

5. 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"). 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. *Prosecutor v. Tadic*, No. IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Witness L of 14 November 1995 ICTY Tr.Ch. II ("*Witness L Decision*") para. 11.

D. Reasons For Decision

6. With regard to the limitation of the accused's right to a public trial, this Trial Chamber has to ensure that any curtailment of the accused's right to a public hearing is justified by a genuine fear for the safety of witness R and/or the members of witness R's family. 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 R, this Trial Chamber considers that the public's right to information and the accused's right to a public hearing must yield in the present circumstances 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 R's

fear of the serious consequences to members of his family if information about his identity is made known to the public or the media.

7. Witness R has indicated that he is willing to testify in open session with image distortion. The preference of the Trial Chamber is to have open sessions whenever possible so as not to restrict unduly the accused's right to a public hearing and the public's right to information and to ensure that closed sessions are utilised only when other measures will not provide the degree of protection required.

8. The 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, as amended at the hearing to provide for the evidence to be given in open session. However, if at any time, these measures are no longer required, they shall cease to apply or, if a less restrictive measure can secure the required protection, that measure shall be applied.

III. DISPOSITION

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

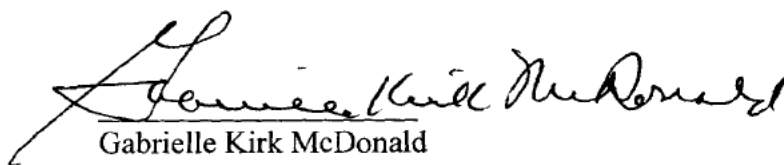
PURSUANT TO RULE 75,

HEREBY GRANTS the Prosecutor's Motion and **ORDERS AS FOLLOWS:**

- (1) the name, address, whereabouts of, and other identifying data concerning the person given pseudonym R shall not be disclosed to the public or to the media;
- (2) all hearings to consider the issue of protective measures for witness R 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 Office of the Prosecutor in consultation with the Victims and Witnesses Unit to ensure that no information leading to the possible identification of the witness is disclosed;
- (3) the name, address, whereabouts of, and identifying data concerning witness R 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 R 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 R shall not be disclosed to the public or to the media;

- (6) the pseudonym R shall be used whenever referring to this witness in proceedings before the International Tribunal and in discussions among parties to the trial;
- (7) the testimony of witness R shall be heard in open session, using image-altering devices to the extent necessary to prevent his identity from becoming known to the public or to the media;
- (8) the accused, the defence counsel, and their representatives who are acting pursuant to their instructions or requests, shall not disclose the name of witness R, or any other identifying data concerning witness R, 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;
- (9) 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 R or the relatives of witness R, and the Office of the Prosecutor shall make arrangements for such contact as may be determined necessary; and
- (10) the public and the media shall not photograph, video-record or sketch witness R while he is 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 thirty-first day of July 1996
At The Hague
The Netherlands

[Seal of the Tribunal]