

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: 16 August 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:** 16 August 1996

**PROSECUTOR**

v.

**DUŠKO TADIĆ A/K/A "DULE"**

**DECISION ON THE DEFENCE MOTION  
TO PROTECT DEFENCE WITNESSES**

**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

On 25 June 1995 this Trial Chamber issued its Decision on the Defence Motions to Summon and Protect Defence Witnesses, and on the Giving of Evidence by Video-link *Prosecutor v. Tadic*, No. IT-94-1-T, ICTY Tr.Ch. II (“*Decision on Protection of Defence Witnesses*”). This Decision granted leave to the Defence to file supplementary affidavits and to amend its Motion in order to request safe conduct instead of orders permitting testimony by video-link. Pending before the Trial Chamber is the Motion to Protect Defence Witnesses (“Motion”) filed by the Defence on 30 July 1996 in which it did amend its request in respect of six witnesses and requests protective measures for nine additional Defence witnesses. On 6 August 1996 the Prosecutor filed a Response to the Motion (“Response”) objecting in part to the requested relief.

Oral arguments on the motions were heard *in camera* on 14 August 1996 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 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 the circumstances as stated in its Motion to Summon and Protect Defence Witnesses of 18 April 1996 still exist. Witnesses are said to be exposed to serious risk of reprisals and 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 co-operation 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 eight witnesses. Second, it requests that the Trial Chamber issue orders for the safe conduct of seven witnesses to travel to the seat of the International Tribunal and testify before the Trial Chamber. Third, it requests that the Trial Chamber order the giving of testimony by six witnesses by video-link. Fourth, the Trial Chamber is asked to protect the identity of five

witnesses from disclosure to the public and the media, *i.e.* confidentiality. Fifth, the Defence requests that its witnesses who will appear before the Trial Chamber on the bases of orders for safe conduct be granted general testimonial immunity under Rule 90 (E).

4. The Prosecutor acquiesces to the request of the Defence to summon certain witnesses but partly opposes the requests for safe conduct, confidentiality, the giving of testimony through video-link, and for general testimonial immunity.

#### 1. Summons

5 Considering that the Prosecutor agrees to the request that Defence witnesses be summoned and, pursuant to Rule 54, the Trial Chamber will issue summonses for the witnesses identified in the Motion as witnesses 29, 30, 31, 32, 33, 34, 35 and 36.

#### 2. Safe Conduct

6. Orders for safe conduct are not specifically provided for by either the Statute or the Rules but can be made under the general power of Rule 54. The Defence requests the Trial Chamber to provide for the safe conduct of seven of its witnesses in order to secure their attendance at the seat of the International Tribunal.

7. In the *Decision on Protection of Defence Witnesses* this Trial Chamber stated that

[t]he 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.

*Decision on Protection of Defence Witnesses* para. 11. For these reasons, the Trial Chamber granted leave to the Defence to amend its Motion to request, where appropriate, orders for safe conduct instead of orders permitting testimony by video-link. In accordance

with the Decision, the Defence asks that witnesses 4 and 5, who had previously been granted leave to give testimony through video-link, be granted safe conduct.

8. 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, 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. *See, Decision on Protection of Defence Witnesses* para. 12.

9. In its Reply the Prosecutor requests that certain limits be put on the orders for safe conduct. The Prosecutor suggests that the freedom of movement of Defence witnesses be restricted while in the Netherlands to give testimony and that the time for which they are in the Netherlands be restricted to seven days before the witness is to appear in the case and three days after he has been excused. These measures the Prosecutor suggests would be necessary to prevent possible harassment of Prosecutor witnesses. The Prosecutor requests that the freedom of movement of the Defence witnesses is restricted to travelling between the port of entry or of exit and their lodging, and between their lodging and the International Tribunal. The Defence does not object to restricting the freedom of movement of its witnesses insofar as witnesses are allowed limited freedom of movement around the location of lodging. The Trial Chamber grants the request with the reservation made by the Defence. The Defence does object to restricting the time the witnesses spend in the Netherlands for the giving of testimony. The Defence bases its opposition *inter alia* on the practical restrictions on the capacity of the Victims and Witnesses Unit in managing to get the witnesses to the International Tribunal. For this reason, the Trial Chamber denies the request to restrict the time for which Defence witnesses are in the Netherlands,

however, if the Victims and Witnesses Unit is able to shorten the period witnesses are in the Netherlands to give testimony, without posing danger to the testimony, it is encouraged to do so. To prevent unnecessary harassment of witnesses, the Trial Chamber also orders, *proprio motu*, that, while in the Netherlands to give testimony, Defence witnesses must refrain from contacting Prosecutor witnesses or their relatives.

10. The Trial Chamber orders that, while in the Netherlands for the purpose of appearing before the International Tribunal to testify, witnesses 4, 5, 29, 30, 31, 32 and 35, 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. This 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. See European Convention Art. 12 (3).

### 3. Video-Link Testimony

11. 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 unable 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.

12. 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 addition the Trial Chamber is

satisfied that in its affidavits and the oral representations the Defence made a sufficient showing that these witnesses are unable 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 of the *Decision on Protection of Defence Witnesses* and provided that the necessary equipment is made available to the Tribunal. *See, Decision on Protection of Defence Witnesses* para. 19.

#### 4. Confidentiality

13. 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 is stated 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*"), 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.

14. 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. 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. *See, Decision on Protection of Defence Witnesses* para. 25.

15. In his Response, the Prosecutor declares not to object to confidentiality for witnesses 7, 29, 32, 33 and 35 if they had not had media contacts which would make the granting of confidentiality inappropriate. During oral proceedings the Defence submitted that none of the witnesses had had media contacts.

16. 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 submission by the Defence that none of the witnesses had had contacts with the media, and the general confirmation by the Prosecutor that the fear of reprisal entertained by witnesses who will testify before the International Tribunal is well founded, 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. See, *Decision on Protection of Defence Witnesses* para. 26. Witnesses 7, 29, 32, 33 and 35 have indicated such fear of reprisals, therefore, the Trial Chamber grants the measures protecting the identity of witnesses 7, 29, 32, 33 and 35 from disclosure to the public and the media.

17. 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. The Trial Chamber prefers to have open sessions whenever possible so as not to restrict unduly the Prosecutor'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. During the oral proceedings the Defence indicated that it might not be needing closed sessions for all its witnesses. The Defence should submit the names of witnesses who are prepared to testify in open session before 10 September 1996.

18. The Prosecutor in its Response requests the Trial Chamber to specifically limit the confidentiality measures relating to Defence's witnesses to their involvement in the present proceedings as witnesses. According to the Prosecutor this restriction is necessary in order not to preclude any possible investigation. As the Trial Chamber has pointed out on several occasions, protective measures should be limited to what is strictly necessary. See, *Protective Measure Decision* para. 66, *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 para. 8, and *Prosecutor v. Tadic*, No. IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Witness R of 31 July 1996, ICTY Tr.Ch. II para. 7, 8. The Trial Chamber therefore confirms that confidentiality measures in respect of Defence witnesses must be interpreted as being restricted as to their status as witnesses in the present case.

#### 5. General Testimonial Immunity

19. During oral argument the Defence requested that its witnesses who will appear before the court on the basis of a safe conduct be granted general testimonial immunity under Rule 90 (E). Rule 90(E) reads:

A witness may object to making any statement which might tend to incriminate him. The Chamber may, however, compel the witness to answer the question. Testimony compelled in this way shall not be used as evidence in a subsequent prosecution against the witness for any offence other than perjury.

The wording of this Rule does not allow the Trial Chamber to grant blanket testimonial immunity for witnesses. When the witness appears before the Trial Chamber he can, however, ask for the protection of Rule 90(E) by refusing to testify on the ground that his testimony may incriminate him. For these reasons, the Trial Chamber denies this request of the Defence.

### 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 29, 30, 31, 32, 33, 34, 35 and 36 shall be summoned;
- (2) witnesses 4, 5, 29, 30, 31, 32 and 35, 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. This 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. When in the Netherlands, the freedom of movement of these Defence witnesses is restricted to the area around the location of their lodging and to travelling between the port of entry or of exit and their lodging, and between their lodging and the International Tribunal; and
- (3) witnesses 9, 20, 22, 34, 36 and 37 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 paragraph 22 of the *Decision on Protection of Defence Witnesses*.

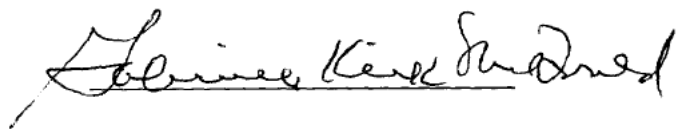
**PURSUANT TO RULE 75,**

- (4) the name, address, whereabouts of, and other identifying data concerning witnesses 7, 29, 32, 33 and 35 shall not be disclosed to the public or to the media;
- (5) all hearings to consider the issue of protective measures for witnesses 7, 29, 32, 33 and 35 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 7, 29, 32, 33 and 35 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 7, 29, 32, 33 and 35 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 7, 29, 32, 33 and 35 shall not be disclosed to the public or to the media;
- (9) the testimony of witnesses 7, 29, 32, 33 and 35 shall be heard in closed session or, if the witnesses are willing to appear in open court, their testimony may be given using image-altering devices to the extent necessary to prevent their identity from becoming known to the public or to the media; if a witness' 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 Defence in consultation with the Victims and Witnesses Unit;

- (10) pseudonyms shall be used whenever referring to witnesses 7, 29, 32, 33 and 35 in proceedings before the International Tribunal and in discussions among parties to the trial;
- (11) the names of witnesses 7, 29, 32, 33 and 35 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 7, 29, 32, 33 and 35, 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 7, 29, 32, 33 and 35 or the relatives of witnesses 7, 29, 32, 33 and 35, and the Defence shall make arrangements for such contact as may be determined necessary;
- (14) the public and the media shall not photograph, video-record or sketch witnesses 7, 29, 32, 33 and 35 while they are in the precincts of the International Tribunal; and

- (15) that while in the Netherlands to give testimony Defence witnesses must refrain from contacting Prosecutor witnesses or their relatives.

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



Gabrielle Kirk McDonald  
Presiding Judge

Dated this sixteenth day of August 1996,  
At The Hague  
The Netherlands

[Seal of the Tribunal]