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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-95-14-T

Date: 5 November 1996

Original: English and French

IN THE TRIAL CHAMBER

Before: **Judge Claude Jorda, Presiding**
Judge Jules Deschenes,
Judge Fouad Riad

Registrar: **Mr. Dominique Marro, Deputy Registrar**

Decision of: **5 November 1996**

THE PROSECUTOR

v.

TIHOMIR, a.k.a. TIHOFIL BLASKIĆ

DECISION ON THE APPLICATION OF THE PROSECUTOR DATED 17 OCTOBER 1996 REQUESTING PROTECTIVE MEASURES FOR VICTIMS AND WITNESSES

The Office of the Prosecutor:
Mr. Eric Ostberg
Mr. Gregory Kehoe
Mr. Andrew Cayley

Counsel for the Defence:
Mr. Zvonimir Hodak
Mr. Russell Hayman
Mrs. Nela Pedišić

1. Trial Chamber I received an application from the Prosecutor dated 17 October 1996 "requesting protective measures for victims and witnesses".

2. This is the Prosecutor's fourth application on the same subject in the present case, not counting an ancillary request in his response of 18 September 1996 and an unsuccessful attempt at an appeal of the second decision which this Trial Chamber rendered on 2 October 1996.

3. Unlike the previous applications, however, which dealt with a significant number of some eighty-seven witnesses, this application concerns only the two witnesses B and C whom the Prosecutor describes in the following terms:

> "The two witness who are the subject of this application, hereinafter referred to as witnesses B and C, are Bosnian Muslim civilians who can provide direct testimony in relation to all counts contained in the indictment."

4. The Prosecutor is requesting the measures indicated below:

Prayer (1): pending a decision on the present application, the Prosecutor requests a stay of Trial Chamber I's order of 2 October 1996 requiring her to make available to the accused and to his counsel the full text of the statements made by Witnesses B and C;

Prayer (2): that the names, addresses, whereabouts and other identifying data concerning persons given pseudonyms B and C shall not be disclosed to the accused, the public or to the media;

Prayer (3): that all hearings to litigate the issue of protective measures for pseudonyms witnesses shall be in closed session;

Prayer (4): that the names, addresses, whereabouts and other identifying information concerning Witnesses B and C shall be sealed and not included in any of the public records of the International Tribunal.

Prayer (5): that, to the extent the names or other identifying data concerning Witnesses B and C are contained in existing public documents of the International Tribunal , those names and other identifying data shall be expunged from those documents;

Prayer (6): that documents of the International Tribunal identifying Witnesses B and C shall not be disclosed to the public or the media;

Prayer (7): that testimony of Witnesses B and C shall be given by one-way closed circuit television;

Prayer (8): that testimony of Witnesses B and C may be given using voice and image altering devices or by not transmitting the image to the accused and the defence;

Prayer (9): that the testimony of Witnesses B and C be heard in closed session;

Prayer (10): that the pseudonyms B and C be used whenever referring to these witnesses in proceedings before the International Tribunal and in discussions among parties to the trial.

5. In his *Opposition* of 28 October 1996, the accused

a) considers that Prayer No. 1 is moot;

b) states that he does not object to Prayers Nos. 3,4,5,6,9, and 10;

c) objects categorically to Prayers Nos. 2 and 8;

d) objects conditionally to Prayer No. 7.

6. The Trial Chamber has no objection to sanctioning the agreement between the parties indicated in paragraph b) above.

7. The questions raised in paragraphs a), c) and d), namely Prayers Nos. 1,2,7 and 8 of the Prosecutor must be settled.

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8. The Prosecutor essentially wishes to ensure the total anonymity of the two witnesses B and C.

9. In opposition, the accused first argues *res judicata*, on the basis of this Trial Chamber's two previous decisions on the matter. This, however, represents an overly restrictive reading of the decision rendered by a bench of three Judges of the Appeals Chamber who, on 14 October 1996, dismissed the Prosecutor's application for leave to appeal. Paragraph 9 of that decision reserves the Prosecutor's future right in a fashion broad enough to accommodate this application, specifically on the basis of Sub-rule 75(A) of the Rules. .

10. The Prosecutor bases her application on a statement of Ms. Apolonia A. Bos dated 17 October 1996. Ms. Bos in an investigator at the Office of the Prosecutor. She concludes her solemn declaration about Witness C in the following terms:

"In short, there is simply no procedure absent anonymity available to guarantee Witness C's safety. Witness C is prepared to testify if his identity and that of his family are completely protected. The witness expressed great concern that his identity be kept confidential from the accused as well as the public."

11. Ms. Bos' statement in respect of Witness B concludes with a similar paragraph.

12. It remains to be determined whether the Prosecutor is legally entitled to the relief she seeks, namely, the total anonymity of the two witnesses, not only in respect of the public and the media, but also the accused.

13. The Statute and the Rules of the Tribunal certainly permit this Trial Chamber to grant the application in respect of the public and the media. Even if, regarding the accused, Investigator Bos' observations may lead to the reservation to which the Trial Chamber refers in the second part of its decision (paragraphs 37 and following), they are

sufficient to dispose the Trial Chamber to grant the Prosecutor's application in respect of the public and the media.

14. The difficulty, which neither the Statute nor the Rules resolve, arises insofar as the accused and his Counsel are concerned.

15. Article 20 of the Statute requires that "a trial is fair and expeditious" (paragraph 1). Placing both matters on an equal footing, it provides for "full respect for the rights of the accused" and "due regard for the protection of victims and witnesses". *Id.* The conflict between the two matters is precisely what the application puts into focus.

16. First, the protection of the victims and witnesses (B in both cases, C in the second) might, in fact, require total anonymity in this case. The measure, however, then comes up against the rights of the accused which are, at least, as important:

- fair and public hearing (Article 21.2) , subject to Article 22;
- adequate time for the preparation of his defence (Article 21.4 (b));
- right to be present at his trial (Article 21.4 (d));
- examination of the witnesses against him (Article 24.4 (e)).

17. The reservation stipulated in Article 22 covers protection measures. It is of interest to note that Article 22 speaks only of "the protection of the victim's identity". The Trial Chamber does not, however, wish to base its conclusion on that specific observation.

18. Mandated by Article 22 of the Statute, the Tribunal adopted Rules 69 and 75 for the protection of victims and witnesses.

19. On this specific subject, an ancillary question must first be settled. Sub-rule 69(B) of the Rules states:

"In the determination of protective measures for victims and witnesses, the Trial Chamber may consult the Victims and Witnesses Unit."

20. The possibility of consultation therefore exists, although under the appropriate circumstances. In her application, the Prosecutor alleges:

"The Prosecutor has consulted with members of the Victims and Witnesses Unit in respect of this application for protective measures. The Victims and Witnesses Unit has agreed to assist the Office of the Prosecutor in fashioning appropriate protective measures."

21. The application focuses entirely on the statement of Ms. Bos, according to whom "there is simply no procedure absent anonymity available to guarantee the (two witnesses') safety"; any further consultation might thus prove vain. Nonetheless, the results would deserve to be communicated to the Tribunal.

22. Having stated the above, let us recall that the relief sought by the Prosecutor requires the presence of "exceptional circumstances" (Sub-rule 69(A)) and that, in any case, "the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence" (Sub-rule 69(C)).

23. It is true that the last provision is stipulated "subject to Rule 75," (Sub-rule 69(C)), This reservation, however, serves only to raise once again the question which has already been asked, since it subjects the protective measures to the "condition" that they be consistent with "the rights of the accused" (Sub-rule 75(A)). It is therefore completely logical that Sub-rule 75(B)(i) permits "measures to prevent disclosure to the public or the media" but stops short of including the accused.

24. The philosophy which imbues the Statute and the Rules of the Tribunal appears clear: the victims and witnesses merit protection, even from the accused, during the preliminary proceedings and continuing until a reasonable time before the start of the trial itself; from that time forth, however, the right of the accused to an equitable trial must take precedence and require that the veil of anonymity be lifted in his favour, even if the veil must continue to obstruct the view of the public and the media.

25. How can one conceive of the accused being afforded an equitable trial, adequate time for preparation of his defence, and intelligent cross-examination of the Prosecution witnesses if he does not know from where and by whom he is accused?

26. In many countries, this is an article of faith enshrined in the constitutions themselves: see, for example, in Yugoslavia (Article 182); in the United States of America (the Sixth Amendment); in Hungary (Article 57); in Canada (Canadian Charter of Rights and Freedoms (Article 11); in Costa Rica (Article 39). In addition, it should be noted that in a study published in 1993,[1] Professor Cherif Bassiouni identified thirty-eight national constitutions "which explicitly guarantee the right to a fair trial or hearing in criminal cases (...)." In other countries, a long-standing legal tradition guarantees the same rights to the accused: *see* in the United Kingdom *D v. National Society for the Prevention of Cruelty to Children.*[2]

27. In France, Mssrs Stefani Levasseur and Bouloc in their *Traité de Procédure pénale*[3] cite a 1974 decision of the Court of Appeals at Bourges which ruled that "the statement of a witness claiming that he could remain anonymous would be null and void."[4] More recently, the *Cour de Cassation* dismissed the testimony of a witness who testified with a hood over his face.[5]

28. Even more directly to the point is the unanimous decision of the European Court of Human Rights in the case *Kostovski v. The Netherlands*[6]. Kostovski had been found guilty of a criminal offence based on the statements *inter alia* of two anonymous witnesses whom Kostovski was never able to cross-examine. The Court commented on this as follows:

"The latter feature of the case (anonymity of witnesses) compounded the difficulties facing the applicant. If the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he

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[1] *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, Duke Journal of Comparative and International Law, 1993, (vol. 3, p. 235, at p. 267).
[2] 1978 A.C. 171.
[3] Dalloz, 16th edition, page 518, no. 529.
[4] Bourges, 5 December 1974, D. 1975, Somm. 55, J..C.P. 1975.I IV. 102.
[5] Crim. 24 June 1984; D 1984 IR 466, note J.M.R.
[6] 20 November 1989, European Court of Human Rights serie A, No 166, p.4.

or she is prejudiced, hostile or unreliable. Testimony or other declarations inculpating an accused may well be designedly untruthful or simply erroneous and the defence will scarcely be able to bring this to light if it lacks the information permitting it to test the author's reliability or cast doubt on his credibility. The dangers inherent in such a situation are obvious" (paragraph 42).

29. The Court had to consider this situation in light of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention). After providing in paragraph 1 of that article that "everyone is entitled to a fair and public hearing, paragraph 6 adds that

"Everyone charged with a criminal offence has the following minimum rights:
(...)
"to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;"

30. Except for one synonym of no significance, these are the very words of paragraphs 2 and 4(e) of Article 21 of the Statute of the Tribunal.

31. Guided by these provisions, the Court severely criticised the behaviour of the Dutch courts and concluded that Kostovski was the victim of violations of the Convention:

"The right to a fair administration of justice holds so prominent a place in a democratic society (Delcourt judgement of 17 January 1970, series A no. 11, p. 15, paragraph 41) that it cannot be sacrificed to expediency" (paragraph 44).
(...)
The Court therefore concludes that in the circumstances of the case the constraints affecting the rights of the defence were such that Mr. Kostovski cannot be said to have received a fair trial. There was accordingly a violation of paragraph 3 (d), taken together with paragraph 1, of Article 6" (paragraph 45).

32. The decision was praised by Professor Jean Pradel , *Procédure pénale.*[7] This was also the opinion of two authors who enjoyed the status of privileged observers throughout the implementation period of the Tribunal, its Statute and Rules: Virginia Morris, member of the Office of Legal Affairs of the United Nations and Michael P. Scharf, advisor for United Nations affairs at the United States Department of State. In 1995, the two co-published *An Insider's Guide to the International Criminal Tribunal for the former Yugoslavia.*[8] The authors state the principle that "(...) the protection measures cannot infringe the rights of the accused" (vol. 1, p. 244). They emphasise that, in this area, "(...) the accused's right of confrontation and cross-examination must be protected." *Id.* Significantly, they add:

"However, the person's identity must be disclosed to the accused before trial to provide adequate time to prepare the defense to the charges, including the cross-examination of prosecution witnesses ." *Id.*

Last, since in the final analysis one of the rights must take precedence over the other, the same authors conclude (p. 246):

"When witness protection cannot be provided consistent with the rights of the accused, the Prosecutor may have to consider calling other witnesses or offering other documentary or physical evidence rather than seriously jeopardising the physical safety of a particular witness in the absence of adequate protection."

33. We must reiterate here the observation of the European Court of Human Rights: "a fair administration of justice cannot be sacrificed to expediency."

34. On this question, this Trial Chamber agrees with the conclusion of Judge Stephen in the case *The Prosecutor v. Tadić*[9]*:*

"I can conclude my survey of the Rules by saying, in sum, that they give no support of anonymity of witnesses at the expense of fairness of the trial and the rights of the

[7] Editions Cujas, 8th edition, 1995, pages 626-627, paragraph 551.
[8] Transnational Publishers, Inc. Irvington-on-Hudson, New York.
[9] Decision of 10 August 1995, p. 5022.

accused spelt out in Article 21. In this they are, in their entirety, consistent with the Statute."

35. In light of this analysis and the protective measures about which the parties have already agreed (see paragraph 6), it is therefore proper in order to complete those measures without prejudicing the pre-eminent rights of the accused, to order that all identifying data on witnesses B and C be disclosed to him with a time period consistent with the requirements of Sub-rule 69(C) of the Rules, that is, prior to the trial with adequate time for preparation of the defence.

36. In its Decision of 2 October 1996, this Trial Chamber already ordered that the trial would begin on Wednesday, 8 January 1997. A previous 30-day period appears reasonable. This is the time which Trial Chamber II set in its decision of 14 November 1995 in the same *Tadić* case (supra). The relevant data shall therefore be transmitted to the Defence before Saturday, 8 December 1996.

37. ONE RESERVATION IS HOWEVER ESSENTIAL.

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38. The Statute has taken care to emphasise the rights of the Defence and the need to protect the witnesses. The Rules have sought to ensure the equilibrium between these two demands of justice. However, the tension between the two always remains and, according to the ever-changing circumstances of human affairs, one or the other of the demands will tip the balance.

39. In principle, the rights of the Defence shall take precedence, but the protection of the witnesses will at times also claim its right, loud and clear.

40. Achieving this balance is a delicate operation. Trial Chamber II strove to do so in its majority decision of 10 August 1995 in the case *The Prosecutor v. Tadić* (see above, note 9). Referring to the extreme measure of anonymity of the witnesses even in respect of the accused, Trial Chamber II recognised that it could be granted "only in exceptional circumstances" (paragraph 60). The Trial Chamber added (paragraph 61):

"The situation of armed conflict that existed and endures in the area where the alleged atrocities were committed is an exceptional circumstance par excellence."

41. Trial Chamber II then listed five conditions which the Prosecutor needed to satisfy before a measure of anonymity would be granted to him. In the words of the Tadić decision, the conditions are the following (paragraphs 62 to 66):

"First and foremost, there must be real fear for the safety of the witness or her or his family.

Secondly, the testimony of the particular witness must be important to the Prosecutor's case.

Thirdly, the Trial Chamber must be satisfied that there is no prima facie evidence that the witness in untrustworthy.

Fourthly, the ineffectiveness or non-existence of a witness protection programme is another point that (...) has considerable bearing on any decision to grant anonymity (...)

Finally, any measures taken should be strictly necessary. If a less restrictive measure can secure the required protection, that measure should be applied."

42. This Trial Chamber agrees with the decision of Trial Chamber II. However, with all due deference, and taking into consideration the exceptional character of this departure from the rights of the Defence, this Trial Chamber will require that the Prosecutor support the conditions in question with relevant proof, especially as regards:

- condition no. 2:

This Trial Chamber cannot rely entirely on the Prosecutor who asserts the importance of the testimonies of witnesses B and C. The assertion must be supported by objective elements in respect of specific charges and, if necessary, independent proof.

- condition no. 3:

The double negative expressed in the condition encourages a negative *ipse dixit* from the Prosecutor. The demonstration of this condition demands instead a positive approach because the Trial Chamber cannot be satisfied with a simple assertion by the Prosecutor that the witnesses are credible.

- condition no. 4:

Possible clarification from the Victims and Witnesses Unit which the Prosecutor states that she has consulted must be demanded.

43. In the present case, the Prosecutor's entire demonstration is contained in the solemn declaration of Ms. Bos attached to the application. The authenticity and credibility of the declaration were not questioned by the Defence. That is where the answer to the five question raised above and then characterised must be sought. In order:

1. the "real fear" is constant and justified;

2. the two witnesses, according to the Prosecutor, are "essential" to the proof of the prosecution; but no objective element supports this assertion;

3. nothing exists to raise doubts as to the credibility of the two witnesses, but nothing supports it either;

4. no protection programme permits ensuring the safety of the two witnesses or that of their families according to the Prosecutor; but what is the opinion of the Victims and Witnesses Unit?

5. total anonymity would be necessary.

44. The five conditions suggested by Trial Chamber II are therefore satisfied only in part. Furthermore, a significant preliminary question remains unanswered: are we faced here with an exceptional case, within the meaning of the Rules?," or is the Prosecutor not attempting rather to make an exceptional case out of what is really the rule in Bosnia?

45. Trial Chamber II saw "an exceptional circumstance" in the situation of the enduring armed conflict. But it is public knowledge that this situation no longer exists and the Prosecutor cannot benefit from it. This Trial Chamber is not satisfied that the case-file demonstrates the existence of an "exceptional case," the pre-requisite for taking into consideration the five conditions which might lead to the granting of the protective measures the Prosecutor has requested.

46. Furthermore, the Prosecutor is apparently aware of this difficulty. In his application he states:

"The Prosecutor is prepared to present additional evidence in support of this application if the Trial Chamber so desires."

47. In order to avoid other proceedings, this Trial Chamber - rather than merely dismissing this aspect of the application - is prepared to grant to the Prosecutor the option of presenting additional evidence, should any exist, within a time period which is readily consistent with the date set for the disclosure of the evidence, that is, by 15 November 1996. Should the Prosecutor fail to do so, the order to communicate the evidence must be complied with.

48. **FOR THE FOREGOING REASONS**

Trial Chamber I,

After reviewing the Application of the Prosecutor filed on 17 October 1996 and the Opposition of the accused dated 28 October 1996,

RULING *inter partes* and unanimously,

Pursuant to Rule 75 of the Rules:

GRANTS

HAVING NOTED the lack of objection of the accused,

Prayers Nos. 3,4,5,6,9 and 10 of the Prosecutor's application;

AND

Should the Prosecutor fail to provide to this Trial Chamber by 15 November 1996 relevant proof in respect of the exceptional character of the situation on which her Application is based and in respect of conditions 2,3, and 4 (see paragraph 42) which the case-file must satisfy;

ORDERS THAT

1. the names, addresses and other identifying data of the persons referred to by the pseudonyms B and C, their whereabouts and the full text of their statements not be disclosed to the public and to the media but be communicated to the accused and his Counsel by 7 December 1996 at the latest;

2. the accused, his Counsel and their representatives acting on their instructions not disclose to the public or to the media the names of the witnesses B and C or any other identifying data regarding them nor the text of their statements, except to the limited

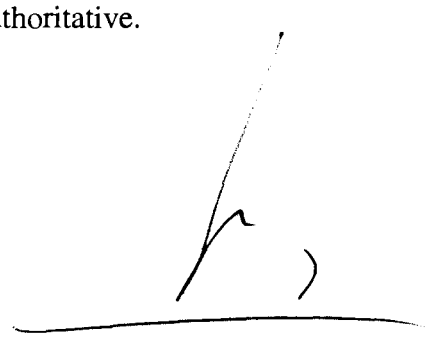
extent that the disclosure to members of the public is necessary to investigate adequately the said witnesses; under pain of contempt of the Tribunal;

3. any disclosure of this sort be made in such a way that the risk of identification of the victims and witnesses by the public or the media be kept to a minimum;

4. the public and the media not photograph, film or sketch the witnesses B and C while they are within the confines of the Tribunal;

REJECTS Prayers Nos. 7 and 8 of the Prosecutor.

Done in French and English, both versions being authoritative.
The Hague, The Netherlands
This 5th day of November 1996.



Claude Jorda,
Presiding Judge, Trial Chamber I

SEAL OF THE TRIBUNAL