



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: 12 November 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 of: 12 November 1996

PROSECUTOR

v.

DUŠKO TADIĆ A/K/A "DULE"

**DECISION ON THE PROSECUTOR'S MOTION TO WITHDRAW
PROTECTIVE MEASURES FOR WITNESS K**

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

On 10 August 1995 this Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 ("International Tribunal") issued its Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses. *Prosecutor v. Tadić*, No. IT-94-1-T, Tr.Ch. II, 10 Aug. 1995 ("*Protective Measures Decision*"). Pending before the Trial Chamber is the unopposed motion to withdraw the protective measures for witness K ("Motion") provided for in the *Protective Measures Decision*.

The request was made orally by the Office of the Prosecutor ("Prosecution") on 30 July 1996. Official Trial Transcript, *Prosecutor v. Tadić*, at p. 2858 ("OTT"). During the hearing that day, the Trial Chamber gave an oral decision granting the Motion, reserving the written decision on the Motion to a later date. *Id.*

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, crimes against humanity as recognised by Article 5 of the Statute, and are acts for which individual criminal responsibility applies as recognised by Article 7(1) of the Statute.

2. In the *Protective Measures Decision* the identity of six witnesses was protected from the public and the media. *Protective Measures Decision* at 38. Four of these were witnesses to charges concerning sexual assault and were granted supplemental protective measures to prevent further traumatization, such as the possibility of giving testimony by one-way closed circuit television. *Id.* at 39. Additionally, four of these witnesses, G, H, J and K, were granted protection from disclosure of their identities to the Defence, *i.e.*, anonymity, by majority decision. *Id.* at 39. However, absolute anonymity was granted only to witness H. The Defence knew the true name of witness G; only his identity under a national witness protection programme was withheld. *Id.* The Defence indicated in its Response to the Motion to Amend the Requested Reliefs 3 and 11 Providing Protective Measures for Witnesses, Additional Information and Rebuttal of Arguments of 14 July 1995, that it did not need to observe the image of witnesses J and K while they testified (Official Record Registry Page at ("RP") 4315), and only their names and actual addresses were withheld, for the Defence was given their "general locality . . . sufficiently precise to allow the Defence to

make enquires of others in the vicinity as to what they saw of the incidents" about which they were to testify. *Protective Measures Decision* at 34.

3. Witness K was granted protection of her identity from disclosure to the Defence, the public and the media. In the Prosecution's Motion and Supporting Brief Requesting Protective Measures for Victims and Witnesses filed on 18 May 1995 it was asserted that her father, brother and husband were taken from her home and presumably executed with the other men from her village on 14 June 1992. RP 1739-40, 1751. It was further asserted that she witnessed the ethnic cleansing of the area of Jaskići and Sivci in opština Prijedor, that her testimony is relevant to counts one and twenty-nine to thirty-four of the indictment as amended on 14 December 1995 (which counts were formerly included in Charge 11 of the original indictment) and that she feared that the accused or his associates would harm her and her children if she were to testify before the International Tribunal. *Id.*

4. In the *Protective Measures Decision* the Trial Chamber stated that

the International Tribunal must interpret its provisions within its own context and determine where the balance lies between the accused's right to a fair and public trial and the protection of victims and witnesses within its unique legal framework.

Protective Measures Decision at 15. The Trial Chamber considered all the circumstances of the case including: witness K's fear for her safety and that of her family; the Prosecution assertion that witness K was a "critical witness" to Charge 11 of the original indictment (RP 1751); that witness K had had no contact with the media; that there were no less restrictive measures available to allay the fear of the witness; that the witness had been a mere bystander; and that there was no evidence indicating that the witness might be untrustworthy. The Trial Chamber observed that

[t]his balancing of interests shows that, on the one hand, there is some constraint to cross-examination, which can be substantially obviated by the procedural safeguards. On the other hand, the Trial Chamber has to protect witnesses who are genuinely frightened.

Protective Measures Decision at 34-35. When balancing the rights of the accused against those of the victims and witnesses, the majority of the Trial Chamber, observing that all the criteria for anonymity set out in the *Protective Measures Decision* had been met and that there were no other means available to protect the witness and her family adequately, granted witness K anonymity.

B. The Pleadings

5. During the trial proceedings the Prosecution requested that the protective measures relating to witness K be withdrawn because the witness had advised the Prosecution that she was now willing to testify in open session and without protection of her identity. The Defence did not oppose the request.

C. Reasons For Decision

6. The *Protective Measures Decision* sets out five criteria that must be met for a request for anonymity to be granted (*id.* at 27) and four procedural safeguards - guidelines - ensuring a fair trial when anonymity is granted. *Id.* at 29-30. The criteria for granting anonymity require that the measures taken should be strictly necessary and that if a less restrictive measure can satisfy the requested protection that measure should be applied. *Id.* at 28. Furthermore, the procedural safeguards provide that the identity of the witness must be released when there is no longer a reason to fear for the security of the witness. *Id.* at 30. In addition the Trial Chamber stated that

[i]f, after considering the proceedings as a whole, as suggested in the *Kostovski* case [*Kostovski v. The Netherlands*, 166 Eur. Ct. H.R. (ser. A) at 4 (1989)], the Trial Chamber considers that the need to assure a fair trial substantively outweighs this testimony, it may strike that testimony from the record and not consider it in reaching its finding as to the guilt of the accused. It would be premature for the Trial Chamber to determine now that such testimony must be excluded.

Id. at 34.

7. In its Decisions on witness protection subsequent to the *Protective Measures Decision*, this Trial Chamber has also stated that “if at any time, [protective] 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”. *Prosecutor v. Tadić*, No. IT-94-1-T, Decision on the Prosecutor’s Motion Requesting Protective Measures for Witness P, Tr.Ch. II, 15 May 1996 at 5. In relation to closed sessions the Trial Chamber has observed that

[t]he 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.

Prosecutor v. Tadić, No. IT-94-1-T, Decision on the Prosecutor’s Motion Requesting Protective Measures for Witness R, Tr.Ch. II, 31 July 1996 at 5. The Trial Chamber, therefore, has applied the less restrictive measure of facial distortion of the broadcast image of the witness instead of closed sessions where possible. *See id.*; *see also Prosecutor v. Tadić*, No. IT-94-1-T, Decision on the Prosecutor’s Motion Requesting Facial Distortion, Tr.Ch. II, 31 July 1996.

8. The above provisions direct the party which intends to offer the witness for whom protective measures are requested to narrow its request, on a continuing basis, to what is strictly necessary. Additionally, the implementation of the *Protective Measures Decision* has been accomplished in subsequent Decisions on protective measures for witnesses in a manner that avoids any undue prejudice to the rights of the accused. Although the accused was not able to see the one anonymous witness who testified, witness H, he could hear the testimony and Defence counsel were permitted to observe the demeanour of the witness while he testified. Furthermore, of the four witnesses who were granted some form of anonymity by the *Protective Measures Decision*, G, H, J and K, only H and K actually testified, and only H made use of the protective measures granted.

9. Thus, considering the obligation on the parties to limit their requests for protective measures to those that are strictly necessary and the Trial Chamber's practice of implementing protective measures decisions in a manner that avoids undue prejudice to the rights of the accused, as well the fact that the Motion is unopposed, the Trial Chamber grants the Motion.

III. DISPOSITION

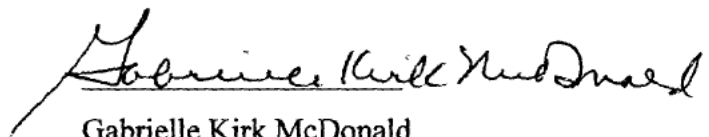
For the foregoing reasons, **THE TRIAL CHAMBER**, being seized of the Motion to withdraw protective measures for witness K filed by the Prosecution, and

PURSUANT TO RULE 75,

HEREBY GRANTS the Motion; and,

ORDERS the withdrawal of the protective measures granted in respect of witness K in the Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses.

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



Gabrielle Kirk McDonald

Presiding Judge

Dated this twelfth day of November 1996

At The Hague

The Netherlands

[Seal of the Tribunal]