



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

Case No.: IT-95-17/1-T
Date: 11 June 1998
Original: ENGLISH

IN THE TRIAL CHAMBER

Before: Judge Florence Ndepele Mwachande Mumba, Presiding
Judge Antonio Cassese
Judge Richard May

Registrar: Mrs. Dorothee de Sampayo Garrido-Nijgh

Decision of: 11 June 1998

PROSECUTOR

v.

ANTO FURUNDŽIJA

**DECISION ON PROSECUTOR'S MOTION REQUESTING PROTECTIVE
MEASURES FOR WITNESSES "A" AND "D" AT TRIAL**

The Office of the Prosecutor:

Ms. Patricia Viseur-Sellers
Mr. Michael Blaxill

Counsel for the Accused:

Mr. Luka Mišetić
Mr. Sheldon Davidson

I. INTRODUCTION

1. Pending before this Trial Chamber of the International Criminal Tribunal for Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 ("the International Tribunal") is the Prosecutor's Motion Requesting Protective Measures for Witnesses at Trial filed on 5 June 1998 ("Motion") (Official Record at Registry Page ("RP") D1398- D1405).

The Trial Chamber heard oral argument on 8 June 1998, at which time the Defence counsel for Anto Furundžija responded to the Motion. The Trial Chamber granted the Motion in an oral decision, reserving its written decision to a later date.

The Trial Chamber will issue an Order on Prosecutor's Motion Requesting Protective Measures for Witnesses at Trial pertaining to witnesses "B" and "C"; this Decision will therefore deal only with those protective measures requested for witnesses "A" and "D".

THE TRIAL CHAMBER, HAVING CONSIDERED the written submissions and oral arguments of the parties,

HEREBY ISSUES ITS WRITTEN DECISION.

II. DISCUSSION

2. In its Motion, the Prosecution requests that protective measures be extended to a number of its witnesses at trial, pursuant to Article 22 of the Statute of the International Tribunal ("Statute") and Rule 75 of the Rules of Procedure and Evidence of the International Tribunal ("Rules"). Measures requested for two of its witnesses, witness "A" and witness "D", include a pseudonym, voice and image alterations whilst giving testimony, and the request that their testimony take place in closed session. The Prosecutor on 10 June 1998 subsequently withdrew its request for voice and image alterations. The Prosecution notes that the Trial Chamber has already granted certain protective measures for witness "A" in the Order Pursuant to Prosecutor's Motion to Protect Victims and Witnesses, filed on 13 February 1998. Furthermore, the Prosecution argues that the granting of protective measures is a well-established practice of the International Tribunal. Furthermore, the Prosecutor argues that the circumstances of witnesses "A" and "D" are such as to merit the measures requested.

3. At the hearing held on 8 June 1998, the Defence responded to the Motion with the argument that Article 21 of the Statute establishes the right of the accused to a fair and public hearing, and that the right to a public hearing includes the disclosure of the identity of witnesses to the public except in extraordinary circumstances. The Defence argues that to allow the testimonies of witnesses "A" and "D" in closed session is to deprive the accused of having the essence of his case heard in public.

4. The Prosecution relies on Article 22 of the Statute, whereas the Defence relies on Article 21. These two Articles reflect the balance which the Trial Chamber must observe between the right of the accused to a public trial on the one hand, and the protection of victims and witnesses on the other. Article 21, paragraph 2, states:

In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute.

The right of an accused to a public hearing is therefore not absolute, but is subject to Article 22 which provides:

The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of *in camera* proceedings and the protection of the victim's identity.

The granting of protective measures in exceptional circumstances is consistent with the Statute. Such measures are granted pursuant to Rule 75, which states:

(A) A Judge or a Chamber may, *proprio motu* or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Unit, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused.

(B) A Chamber may hold an *in camera* proceeding to determine whether to order:

(i) measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related to or associated with a victim or witness by such means as:

(a) expunging names and identifying information from the Chamber's public records;

(b) non-disclosure to the public of any records identifying the victim;

(c) giving of testimony through image- or voice- altering devices or closed circuit television;

(d) assignment of a pseudonym;

(ii) closed sessions, in accordance with Rule 79;

(iii) appropriate measures to facilitate the testimony of vulnerable victims and witnesses, such as one-way closed circuit television.

(C) A Chamber shall, whenever necessary, control the manner of questioning to avoid any harassment or intimidation.

Furthermore, the Trial Chamber may order a closed session pursuant to Rule 79, which states:

(A) The Trial Chamber may order that the press and the public be excluded from all or part of the proceedings for reasons of:

(i) public order or morality;

(ii) safety, security or non-disclosure of the identity of a victim or witness as provided in Rule 75; or

(iii) the protection of the interests of justice.

(B) The Trial Chamber shall make public the reasons for its order.

5. The Trial Chamber also has in mind Article 14, paragraph 1, of the International Convention on Civil and Political Rights of 1966, which states:

[E]veryone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interests of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice¹. . .

This Article confirms that the right of the accused to a public hearing is subject to other considerations. In the case at hand, giving public testimony would be contrary to the interests of the private lives of both witnesses "A" and "D". Moreover, to order these witnesses to testify in public may result in their unwillingness to testify at all, and as witnesses "A" and "D" are crucial to the Prosecution case, this would prejudice the interests of justice.

6. The granting of protective measures for witnesses in exceptional circumstances is a well-established practice of the International Tribunal, especially in cases of victims of rape or sexual assault². The rationale for this practice is found in paragraph 108 of the *Report of The Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808* (1993), (U.N. Doc. S/25704, 3 May 1993) ("the Report"), which states:

In the light of the particular nature of the crimes committed in the former Yugoslavia, it will be necessary for the International Tribunal to ensure the protection of victims and witnesses. Necessary protection measures should therefore be provided in the rules of procedure and evidence for victims and witnesses, especially in cases of rape and sexual assault . . .

¹ Emphasis added.

² Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses in The Prosecutor v. Duško Tadić (IT-94-I-T) filed on 10 August 1995; Decision on the Motions by the Prosecution for Protective Measures for the Prosecution Witnesses Pseudonymed "B" through to "M" in The Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić, and Esad Landžo (IT-96-21-T) filed on 28 April 1997; Decision on the Prosecution's Motion for the Redaction of the Public Record in The Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić, and Esad Landžo (IT-96-21-T) filed on 5 June 1997.

7. The Trial Chamber finds that the case before it is exceptional for several reasons. The first of these is the situation in the former Yugoslavia, which remains volatile because of ongoing ethnic tension and hatred. Witnesses therefore have more to fear for their own safety and that of their family than in countries where peace and stability prevail. Cases before the International Tribunal are therefore not comparable to cases before national jurisdictions in this respect.

8. This does not mean that every similar case merits the granting of protective measures; such measures should only be granted in exceptional circumstances. Each case must be determined on its own merits. The Trial Chamber holds such exceptional circumstances exist in this case. The allegations in this case concern, *inter alia*, a serious case of rape, and the protective measures requested are, therefore, warranted.

9. Furthermore, the Trial Chamber finds that in this case, the protective measures requested are in the interests of justice. The primary duty of the Trial Chamber is the search for truth. The measures requested will assist in giving witnesses "A" and "D" psychological freedom in giving their testimony, thus promoting the search for truth.

10. In any case, all the proceedings of the International Tribunal are video-taped in order to constitute a permanent record of the case. Furthermore, an overview of the evidence presented at trial will be reflected in the Judgement when rendered.

III. DISPOSITION

For the foregoing reasons

PURSUANT TO ARTICLES 21 and 22 of the Statute and **RULES 75 and 79**

THE TRIAL CHAMBER GRANTS the Prosecutor's Motion Requesting Protective Measures for Witnesses at Trial filed on 5 June 1998, and orders the following:

- (1) the names, addresses, whereabouts and other identifying information concerning the persons designated the pseudonyms witnesses "A" and "D" shall not be disclosed to the public or to the media;
- (2) the names, addresses, whereabouts of, or other identifying information concerning the status of witnesses "A" and "D" shall be sealed and not included in any of the public documents of the International Tribunal;
- (3) to the extent that the names, addresses, whereabouts of, or other identifying information concerning the status of witnesses "A" and "D" as witnesses are contained in the public documents of the International Tribunal, that information shall be expunged from those documents;
- (4) documents of the International Tribunal identifying witnesses "A" and "D" shall not be disclosed to the public or to the media;
- (5) the pseudonyms "A" and "D" shall be used whenever these witnesses are referred to in their capacity as witnesses in the present proceedings before this Trial Chamber and in discussions among parties to the trial;
- (6) testimony of the witnesses "A" and "D" will be heard in closed session (s);

(7) the accused, the defence Counsel and the Prosecution and their representatives who are acting pursuant to their instructions or requests, shall not disclose the names of witnesses "A" and "D", or other identifying data concerning witnesses "A" and "D", 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 names of the witnesses being divulged to the public at large or to the media;

(8) the public and the media shall not photograph, video-record or sketch witnesses "A" and "D" while they are in the precincts of the International Tribunal.

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



Florence Ndepela Mwachande Mumba
Presiding Judge

Dated this eleventh day of June 1998
At The Hague,
The Netherlands.

[Seal of the Tribunal]