



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: IT-99-36-PT
Date: 27 October 2000
Original: English

IN TRIAL CHAMBER II

Before: Judge David Hunt, Presiding
Judge Florence Ndepele Mwachande Mumba
Judge Liu Daqun

Registrar: Mrs Dorothee de Sampayo Garrido-Nijgh

Decision of: 27 October 2000

PROSECUTOR

v

Radoslav BRĐANIN & Momir TALIĆ

**DECISION ON SECOND MOTION BY PROSECUTION
FOR PROTECTIVE MEASURES**

The Office of the Prosecutor:

Ms Joanna Korner
Ms Anna Richterova
Ms Ann Sutherland

Counsel for Accused:

Mr John Ackerman for Radoslav Brđanin
Maître Xavier de Roux and Maître Michel Pitron for Momir Talić

1 Introduction

1. On 3 July 2000, the Trial Chamber gave its decision on the prosecution's Motion for Protective Measures,¹ by which the Prosecutor was ordered to comply, on or before a set date –

[...] with her obligation under Rule 66(A)(i) of the Rules of Procedure and Evidence to supply to each of the accused copies in unredacted form of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by her from that accused;

provided that, in the event that the Prosecutor files a motion within that period for protective measures in relation to particular statements or other material or particular victims or witnesses (which shall be identified in such motion by a number or pseudonym), she need not supply unredacted copies of those statements or that other material identified in that motion until that motion has been disposed of by the Trial Chamber, and subject to the terms of any order made upon that motion.²

2. In accordance with that proviso, the prosecution filed a number of further motions seeking protective measures.³ This Decision is concerned only with the Second Motion for Protective Measures, in which the prosecution seeks the following relief:⁴

- (a) Leave to retain the redaction of the witness'[scil witness's] current whereabouts in respect of witness numbered 7.18 and the previous address to which the witness may be returning in respect of witness numbered 7.2.
- (b) Leave for disclosure of the identity of the witnesses to be delayed until a period closer to trial in respect of the witness numbered 7.10, and as per the *ex parte* Attachment to this Motion in respect of witnesses numbered 7.4, 7.9, 7.26, 7.30 and 7.42.
- (c) Requests until 31 August 2000 (the date for further disclosure of witness statements) to contact these witnesses to ascertain their security concerns, in respect of witnesses numbered 7.1, 7.15, 7.19, 7.24, 7.28 and 7.47.
- (d) Leave to withhold from the accused the identity of the witnesses numbered 7.14, 7.17, 7.20, 7.31 and 7.34, whom the prosecution does not intend to call at trial.

¹ Decision on Motion by Prosecution for Protective Measures, 3 July 2000 ("Protective Measures Decision").

² Protective Measures Decision, par 65.2.

³ Second Motion for Protective Measures for Victims and Witnesses, 31 July 2000 ("Second Motion"), Prosecution's Fourth Motion for Protective Measures for Victims and Witnesses, 21 Sept 2000 ("Fourth Motion"), and Prosecution's Fifth Motion for Protective Measures for Victims and Witnesses, 10 Oct 2000 ("Fifth Motion"). A Third Motion for Protective Measure for Victims and Witnesses, filed on 31 August 2000 ("Third Motion"), concerns the witnesses whose unredacted statements would otherwise have to be disclosed pursuant to Rule 66(A)(ii), and not with the supporting material which must be disclosed pursuant to Rule 66(A)(i).

⁴ Second Motion, par 14.

2 The basis of the application

3. Rule 66 (“Disclosure by the Prosecutor”) of the Rules of Procedure and Evidence (“Rules”), so far as it is here relevant, provides:

- (A) Subject to the provisions of Rules 53 and 69, the Prosecutor shall make available to the defence in a language which the accused understands
 - (i) within thirty days of the initial appearance of the accused, copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused, and

[...]

4. The obligation imposed by Rule 69(A)(i) is thus made subject to only two exceptions, Rules 53 and 69. Rule 53 (“Non-disclosure”), so far as it is here relevant, provides:

- (A) In exceptional circumstances, a Judge or a Trial Chamber may, in the interests of justice, order the non-disclosure to the public of any documents or information until further order.

[...]

- (C) A Judge or Trial Chamber may, in consultation with the Prosecutor, also order that there be no disclosure of an indictment, or part thereof, or of all or any part of any particular document or information, if satisfied that the making of such an order is required to give effect to a provision of the Rules, to protect confidential information obtained by the Prosecutor, or is otherwise in the interests of justice.

[...]

Rule 69 (“Protection of Victims and Witnesses”), so far as it is here relevant, provides:

- (A) In exceptional circumstances, the Prosecutor may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal.

[...]

- (C) Subject to Rule 75, 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.

Rule 75 (“Measures for the Protection of Victims and Witnesses”), so far as it is here relevant, provides:

- (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 Section, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused.

[...]

5. The prosecution does not, by the present Second Motion, seek protective measures in relation to the disclosure *to the public* of the identity of the witnesses whose statements had been

part of the supporting material which accompanied the indictment when confirmation was sought pursuant to Rule 47 (“Submission of Indictment by the Prosecutor”).⁵ The Second Motion is concerned only with the disclosure of the identity of those witnesses *to the two accused and their defence teams*. However, in the event that the prosecution does not succeed, so that that identity must be disclosed to the accused and their defence teams, that identity is clearly “confidential or non-public materials provided by the Prosecutor”. Pursuant to the Protective Measures Decision, they are already under the obligation not to disclose that material to the public (“save as is directly and specifically necessary for the preparation and presentation of this case”) or to the media under any circumstances.⁶

3 The relief sought in par (a)

6. The prosecution sought to retain the redactions made to two of the statements which were part of the supporting material which accompanied the indictment when confirmation was sought insofar as the redacted material discloses the current whereabouts of witness 7.18 and the previous address to which witness 7.2 may be returning.

7. The accused Momir Talić (“Talić”) does not object to the relief sought.⁷ The accused Radoslav Brđanin (“Brđanin”) made no submissions in relation to this issue. That relief will therefore be granted.

4 *Ex parte* material

8. Before turning to the relief sought in par (b), it is necessary to deal with the complaint made by Talić concerning the prosecution’s use of *ex parte* communications to the Trial Chamber in relation to that relief.⁸ Brđanin did not file any response to the Second Motion, but his counsel indicated orally to the Trial Chamber that he relied upon the same issues which he

⁵ The prosecution has reserved its right to seek such measures at a later time: each of the draft orders attached to the Second, Third, Fourth and Fifth Motions expressly reserves the right of anyone to seek “such other or additional protective orders or measures as may be viewed as appropriate concerning a particular witness or other evidence”.

⁶ Protective Measures Decision, pars 65(3) and 65(4).

⁷ Response to the Prosecution Motion for Protective Measures dated 31 July 2000, 30 Aug 2000 (“Talić Response”), par 2.

⁸ Talić Response, par 3.2. An *ex parte* application is one made by one party without notice to the other parties.

had raised in his responses to the Third and Fourth Motions.⁹ The issues raised in those responses are stated in the most general of terms but, in the light of previous concerns expressed on behalf of Brđanin in relation to *ex parte* communications,¹⁰ the Trial Chamber is prepared to interpret those responses as adopting the complaint by Talić.

9. As indicated in the relief sought, the *ex parte* material in the present case relates to five witnesses (7.4, 7.9, 7.26, 7.30 and 7.42) whose identity the prosecution seeks to disclose only at a time closer to the trial.¹¹ Talić submitted that none of the provisions upon which the prosecution relies to obtain the relief sought provided for *ex parte* proceedings.¹² He relied upon a decision in *Prosecutor v Blaškić* as supporting his argument,¹³ in which it was said:¹⁴

[...] although it is true that Rule 66 (C)¹⁵ *in fine* does provide for *ex parte* disclosure by the Prosecutor to the Trial Chamber of the information for which confidentiality is sought, it in no manner authorises the holding of *ex parte* hearings on all the measures to be taken to ensure the protection of the witnesses as part of proceedings before the Tribunal.

Talić went on to submit that, in general, *ex parte* proceedings should be used only in exceptional or limited circumstances as they infringe upon the accused's right to a fair trial which he is guaranteed by Article 21.2 of the Tribunal's Statute.¹⁶

10. The prosecution replied, by leave,¹⁷ that an application for protective measures was appropriately dealt with on an *ex parte* basis where the persons to be protected would otherwise be identified, relying upon the decision in *Prosecutor v Simić*,¹⁸ in which it was said:¹⁹

⁹ Response to the Prosecutor's Confidential Third Motion for Protective Measures and Request for Leave Not to Disclose the Identity of Certain Individuals, 6 Sept 2000; Response to Prosecutor's Fourth Confidential Motion for Protective Measures, 22 Sept 2000.

¹⁰ Response to Prosecutor's Confidential Further and Better Particulars of "Motion for Protective Measures", 14 Feb 2000, pars 4-6; Transcript of Oral Hearing, 24 Mar 2000, pp 120-122.

¹¹ The material relating to witness 7.10 is revealed in the Second Motion.

¹² Talić Response, par 3.2.

¹³ Case IT-95-14-T, Decision Rejecting the Request of the Prosecutor for *Ex parte* Proceedings, 18 Sept 1996.

¹⁴ *Ibid*, p 3.

¹⁵ Rule 66(C) at that time provided: "Where information is in the possession of the Prosecutor, the disclosure of which may prejudice further or ongoing investigations, or for any other reasons may be contrary to the public interest or affect the security interests of any State, the Prosecutor may apply to the Trial Chamber sitting *in camera* to be relieved from the obligation to disclose pursuant to Sub-rule(B). When making such application the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential."

¹⁶ Talić Response, par 3.2.

¹⁷ Prosecution's Reply to "Response to the Prosecution Motion for Protective Measures Dated 31 July 2000", 12 Sept 2000 ("Prosecution Reply"), par 2.

¹⁸ Case IT-95-9-PT, Decision on (1) Application by Stevan Todorović to Re-Open the Decision of 27 July 1999, (2) Motion by ICRC to Re-Open Scheduling Order of 18 November 1999, and (3) Conditions for Access to Material, 28 Feb 2000 ("*Simić* Decision").

¹⁹ *Ibid*, par 40.

As a matter of practice, and in accordance with common sense, applications by either party for protective orders are determined on an *ex parte* basis where the persons to be protected would otherwise be identified.

11. The possible conflict between those two decisions (*Blaškić* appearing to state that protective measures can *never* be sought *ex parte*, and *Simić* permitting such applications when the person to be protected would otherwise be identified) is somewhat reduced by the subsequent decision in the *Blaškić* case permitting such applications on an *ex parte* basis in certain circumstances.²⁰ The Trial Chamber accepts the statement in the *Simić* Decision as the correct one, but it emphasises that that statement does not authorise *ex parte* applications, as opposed to *confidential* applications, for protective measures in *every* case.²¹ The statement must be understood in the light of the general principle stated in that case:²²

The fundamental principle in every case is that *ex parte* proceedings should be entertained only where it is thought to be necessary in the interests of justice to do so – that is, justice to *everyone* concerned – in the circumstances already stated: where the disclosure to the other party or parties in the proceedings of the information conveyed by the application, or of the fact [of] the application itself, would be likely to prejudice unfairly either the party making the application or some person or persons involved in or related to that application.

It was also made clear in the *Simić* Decision that the party seeking relief on an *ex parte* basis must identify with some care why the disclosure of the detail of the application to the other party to proceedings would cause such unfair prejudice.²³

5 The relief sought in par (b)

12. The prosecution seeks to delay until a time closer to the trial the disclosure to the accused and the defence teams the identity of certain of the witnesses whose statements had been part of the supporting material which accompanied the indictment when confirmation was sought. The justification for that relief has been disclosed in the Second Motion in relation only to one of those witnesses, witness 7.10. The *only* material tendered in justification for the relief sought in relation to the remaining witnesses was filed on an *ex parte* basis. It is convenient to deal first with that part of the relief sought in par (b) of the present application which was sought on an *ex parte* basis.

²⁰ *Prosecutor v Blaškić*, Case IT-95-14-T, Decision on the Defence Motion for Protective Measures for Witnesses D/H and D/I, 25 Sept 1998, p 2. It was an application by the accused.

²¹ A *confidential* application in one made on notice to the other parties but without disclosure to the public.

²² *Simić* Decision, par 41.

²³ *Ibid*, pars 42-43.

13. There are two discrete issues to be determined in relation to that relief:
- (1) whether the application for protective measures in relation to each particular witness on a completely *ex parte* basis was warranted; and
 - (2) whether the non-disclosure to the accused and the defence teams of the identification of each witness is warranted – either because the witness “may be in danger or at risk” within the meaning of Rule 69(A), or because of one or more of the provisions of Rules 53(A) or 53(B).

If protective measures are granted in favour of the prosecution, the time when disclosure would have to be made in accordance with Rule 69(C) (to allow adequate time for the preparation of the defence) is best determined when the protective measures are in place.²⁴

14. As Talić has submitted, any *ex parte* proceedings infringe upon the accused’s right to a fair trial,²⁵ and – particularly where the application is to deny the accused at this stage the identity of these witnesses – the accused must be given sufficient information to enable him to decide whether or not to oppose that application. The arguments advanced to justify the protective measures sought should therefore be set out in such a way that the basis for the application is disclosed as far as possible without revealing the identity of the particular witness for whom the protection is sought.²⁶ The procedure adopted by the prosecution in this case of producing *all* the material tendered as justifying the relief sought on an *ex parte* basis in relation to all the witnesses other than 7.10 deprives the accused of *any* opportunity of making a decision as to whether to oppose the application.

15. The Trial Chamber is not satisfied that the extent to which this *ex parte* procedure was adopted by the prosecution in this case was warranted. The Trial Chamber does not accept that *all* of the material filed on an *ex parte* basis was of such a nature that its disclosure would be likely to reveal the identity of those witnesses. The prosecution is accordingly directed to file, on a confidential basis only and without revealing the identity of the witnesses, its justification for non-disclosure to the accused in such a way that the accused are given sufficient information to enable them to determine whether to oppose the relief sought. When this has been done, the Trial Chamber will also take into consideration any material already filed on an *ex parte* basis which does not appear in the new filing, but only if the Trial Chamber is satisfied that it was

²⁴ Protective Measures Decision, par 38.

²⁵ See also the Protective Measures Decision, pars 26-31.

²⁶ Talić Response, par 3.2.

appropriate for that material not to have been disclosed to the accused. The prosecution should accordingly use its best endeavours to reveal as much as possible in that new filing.

16. The Trial Chamber's further consideration of the relief sought in par (b) on an *ex parte* basis must await that further information. The prosecution should also prepare for filing later at the appropriate time, also on a confidential basis, a clear identification of the nature of the evidence which each of these witnesses is to give. This is information which both accused presently have but which the Trial Chamber does not have, and which the Protective Measures Decision said was relevant to the determination of the time when disclosure must be made to the accused and the defence.²⁷ The various categories into which witnesses fall in relation to that issue are discussed in the Protective Measures Decision, in par 34. The material in the *ex parte* document certainly does not make clear into which of those categories of witnesses the relevant witnesses fall.²⁸

17. In relation to witness 7.10, the whole of the material upon which the prosecution relies for the non-disclosure of this witness's identity to the accused and their defence teams is revealed in the Second Motion. Reliance is placed upon Rule 69(A) – that the witness “may be in danger or at risk” and that exceptional circumstances warrant the non-disclosure until a time closer to the trial.

18. It is obvious that what would usually be sufficient to show that a witness may be in danger or at risk if that witness's identity is directly disclosed *to the public* would not usually be sufficient to show that the witness may also be in danger or at risk if that witness's identity is disclosed only to the accused and the defence team – where obligations are also imposed upon the accused and the defence team in relation to further disclosure by them.²⁹ As in the Protective Measures Decision, the Trial Chamber accepts that the greater the length of time between the disclosure of the identity of a witness and the time when the witness is to give evidence, the greater the potential for interference with that witness,³⁰ and that, once the defence commences (quite properly) to investigate the background of the witnesses whose identity has been disclosed to them, there is a risk that those to whom the defence has spoken may reveal to others the

²⁷ Paragraph 35.

²⁸ The only express indication given to the evidence to be given relates to witness 7.42, when it is said that he “will give direct evidence against both of the accused”. Even that is insufficient for the purposes of the Trial Chamber's decision on the third issue.

²⁹ *Supra*, par 5.

³⁰ Protective Measures Decision, par 24.

identity of those witnesses, with the consequential risk that the witnesses will be interfered with.³¹ However, the Trial Chamber in that Decision went on to say:³²

But it does not accept that, absent specific evidence of such a risk relating to particular witnesses, the likelihood that the interference will eventuate in this way is sufficiently great as to justify the extraordinary measures which the prosecution seeks in this case in relation to every witness.

It must be demonstrated in relation to the particular witness for whom protective measures are sought that there is sufficient possibility that he or she may be threatened or interfered with as to warrant the conclusion that, despite the obligations imposed upon the accused and their defence teams, there should be no disclosure even to them at this stage. The prosecution has rightly accepted that Article 20.1 of the Tribunal's Statute makes the rights of the accused the first consideration, and the need to protect victims and witnesses the secondary consideration.³³ A balancing exercise is required in each case.³⁴

19. The material upon which the prosecution relies in relation to witness 7.10 is stated in this way:

This witness was recently spoken to by an OTP investigator. This witness has concerns for her safety and security and that of her family. The witness is a 69 year old woman in ill-health, living alone in a town in the Federation [of Bosnia and Herzegovina]. Her daughter-in-law lives alone in a village in the Federation to which many Serbs who have houses therein plan to return. The witness intends returning to her house in the same village as her daughter-in-law.

Talić submits that Rule 69(A) has not been satisfied in this case.³⁵ He points out that, in the Protective Measures Decision, the Trial Chamber has already held that "fears of potential witnesses themselves that they may be in danger or at risk are *not in themselves* sufficient to establish any real *likelihood* that they may be in danger or at risk".³⁶ The Trial Chamber went on to say in that Decision:³⁷

Something more than that must be demonstrated to warrant an interference with the rights of the accused which these redactions represent.

³¹ *Ibid*, par 28.

³² *Ibid*, par 28.

³³ *Ibid*, par 20.

³⁴ *Prosecutor v Tadić*, Case IT-94-1-T, Decision on the Prosecution's Motion Requesting Protective Measures for Witness R, 31 July 1996, at 4; Protective Measures Decision, par 7.

³⁵ Talić Response, par 3.1 Brđanin's counsel indicated orally to the Trial Chamber that he relies upon the same issues which he has raised in his responses to the Third and Fourth Motions (see footnote 9, *supra*). In his Response to the Fourth Motion, Brđanin objects to similar protective measures sought by the prosecution, on the basis that the prosecution relies upon a presumption that defence counsel will violate the obligations placed upon them: pars 2-3.

³⁶ Protective Measures Decision, par 26.

³⁷ *Ibid*, par 26.

What is required is that there be some objective foundation for those fears, as well as exceptional circumstances. There is no such foundation demonstrated in the passage quoted, as the mere fact that there will be some Serbs also living in the area to which the presumably Bosnian Muslim witness will be returning hardly takes the situation out of the prevailing (or normal) circumstances so as to render the circumstances exceptional.³⁸

20. The prosecution argues that such a foundation does exist when the witness's fears are considered³⁹ –

[...]in the context of the present circumstances existing in:

- (a) The municipality in which the witnesses and their relatives resided and to which they wish to return; and/or
- (b) The municipality in which the witnesses presently reside; and,
- (c) The circumstances existing within Bosnia and Herzegovina as a whole.

In order to demonstrate those circumstances, the prosecution has provided a number of reports by international and non-governmental organisations which discuss the changing position within the Federation of Bosnia and Herzegovina (“Federation”)⁴⁰ and its specific municipalities.⁴¹

21. The UNHCR reports demonstrate that, insofar as the risk to persons returning to live in the Federation is concerned, the situation has changed over recent times for the better. The earlier UNHCR report made the assessment that persons originating from areas where they would no longer be in the majority upon return – where the region is administered by an ethnic group other than their own – were *per se* at risk.⁴² The more recent UNHCR report states:⁴³

Due to the overall improved situation in BiH, it can no longer be upheld that belonging to a numerical minority group upon return *per se* renders a person in need of international protection. It is therefore necessary to assess the situation in the return municipality and to determine whether s/he can return there in safety.

³⁸ *Ibid*, par 11.

³⁹ Second Motion, par 6.

⁴⁰ The State is called Bosnia and Herzegovina, and it consists of two entities: Republika Srpska (which is predominantly Bosnian Serbian) and the Federation of Bosnia and Herzegovina (which is predominantly Bosnian Muslim and Bosnian Croat).

⁴¹ All but one of these reports were provided confidentially to both the Tribunal and the defence, as the organisations which provided the reports have personnel working in the relevant areas. The one public report was a report by the United Nations High Commissioner for Refugees (“UNHCR”). A version of this Report dated May 1999 was provided with the Second Motion with the promise of an updated version. The updated version of the Report, dated August 2000, was annexed to the Fourth Motion.

⁴² Update of UNHCR’s Position on Categories of Persons from Bosnia and Herzegovina who are in Continued Need of International Protection, May 1999, pars 1.10, 2.1 and 2.2.

⁴³ Update of UNHCR’s Position on Categories of Persons from Bosnia and Herzegovina in Need of International Protection, August 2000, p 2.

The recent report does identify as needing continued international protection various categories of persons particularly at risk, including⁴⁴ –

[p]ersons originating from areas where they would no longer be in the majority upon return, unless it can reasonably be assessed that they can return in safety and dignity [...].

and “humanitarian cases”, including witnesses testifying before the Tribunal. The emphasis, however, is upon the circumstances in the particular areas or municipalities to which the witnesses are to return. The other reports submitted by the prosecution also emphasise that the particular risk faced by a person testifying against a person of another ethnic group will depend on the particular municipality to which that witness is returning and the ethnicities of the witness and the accused.⁴⁵ In one particular report concerning, *inter alia*, the risks to Bosnian Muslims testifying against Serbs when they returned or went to municipalities in the Federation, such risks arising in every one of the municipalities within the Federation referred to in the report are described as “minimal”.⁴⁶ All reports do disclose that there are real risks to witnesses testifying in the Tribunal in particular areas, but they also acknowledge that the existence of those risks depends on the specific circumstances of the particular individual, generally requiring a consideration at least of local or regional factors (as opposed to a broad overview of the situation in the Federation).

22. Despite the prosecution’s earlier references to the context of the present circumstances in the area in which the witnesses live or to which they are to return,⁴⁷ it has not revealed anything of the circumstances in the town to which witness 7.10 intends to return, or of the circumstances in the municipality in which that town is situated. The identity of the town itself has not been revealed to the Trial Chamber (even on an *ex parte* basis). The assessments of various municipalities provided in the reports filed by the prosecution are therefore of no assistance to the Trial Chamber in relation to this witness. It may well be that, when those circumstances are revealed, witness 7.10 will be entitled to protective measures to prevent her identification being disclosed *to the public*, but nothing has been demonstrated which suggests that the disclosure at this stage of her identity *to the accused and their defence teams*, may put her in danger or at risk, or which is of such an exceptional nature as to warrant the interference with the rights of the accused which the non-disclosure produces.

⁴⁴ *Ibid*, p 2.

⁴⁵ For example, the risk for a Bosnian Muslim testifying against a Serb was assessed as slight in a particular municipality in the Federation, but the risk for a Serb testifying against a Bosnian Muslim in that same municipality would be greater: Confidential letter, Appendix B to the Second Motion, first unnumbered page.

⁴⁶ Confidential letter, Appendix B to the Second Motion, second, third, fifth, sixth and seventh unnumbered pages.

⁴⁷ Second Motion, par 6, quoted in par 18, *supra*.

23. The balancing operation which must be carried out in each case requires this particular application for protective measures for witness 7.10 to be refused, but a fresh application may be made if desired in relation to the disclosure of her identity to the public.

6 The relief sought in par (c)

24. During the extensive period it has taken for the filings to be completed in relation to the Second Motion, the nature of the relief sought in par (c) has changed. Talić initially did not object to the extension of time until 31 August sought.⁴⁸ Brđanin also made no submissions in relation to this issue. The prosecution then sought further and differing extensions of time in relation to the witnesses nominated in par (c).⁴⁹ Talić objected to the further extensions sought upon the basis that the prosecution had had sufficient time to contact the witnesses,⁵⁰ but an extension until 10 October in relation to all those witnesses was nevertheless granted by the Trial Chamber.⁵¹

25. The situation changed again when the prosecution filed its further motions, in which it updated the information contained in the Second Motion concerning the witnesses nominated in par (c) as follows:

- (i) The only protective measures sought in relation to witness 7.1 is the redaction of information revealing his present whereabouts.⁵²
- (ii) Leave is sought to delay the disclosure of the identity of witness 7.15 until a time closer to the trial.⁵³
- (iii) Witnesses 7.19, 7.24, 7.28 and 7.47 have decided that they do not wish to testify, and the prosecution seeks leave to withhold their identity from the accused completely.⁵⁴

⁴⁸ Talić Response, par 2.

⁴⁹ Prosecution's Request for Leave Not to Disclose the Identity of Certain Individuals, 31 Aug 2000, pars 2 and 3.

⁵⁰ Response to the Prosecution's Request for Leave Not to Disclose the Identity of Certain Individuals Dated 31 Aug 2000, 8 Sept 2000, par 2.

⁵¹ Order, 19 Sept 2000, p 4.

⁵² Fifth Motion, par 3.

⁵³ Fourth Motion, par 10(c).

⁵⁴ *Ibid*, par 10(d); Fifth Motion, par 4.

The Fourth and Fifth Motions have therefore completely replaced the application made in par (c) of the present Second Motion. The relief sought in these further motions will be considered in separate decisions directed to those motions.

7 **The relief sought in par (d)**

26. The prosecution seeks leave to withhold completely from the accused and their defence teams the identity of five persons whose statements were part of the supporting material which accompanied the indictment when confirmation was sought, on the basis that it does not intend to call those witnesses at the trial.

27. Rule 66(A)(i) requires the disclosure of the material which was before the confirming judge (which necessarily includes *all* of that material), subject only to Rules 53 and 69. Rule 66(A)(i) may for present purposes relevantly be contrasted with Rule 66(A)(ii), which requires the prosecution, subject again to Rules 53 and 69, to disclose to the accused the statements of all witnesses whom it proposes to call at the trial.⁵⁵ The implicit exclusion from the obligation imposed by Rule 66(A)(ii) of statements from witnesses whom the prosecution does *not* intend to call is not made applicable to the obligation imposed by Rule 66(A)(i). The fact that the prosecution does not intend to call these five persons as witnesses does not by itself justify the non-disclosure of their identity as required by Rule 66(A)(i). It is therefore necessary for the prosecution to justify the relief which it seeks under either Rule 53 or Rule 69.⁵⁶

28. From its context in the Rules of Procedure and Evidence, Rule 53 is primarily concerned with protective measures needed prior to the initial appearance of the accused. This is particularly so of Rule 53(C), which speaks of consultation with the Prosecutor. But Rule 66(A) is expressly made subject to Rule 53. The general power to order protective measures in Rule 53(A) relates only to disclosure to the public, and it is in any event dependent upon the existence of exceptional circumstances *and* the requirements of justice. The power in Rule 53(C) is dependent upon the need to give effect to a provision of the Rules, to protect

⁵⁵ Rule 66(A)(ii) provides: “Subject to the provisions of Rules 53 and 69, the Prosecutor shall make available to the defence in a language which the accused understands [...] (ii) within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge appointed pursuant to Rule 65*ter*, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial, and copies of all affidavits and formal statements referred to in Rule 94*ter*; copies of the statements of additional prosecution witnesses shall be made available to the defence when a decision is made to call those witnesses.”

⁵⁶ The text of both Rules, so far as they are relevant, is quoted in par 4, *supra*.

confidential information obtained by the Prosecutor *or* the requirements of justice. The power to order protective measures in Rule 69 has already been discussed in this Decision. It relates only to protective measures for victims or witnesses. These five persons are no longer to be witnesses. It has not been suggested that they would be entitled to protective measures as victims. Indeed, the prosecution has made no attempt to rely upon any of these provisions in order to justify the relief which it seeks.

29. Without assistance from the prosecution, the Trial Chamber has nevertheless considered whether the fact that the prosecution will not be calling the five persons at the trial because they are not willing to give evidence against these accused justifies non-disclosure of their identity to the accused in the interests of justice. Article 19 of the Tribunal's Statute requires the judge confirming the indictment to be satisfied that a *prima facie* case has been established. Rule 47(B) requires the Prosecutor to forward to the Registrar the indictment "together with supporting material" for this purpose, which is then examined by the confirming judge.⁵⁷ In determining whether a *prima facie* case has been established (as Article 19 requires), the confirming judge will necessarily assume that the supporting material forwarded by the Prosecutor contains the evidence (although not necessarily in admissible form) which the prosecution has available to be called at the trial of the indictment to be confirmed.

30. The prosecution now concedes that no such assumption was appropriate in the present case. It says that the persons whose statements were utilised in the confirmation process in this case had not been asked previously whether "they would be prepared to testify in this case" and "against these Accused", and that they were asked this only after the accused had been taken into custody.⁵⁸ This is a surprising state of affairs.⁵⁹ The apparent failure of the prosecution to act appropriately when seeking confirmation does not, in the circumstances of this case as disclosed to the Trial Chamber, mean that it is in the interests of justice to deny the rights of the accused given by Rule 66(A)(i) to have the identity of those persons disclosed – absent any other basis for protective measures.

31. The unwillingness of these five persons to give evidence is directly related to their identification to the accused as persons willing to give evidence against them, the implication

⁵⁷ Rule 47(E).

⁵⁸ Prosecution Reply, pars 6-7. The emphasis is in the original.

⁵⁹ Talić has responded that each of the persons signed a declaration when giving their statements "that they might be called to testify in public at the Tribunal": Response to the Reply of the Prosecutor Dated 12 September 2000, 20 Sept 2000, par 4.b. The Trial Chamber does not have these statements, and is unaware of the context in which such a declaration would have been made. It is unnecessary to resolve this issue.

being that they feared retaliation as a consequence of their willingness to do so. However, once the prosecution says that it will not call them, and concedes that it used their statements prepared for other purposes in this case without their authority, the suggested justification for their continuing fear of retaliation disappears. No other justification for a continuing fear has been suggested. On the material provided by the prosecution, it cannot be said that these five persons “may be in danger or at risk”, even if Rule 69 did apply to them.⁶⁰ The prosecution says that, as the accused already have the substance of the statements and therefore know what facts contributed to the confirmation of the indictment, they suffer no prejudice.⁶¹ Whether or not that is so, it is not a question of whether the accused can show that they would be prejudiced by the denial of their rights to have the identity of those persons disclosed.⁶² The question is whether the prosecution has established that the interests of justice require that denial of those rights of the accused.

32. The Trial Chamber is not satisfied that the relief sought by the prosecution is justified, and the application is refused. The identity of the five persons will, however, be revealed on a confidential basis, so that the obligations imposed upon the accused and their defence teams by the Protective Measures Decision will apply to that material.⁶³

8 Disposition

33. For the foregoing reasons, Trial Chamber II makes the following orders:

1. In relation to the statement of witness 7.18, and until further order, the prosecution is not obliged to disclose to the accused or their defence teams those parts which reveal the witness’s present whereabouts.
2. In relation to the statement of witness 7.2, and until further order, the prosecution is not obliged to disclose to the accused or their defence teams those parts which reveal the previous address to which the witness may be returning.

⁶⁰ Protective Measures Decision, par 26. See also par 19, *supra*.

⁶¹ Prosecution Reply, par 5.

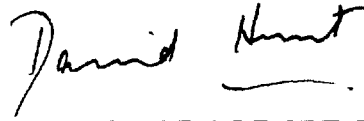
⁶² Under Rule 68 (“Disclosure of Exculpatory Evidence”), the prosecution is obliged to disclose to the defence the existence of any material known to it which “in any way tends to suggest the innocence or mitigate the guilt of the accused or [which] may affect the credibility of prosecution evidence”. Both accused have the statements in question, but with all references to the identity of the persons who made them redacted. If any of those statements fall within the description quoted, the prosecution is obliged by Rule 68 to reveal to the accused the identity of the person who made it. The Talić Response could be interpreted, in par 4, as asserting that at least one of the statements does fall within that description. The prosecution has conceded that the name and current whereabouts of the person who made that statement will be disclosed upon application to it: Prosecution Reply, par 9. The parties have not raised any issue before the Trial Chamber as to whether this concession would make available to the accused all of the material presently redacted in that person’s statement.

⁶³ See par 5, *supra*.

3. In relation to the witnesses for whom protective measures have been sought on an *ex parte* basis, the prosecution is directed to file, on a confidential basis only and without revealing the identity of the witnesses, its justification for non-disclosure of their identity to the accused in such a way that the accused are given sufficient information to enable them to determine whether to oppose the relief sought.
4. The application for protective measures in relation to witness 7.10 is refused.
5. Leave to withhold from the accused the identity of witnesses 7.14, 7.17, 7.20, 7.31 and 7.34 is refused.

Done in English and French, the English text being authoritative.

Dated this 27th day of October 2000,
At The Hague,
The Netherlands.



Judge David Hunt
Presiding Judge

[Seal of the Tribunal]