



**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: 29 November 2000**  
**Original: English**

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**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: 29 November 2000**

**PROSECUTOR**

**v**

**Radoslav BRĐANIN & Momir TALIĆ**

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**DECISION ON PROSECUTION'S REQUEST FOR VARIATION  
OF THIRD PROTECTIVE MEASURES DECISION**

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**The Office of the Prosecutor:**

**Ms Joanna Korner  
Mr Nicholas Koumjian  
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. On 8 November 2000, the Trial Chamber gave its decision in relation to the Prosecution's Third Motion for Protective Measures for Victims and Witnesses ("Third Motion"), which was concerned with the prosecution's obligations of disclosure under Rule 66(A)(ii) of the Rules of Procedure and Evidence ("Rules"). The Trial Chamber ordered that –

The prosecution is granted leave to redact from the statements of all witnesses whom it proposes to call to give evidence in this case any information concerning the current whereabouts of each witness.<sup>1</sup>

Such an order had not been opposed by the two accused, Radoslav Brđanin ("Brđanin") and Momir Talić ("Talić"), subject only to a reservation by Brđanin that this information should be disclosed no later than sixty days before trial. That issue was left for resolution at a later date.<sup>2</sup>

2. The prosecution has now requested a variation of that order.<sup>3</sup> It points out that what it had *intended* to seek in its Third Motion was leave to redact from the statements of all witnesses the current whereabouts not only of each witness who gave the statement but also of each "witness" who is mentioned in such statement even though such "witness" may not have made a statement in the case.<sup>4</sup> The word "individual" was subsequently substituted for "witness".<sup>5</sup> The prosecution concedes that perhaps this had not been made as sufficiently clear as it might have been in the Third Motion.<sup>6</sup>

3. The relief now sought by the prosecution in its Request relates to its obligations of disclosure not only under Rule 66(A)(ii) but also now under Rule 66(A)(i). The Request seeks:<sup>7</sup>

[...] a blanket order that it may, with respect to the disclosure of witnesses, redact from the statements/proffers:

(a) any information which discloses the current whereabouts of the maker of the statement/proffer and/or his family;

(b) any information contained within that statement/proffer which discloses the current whereabouts of other persons named within the said statement/proffer who have made witness statements which the Prosecution has already or intends to disclose;

(c) any information contained within statements/proffers which discloses the current whereabouts of other individuals who were present at the events described but who have either not been contacted by the Prosecution or who have been contacted and [have] declined to assist.

(d) the personal identification number given to citizens of the former Yugoslavia which appears on statements taken by the Bosnian authorities.

<sup>1</sup> Decision on Third Motion by Prosecution for Protective Measures ("Third Protective Measures Decision"), par 23.1.

<sup>2</sup> *Ibid*, par 4.

<sup>3</sup> Prosecution's Request for a Variation of the Blanket Order Given in the Decision on Third Motion by Prosecution for Protective Measures, 17 Nov 2000 ("Request").

<sup>4</sup> Status Conference, 17 Nov 2000, Transcript p 196.

<sup>5</sup> *Ibid*, Transcript p 209.

<sup>6</sup> *Ibid*, Transcript pp 196, 210.

<sup>7</sup> Request, par 3.

It was explained that the reference to a “proffer” was intended to be a reference to an *unsigned* statement which formed part of the supporting material which accompanied the indictment when confirmation was sought.<sup>8</sup> Because the document is unsigned, the prosecution apparently prefers to call such a statement a “proffer of testimony”.

4. Both Talić and Brđanin have responded that they do not object to the “blanket” orders sought in pars (a), (b) and (d), but each objects to the order sought in par (c)<sup>9</sup> – the redaction of any information which discloses the current whereabouts of those individuals who are described in the statements to be disclosed as having been present at an event described in those statements but who either have not been contacted by the prosecution or have been contacted by the prosecution but have declined to assist.

5. The only material upon which the prosecution relies in support of the relief it seeks is stated in these terms:<sup>10</sup>

[...] many witnesses and persons whose assistance has been sought by the Office of the Prosecutor, have expressed concerns for their security or that of their families. In respect of people named in statements, they were not consulted before those names and current whereabouts were provided by the maker of the statement and were not given an opportunity to agree to or object to such disclosure. The relief sought is not that their names be redacted, but merely information indicating their current whereabouts.

The Defence may apply to the Prosecution for that information if, in their judgement, they require to interview the person named.

6. The prosecution does not identify any provision in the Rules which would justify the relief it seeks in par (c), notwithstanding its earlier recognition of the Trial Chamber’s dissatisfaction with the degree of assistance which it was receiving from the prosecution in relation to these many applications for protective measures.<sup>11</sup> The prosecution has an obligation to put forward its arguments to the Trial Chamber in support of its application. If the prosecution does not do so, it should not expect to be permitted it to do before the Appeals Chamber what it failed to do before the Trial Chamber. These applications, particularly where (as here) they may involve a substantial denial of the rights of the accused, require a

<sup>8</sup> Status Conference, 17 Nov 2000, Transcript pp 196-198.

<sup>9</sup> Response to Prosecutor’s Request for a Variation of the Blanket Order Given in the Decision on Third Motion by Prosecution for Protective Measures, 22 Nov 2000, pars 2-3; Réponse à la Requête du Procureur aux Fins de Modification d’une Décision en Date du 17 Novembre 2000, 27 Nov 2000, pars 2-3. The response by Talić appears to have interpreted what is sought under par (a) as relating to the current whereabouts of the maker of the statement, but nevertheless does not oppose the relief sought. The concession is sufficient to cover also the current whereabouts of the maker’s family.

<sup>10</sup> Request, pars 4-5.

<sup>11</sup> Status Conference, 17 Nov 2000, Transcript p 204.

consideration of many difficult and conflicting interests. They cannot be granted simply because the prosecution asks for them. The prosecution's failure to give to the Trial Chamber the assistance to which it is entitled in these protective measures applications is unfortunate, and its continuing failure to do so can only be regarded now as deliberate.

7. Subject to the provisions of Rule 53 and 69, Rule 66(A)(ii) requires the prosecution to disclose to the accused the statements of all witnesses whom it intends to call to testify at the trial.

8. Rule 69 ("Protection of Victims and Witnesses") is, as its title suggests, concerned only with the protection of victims and witnesses. The individuals in issue here may fairly be said to have witnessed the events described in the statements, but they could not be said to be "witnesses" within the meaning of Rule 69 unless it is intended that they are to be called as such in the trial, or (at the very least) unless they have given a statement to the prosecution with the intention of giving evidence in this trial. Necessarily, none of the individuals in issue here falls within either category. It has not been suggested that they are victims.

9. Rule 53 ("Non-Disclosure") appears, from its context in the Rules of Procedure and Evidence, to be primarily concerned with protective measures needed prior to the initial appearance of the accused, particularly Rule 53(C) which speaks of consultation with the Prosecutor.<sup>12</sup> But Rule 66(A) is nevertheless expressly made subject to Rule 53. Rule 53(A) relates only to the non-disclosure of information to the public, not to the accused and their defence teams. Rule 53(B) has no application in the present case. Rule 53(C) is in the following terms:

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.

No provision of the Rules has been pointed to which would assist the prosecution here.

10. Although the prosecution does not expressly in its Request raise any issue in relation to confidentiality, there may be included in some witness statements information which the maker of the statement had received on a confidential basis, a fact which may not have been realised at

<sup>12</sup> Decision on Second Motion by Prosecution for Protective Measures, 27 Oct 2000 ("Second Protective Measures Decision"), par 28.

the time when the witness statement was taken. Such information could fall within the terms of Rule 53(C), but it would be necessary for the prosecution to establish that fact when seeking an order under that rule, and it has not sought to do so here. It may be that confidential information has been recorded in the statement deliberately with knowledge of its confidential quality. The prosecution would not have much difficulty in obtaining an order under Rule 53(C) that such information not be disclosed to the public. However, a witness statement on the face of it is a document which is intended to be disclosed to the accused and his defence teams, and the prosecution may have some difficulty in obtaining an order that the confidential information not be disclosed to the very persons to whom the statement was intended to be disclosed. Again, the prosecution has not sought to establish such a confidential basis here.

11. The phrase “otherwise in the interests of justice” in Rule 53(C) was discussed in a somewhat different context in the Second Protective Measures Decision.<sup>13</sup> There, the prosecution had sought to withhold completely from the accused and their defence teams the identity of a number of witnesses whose statements had wrongly been put forward to the judge confirming the indictment as evidence which the prosecution had available to be called at the trial of that indictment. That discussion does not assist in the resolution of the present issue.

12. One situation in which it may be in the interests of justice to make an order under Rule 53(C) for the non-disclosure of either the identity or the current whereabouts of individuals merely named in a witness statement is one which commonly arises in statements taken by the Office of the Prosecutor (“OTP”). It is recognised by everyone with experience of criminal trials in this Tribunal and of the investigation which precedes them that, at the time when statements are first taken by OTP investigators, there is not always a particular offender or particular crime in contemplation. The statements may cover a wide range of events, many of which ultimately have no relevance at all to the trial in which the witnesses who gave the statements are called to give evidence.

13. Where a witness statement to be disclosed in a particular trial identifies an individual who was present at an event which is described in the statement but which could not be relevant to that particular trial, it would usually be easy to conclude that, where the individuals named have played no part in making the statement and have had no knowledge that they have been named, it

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<sup>13</sup> Paragraphs 26-32.

is in the interests of justice that either their identity or current whereabouts should not be disclosed even to the accused, who does not need the information.

14. But the Trial Chamber does not see how – other than in extraordinary circumstances – it could be in the interests of justice to deny the accused access to individuals who witnessed the very events which are or which may be the subject of the trial. The suggestion in the prosecution’s Request that the accused may apply to the prosecution for the current whereabouts is very carefully worded so as not to suggest that the information will always be supplied. Although the prosecution has not repeated the proviso which it had sought to impose in a similar situation, that the information would be disclosed to the accused “upon a reasonable showing”,<sup>14</sup> its statement in the Request that such individuals were “not given an opportunity to agree to or object to such disclosure” suggests that the information will not always be supplied. The prosecution has no property in these individuals, and it is not for it to have the final say as to whether or not the accused and their defence teams should have access to them. The prosecution has had every opportunity to decide whether it wishes to call these individuals as witnesses, and it will not be doing so. As those individuals are not to be witnesses for the prosecution, or of any assistance in some other way to the prosecution, there is nothing before the Trial Chamber to suggest that they are in need of any particular form of protection. If any of those individuals do not wish to speak to the legal teams of the accused, it is for those individuals (not the prosecution) to say so. The accused must be given the opportunity of attempting to determine whether those individuals can assist them.

15. It is surprising that the prosecution should seek to argue otherwise. In another case before this Trial Chamber, the prosecution was very insistent that it was not intending to put such an argument.<sup>15</sup> That is not to suggest that the attitude of the prosecution in one case necessarily binds it to take the same attitude in every case, although in matters such a protective measures it would be preferable for the prosecution to have a uniform approach. However, it does suggest that a proper sense of proportion exists in some sections of the OTP in relation to the issue of protective measures.

16. The Trial Chamber does not propose to grant the relief sought in par (c) in the prosecution’s Request in the terms of universal application in which it is expressed. The Trial Chamber is in no position itself to determine whether the current whereabouts of any particular

<sup>14</sup> Third Motion, par 3.

<sup>15</sup> Prosecutor v Nikolić, Case IT-94-2-PT, Status Conference, 24 Nov 2000, Transcript pp 21-23.

individual named in the statements should be disclosed. It does not have those statements before it. Nor does it really know, in part because of the rather inadequately pleaded indictment, which events are or may be relevant to the issues in the trial. It will therefore be for the prosecution to determine which events in the statements to be disclosed *are or may be* relevant to the issues in the trial. The prosecution has a very real interest in ensuring that every event which *is or may be* relevant will be the subject of evidence at the trial. It will therefore realise that, if it does not identify the events correctly at this stage, there may well be adverse consequences to its case at the trial if it seeks to lead evidence in relation to an event where the current whereabouts of such individuals have not been disclosed.

17. The name and current whereabouts of any individuals described as being present at those events identified as relevant or possibly relevant to the charges against the accused must therefore be disclosed, whether or not those individuals have already been contacted by the prosecution.

### **Disposition**


18. Accordingly, the Trial Chamber makes a “blanket” order that the prosecution may, with respect to its obligations of disclosure under Rules 66(A)(i) and 66(A)(ii), redact from the supporting material which accompanied the indictment when confirmation was sought, and from the statements, affidavits and formal statements of the witnesses whom it intends to call to testify at trial:

- (a) any information which discloses the current whereabouts of the maker of any such document and/or his or her family;
- (b) any information contained within such documents which discloses the current whereabouts of other individuals named within them who have made witness statements which the prosecution has already disclosed or which it intends to disclose;
- (c) any information contained within such documents which discloses the current whereabouts of other individuals who are named in such documents, *other than* those individuals who are described in any document as having been present at any of those events referred to in the documents which are or which may be relevant to the issues in the trial; and

- (d) the personal identification number given to citizens of the former Yugoslavia which appears on statements taken by the Bosnian authorities.

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

Dated this 29<sup>th</sup> day of November 2000,  
At The Hague,  
The Netherlands.



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Judge David Hunt  
Presiding Judge

**[Seal of the Tribunal]**