

IT-01-47-PT
D3209-D3206
01 FEBRUARY 2002

3209 KB

UNITED
NATIONS



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-01-47-PT
Date: 1 February 2002
Original: English

IN TRIAL CHAMBER II

Before: Judge Wolfgang Schomburg, Presiding
Judge Florence Ndepele Mwachande Mumba
Judge Carmel Agius

Registrar: Mr Hans Holthuis

Order of: 1 February 2002

PROSECUTOR

v

**ENVER HADŽIHASANOVIĆ
MEHMED ALAGIĆ
AMIR KUBURA**

ORDER ON PROTECTIVE MEASURES

The Office of the Prosecutor:

Mr Ekkehard Withopf
Ms Cynthia Fairweather
Mr José Dória

Counsel for the Accused:

Ms Edina Rešidović and Mr Stéphane Bourgon for Enver Hadžihasanović
Mr Vasvija Vidović and Mr John Jones for Mehmed Alagić
Mr Fahrudin Ibrišimović and Mr Rodney Dixon for Amir Kubura

THIS TRIAL CHAMBER is seized of the confidential “Prosecution’s Motion for Protective Measures”, filed by the Prosecution on 5 December 2001 (“Motion”), and the “Confidential Response to Confidential Prosecution’s Motion for Protective Measures”, filed by the Defence on 19 December 2001 (“Response”);

NOTING that the Prosecution requests the Trial Chamber to order various measures to protect the confidentiality of non-public materials disclosed to the three accused, submitting that these measures are necessary to safeguard the security and privacy of victims and witnesses and the integrity of the evidence and the proceedings;

NOTING that this request is made pursuant to Articles 20 and 22 of the Tribunal’s Statute, and Rules 54, 73 and 75 of the Tribunal’s Rules of Procedure and Evidence (“Rules”);

CONSIDERING that both the Statute and the Rules provide that the Trial Chamber shall ensure full respect for the rights of the accused and due regard for the protection of victims and witnesses;

NOTING that the Prosecution justified this request for protective measures in general terms, without justifying the measures in relation to the situation of each victim or witness sought to be protected;

CONSIDERING that, generally, the burden is on the Prosecution to show the need for protective measures, and that this burden involves more than making submissions, *in abstracto*, on the general need for protective measures;

CONSIDERING, however, that the Defence specifically opposes only one of the measures sought by the Prosecution, and that it further requests the Trial Chamber to review closely the other measures requested and order only such measures as are strictly necessary for the protection of victims and witnesses and which do not interfere unduly with the rights of the accused;

NOTING that unless a party raises a specific issue or objection concerning proceedings before the Trial Chamber, it generally cannot be expected that the Trial Chamber will conduct a “review” of an issue or objection raised in general terms;

NOTING that the requested measure opposed by the Defence reads as follows:

The Defence of the Accused shall not contact any witness without first demonstrating to the Trial Chamber the justification for contacting the witness, that the witness may martially [sic] them in some identified way and that such assistance is not otherwise reasonably available to them, and further, if such contact is granted by the Trial Chamber, that the Prosecution be given a right to be present at any contact or interview, if the witness requests such presence;¹

NOTING that the Defence opposes this requested measure for various reasons;

CONSIDERING that, as the Defence has pointed out, the Prosecution has not demonstrated, nor sought to demonstrate, as it did with respect to most of the other measures sought, that this particular proposed measure is necessary for the protection of victims and witnesses, nor that such a severe restriction on the rights of the accused is justified;

¹ Motion, par 16(4). The Prosecution has referred to *Prosecutor v Brđanin & Talić*, Second Decision on Motion by Radoslav Brđanin and Momir Talić for Access to Confidential Documents, Case IT-99-36-PT, 15 Nov 2000, and *Prosecutor v Galić*, Order on the Prosecution Motions for Protective Measures and for Extension of Time, Case IT-98-29-PT, 5 June 2000 in support of these measures requested in par 16(4) of the Motion.

CONSIDERING, therefore, that the request with respect to this particular measure is to be refused;

NOTING further that the Prosecution submits that the Defence of the accused should for various reasons be under an obligation to return all non-public disclosed materials at the conclusion of the proceedings to the Registry, so the Prosecution would not be privy to any of the work products of the Defence of the accused in the materials;

NOTING the Prosecution's submission that disclosure pursuant to Rules 66 and 68 of the Rules is given for the sole purpose of enabling the Defence to prepare to defend the accused against the charges which the accused face, and that disclosure of such material beyond this purpose may jeopardise the safety of victims and witnesses and compromise ongoing investigations and indictments;

NOTING that the reasons submitted by the Prosecution for requesting the return of all non-public materials are the asserted limited purpose for disclosure, the ongoing security and privacy concerns of victims and witnesses, and the concern that non-public materials may be used to undermine the course of justice if disclosed to the Defence;

CONSIDERING, as the Trial Chamber has already pointed out, that the Prosecution made no submissions on the specific needs for protection of specific victims and witnesses, nor did it seek to demonstrate that a likely risk of either deliberate or unintentional disclosure after the conclusion of the case, if any, is of such significance as to justify the unwieldy and possibly unfair consequences of an order that the non-public materials be returned to the Registry;

NOTING that this Trial Chamber has previously rejected a similar request by the Prosecution in the "Decision on Motion by Prosecution for Protective Measures" in *Prosecutor v Brdanin & Talić* of 3 July 2000, pars 39-43;

CONSIDERING, therefore, that the request with respect to this particular measure is to be refused;

NOTING further that the Prosecution requests that it be granted leave to redact from the statements of all witnesses whom it proposes to call to give evidence in this case any information concerning their current whereabouts (Motion, par 16(7));

NOTING that it is unclear whether the Prosecution request is that such information be redacted from the publicly disclosed statements or from the non-public documents disclosed to the Defence of the accused;

CONSIDERING that based on the Rules pursuant to which the Prosecution filed the Motion, in particular that no mention is made of Rule 69, and the nature of the rest of the measures sought, it appears as if the Prosecution meant to ask for leave to redact the said information only from all the publicly disclosed statements of witnesses it proposes to call to give evidence in this case, and not from such statements disclosed to the Defence of the accused;

PURSUANT to Rules 73 and 75,


HEREBY decides to grant the Motion in part and to make the following orders:

1. For the purposes of these orders:
 - (a) "the Prosecutor" or "the Prosecution" means the Prosecutor of the Tribunal and her staff;
 - (b) "the Defence of the accused" means only the accused Enver Hadžihasanović, Mehmed Alagić, and Amir Kubura, their respective defence counsel and their immediate legal

- assistants and staff, and others specifically assigned by the Tribunal to Enver Hadžihasanović's, Mehmed Alagić's, and Amir Kubura's defence teams;
- (c) "the public" means all persons, governments, organisations, entities, clients, associations and groups, other than the judges of the Tribunal and the staff of the Registry (assigned to either Chambers or the Registry), and the Prosecutor, and the Defence of the accused, as defined above. "The public" specifically includes, without limitation, family, friends and associates of the accused, the accused in other cases or proceedings before the Tribunal and defence counsel in other cases or proceedings before the Tribunal; and
- (d) "the media" means all video, audio and print media personnel, including journalists, authors, television and radio personnel, their agents and representatives.
2. The Defence of the accused shall not disclose to the media any confidential or non-public materials provided by the Prosecutor.
3. Save as is directly and specifically necessary for the preparation and presentation of this case, the Defence for the accused shall not disclose to the public:
- (a) the names, identifying information or whereabouts of any witness or potential witness identified to them by the Prosecutor; or
- (b) any evidence (including documentary, physical or other evidence) or any written statement of a witness or potential witness, or the substance, in whole or part, of any such non-public evidence, statement or prior testimony.
4. If the Defence of the accused find it directly and specifically necessary to disclose such information for the preparation and presentation of this case, they shall inform each person among the public to whom non-public material or information (such as witness statements, prior testimony, or videos, or the contents thereof), is shown or disclosed, that such a person is not to copy, reproduce or publicise such statement or evidence, and is not to show or disclose it to any other person. If provided with the original or any copy or duplicate of such material, such person shall return it to the Defence of the accused when such material is no longer necessary for the preparation and presentation of this case.
5. If a member of the Defence of the accused withdraws from the case, all material in his or her possession shall be returned to the lead Defence counsel.
6. The remaining orders sought by the Motion are refused.

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

Done the first day of February 2002
At The Hague
The Netherlands


Wolfgang Schomburg
Presiding Judge

[Seal of the Tribunal]