



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-94-2-PT
Date: 22 November 2002
Original: English

IN TRIAL CHAMBER II

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

Registrar: Mr. Hans Holthuis

Decision of: 22 November 2002

PROSECUTOR

v.

DRAGAN NIKOLIĆ

**DECISION ON "PROSECUTION MOTION FOR PROTECTIVE
MEASURES AND FOR THE SUBMISSION OF A
CORRIGENDUM TO THE RULE 65 TER (E) (i) (ii) (iii) FILING
OF 3 OCTOBER 2002"**

The Office of the Prosecutor:

Mr. Upawansa Yapa

Counsel for the Accused:

Mr. Howard Morrison

TRIAL CHAMBER II (“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 (“Tribunal”):

BEING SEISED OF the Confidential “Prosecution Motion for Protective Measures and for the Submission of a Corrigendum to the Rule 65ter(E) (i) (ii) (iii) Filing of 3 October 2002”, filed by the Prosecution on 1 November 2002 (“Motion”);

NOTING that in the Motion, the Prosecution requests the Trial Chamber to

- (i) grant pre-trial protective measures to the witnesses named in paragraph 10 of the Motion, witnesses who had not sought protective measures previously but indicated to the Prosecution that they will ask for protective measures at trial (“Request I”);
- (ii) assign the pseudonyms given in the Annexes A, C, and D of the Prosecution’s Rule 65ter (E) (i) (ii) (iii) filings made on 3 October 2002 to the witnesses named in paragraph 11 of the Motion, witnesses who the Prosecution had been unable to contact to ascertain whether they require protective measures (“Request II”);
- (iii) accept the corrigendum to the Rule 65ter (E) (i) (ii) (iii) filings of the Prosecution made on 3 October 2002, as set out in the Motion (“Request III”);

CONSIDERING that during the Status Conference of 7 November 2002 (“Status Conference”) Pre-Trial Judge Agius (“Pre-Trial Judge”) directed the Prosecution to approach the Request II witnesses who had not yet been contacted, to ascertain their security and safety concerns, to determine what protective measures are in fact necessary for trial and to justify why the protective measures sought should be granted;

FINDING therefore that the Trial Chamber will not make a determination regarding Request II until such further justification is provided;

CONSIDERING that Request III involves corrections to the Prosecution’s Rule 65ter (E) (i) (ii) (iii) filings made on 3 October 2002, consisting *inter alia* of replacing full names of witnesses with pseudonyms and *vice versa* in accordance with the Decision on Second Motion by Prosecution for Protective Measures of 29 November 2000 and the Decision on Third Motion by Prosecution for Protective Measures of 20 March 2001;

CONSIDERING that during the Status Conference, Counsel for the Accused indicated that he does not intend to respond to Request III;

CONSIDERING however that, if the Trial Chamber were to grant Request III, this would necessitate ordering the Prosecution to file a corrected version of its Rule 65ter (E) (i) (ii) (iii) filings;

CONSIDERING that a decision upon Request II could also necessitate corrections to the Prosecution's Rule 65ter (E) (i) (ii) (iii) filings;

FINDING therefore that a decision upon Request III is best postponed until a decision upon Request II has been taken, and a comprehensive list of required corrections is available;

NOTING that the Motion justifies Request I on the basis that the safety of the witnesses and the safety of their family members would be jeopardised if their identities were disclosed to the public;

CONSIDERING that Counsel for the Accused stated orally during the Status Conference that he does not object to the protective measures sought by the Prosecution in its Motion;

CONSIDERING that the Prosecution has formulated its Motion in general terms, and has not specified the protective measures sought nor put forward any detailed reasoning in relation to specific witnesses, justifying why protective measures should be granted;

CONSIDERING that the burden rests on the party seeking protective measures to identify in each case the specific protective measures sought and to justify in each case why the measures requested should be granted;

CONSIDERING that Article 20 of the Statute of the Tribunal requires a Trial Chamber to ensure that proceedings are conducted with full respect for the rights of the Accused and due regard for the protection of victims and witnesses;

CONSIDERING that Article 22 of the Statute requires the Tribunal to provide in its Rules of Procedure and Evidence ("Rules") for the protection of victims and witnesses;

CONSIDERING that Rule 75 (A) of the Rules provides, *inter alia*, that a Judge or a Trial Chamber may, *proprio motu* or at the request of either party, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the Accused;

CONSIDERING that it appears from the proposed draft order attached to the Motion that the Prosecution requests not only the assignment of pseudonyms but also protective measures intended to preclude the disclosure of the identity and current whereabouts of the witnesses or parts (or all) of the content of the witnesses' testimonies to the media or the public;

CONSIDERING that, despite the general nature of Request I and the brief justifications therefore as presented in the Motion, certain protective measures in relation to these witnesses are nevertheless warranted at this stage of the proceedings in view of the fears expressed by those witnesses as to the safety of themselves and their family members;

CONSIDERING further that the Accused and his Counsel were informed by the Prosecution of the identity of all witnesses it intends to call at trial;

CONSIDERING that the Trial Chamber strongly believes that the protective measures to be granted strike an appropriate balance between the rights of the Accused and the duty of the Tribunal to protect victims and witnesses;

CONSIDERING FURTHER, in particular in view of the observations made above concerning the generality of Request I, that these findings are without prejudice to any future application which may be made by any party or person seeking such other or additional protective measures or a variation of the terms of this Decision, as may be viewed appropriate concerning a particular witness or other evidence, upon good cause being shown;

FOR THE FOREGOING REASONS

PURSUANT TO Article 21 and 22 of the Statute of the Tribunal and to Rule 75 of the Rules;

HEREBY ORDERS AS FOLLOWS:

1. For the purposes of this Decision:
 - (a) the “Prosecution” means the Prosecutor of the Tribunal and her staff;
 - (b) the “Defence” means the Lead Counsel for the Accused and his staff;
 - (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 Prosecution and the Defence, as defined above. The “public” specifically includes, without limitation, family, fiends and associates of the Accused; the Accused in other cases or proceedings before the Tribunal; Defence Counsel in other cases or proceedings before the Tribunal;
 - (d) the “media” means all video, audio and print media personnel, including journalist, authors, television and radio personnel, their agents and representatives.

2. The witnesses numbered (1) to (8) in paragraph 13 of the Motion shall be referred to in these proceedings by the pseudonyms set out in that paragraph unless the Trial Chamber orders otherwise.
3. The Prosecution is granted leave to redact from all documents subject to disclosure pursuant to Rule 66 (A) (i), Rule 66 (A) (ii) and Rule 68 of the Rules any information concerning the current whereabouts of each witness referred to in paragraph 2 of the disposition of this Decision.
4. The Defence shall not disclose to the public and/or the media any confidential or non-public materials provided by the Prosecution.
5. Save as directly and specifically necessary for the preparation and presentation of this case, the Prosecution and the Defence shall not disclose to the public and/or the media:
 - (a) the names, identifying information or whereabouts of any witness or potential witness identified to them by the Prosecution;
 - (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 in part, of any such non-public evidence, statement or prior testimony disclosed.
6. If the Defence 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 when such material is no longer necessary for the preparation and presentation of the case.
7. If a member of the Defence withdraws from the case, all material in his/her possession shall be returned to their lead defence Counsel.
8. Nothing herein shall preclude any party or person from seeking such other or additional protective measures or measures or a variation of the terms of this Decision as may be viewed appropriate concerning a particular witness or other evidence on good cause being shown.

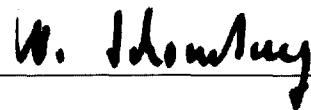
9. Decisions with respect to requests II and III are delayed until the Prosecution has contacted the relevant witnesses and provided the Trial Chamber with specific justifications for the protective measures required for each of the witnesses, as well as information regarding any further amendments to the Rule 65ter (E) (i)(ii)(iii) filings.

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

Dated this twenty-second day of November 2002,

At The Hague

The Netherlands



Wolfgang Schomburg

Presiding Judge

[Seal of the Tribunal]