

IT-99-36-T
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12 DECEMBER 2002

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**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-99-36-T
Date: 12 December
2002
Original: English

IN TRIAL CHAMBER II

Before: Judge Carmel Agius, Presiding
Judge Ivana Janu
Judge Chikako Taya

Registrar: Mr. Hans Holthuis

Decision of: 12 December 2002

PROSECUTOR

v.

RADOSLAV BRĐANIN

**DECISION ON PROSECUTION'S TWELFTH MOTION FOR
PROTECTIVE MEASURES FOR VICTIMS AND WITNESSES**

The Office of the Prosecutor:

Ms. Joanna Korner
Mr. Andrew Cayley

Counsel for the Accused:

Mr. John Ackerman
Mr. Milan Trbojević

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”) is seised of the “Prosecution’s Twelfth Motion for Protective Measures” (“Motion”) filed confidentially and *ex parte* by the Prosecution on 6 November 2002, in which the Prosecution seeks protective measures including the delayed disclosure to Radoslav Brđanin (“Accused”) of the identity and statements of one additional witness until 30 days before that witness appears for testimony, and of a further additional witness until that witness has been successfully relocated to a third country.

I. INTRODUCTION

1. On 6 November 2002, the Prosecution filed confidentially and *ex parte* the Motion, seeking protective measures for two witnesses (“Witnesses”) pursuant to Rules 66(A)(ii), 66(C), 69 and 75 of the Rules of Procedure and Evidence (“Rules”), including the delayed disclosure to the Accused of the identity and statements of one witness until 30 days before that witness appears for testimony, and of another witness until that witness has been successfully relocated to a third country.
2. On 6 November 2002, the Prosecution filed *inter partes* a justification for filing the Motion *ex parte* in accordance with the jurisprudence of this Tribunal on the matter.¹
3. On 20 November 2002, the Prosecution filed *ex parte* Attachment C to the Motion providing further information and support for the requested protective measures.
4. The Defence has not filed a response to the Prosecution’s Motion but has reiterated orally that it does not oppose any protective measure short of closed session.²

¹ *Prosecutor v. Brđanin & Talić*, Case No. IT-99-36-PT, Decision on Second Motion by Prosecution for Protective Measures, 27 October 2000, (“Second Protective Measures Decision”), paras 8-11 and para 14; *Prosecutor v. Brđanin & Talić*, Case No. IT-99-36-PT, Decision on Third Motion by Prosecution for Protective Measures, 8 November 2000 (“Third Protective Measures Decision”), paras 7-11.

² *Prosecutor v. Brđanin*, Transcript page T.12003

II. DISCUSSION

5. In the Motion, the Prosecution seeks to delay the disclosure to the Defence of the identity and statements of the Witnesses as set out above. The Prosecution reserves the right to apply for further protective measures, including measures relating to the Witnesses' appearance in court, at a later date.

6. The Trial Chamber accepts that Article 20.1 of the Statute ensures that proceedings are conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

7. The Trial Chamber acknowledges decisions of the previously constituted Trial Chamber in this case and particularly the First, Second and Third Protective Measures Decisions that established the criteria to be met by the Prosecution to justify delaying disclosure of a witness' identity to the Defence.³

8. In the Second Protective Measures Decision, the Trial Chamber stated that the Prosecution, when applying for protective measures requiring the non-disclosure of the identity of a particular witness to the accused until a later stage in the proceedings, must show that such disclosure, despite the obligation imposed on the Defence in relation to disclosure by them to the public or to the media, may put the witness in danger or at risk. Further, the subjective fears of the potential witness that he or she may be in danger or at risk are not, *per se*, sufficient to establish any real likelihood that the witness may actually be in danger or at risk from disclosure of his or her identity to the opposing party. Something more than that must be demonstrated to warrant an interference with the rights of the accused that such non-disclosure represents.⁴ The party seeking delayed disclosure must establish that there is an objective foundation for those fears. This Trial Chamber has not regarded the mere presence of Serbs in the area to which the witness is due to return as an exceptional circumstance.⁵

9. The Trial Chamber has considered the following factors that the Prosecution disclosed in order to demonstrate those circumstances for the Witnesses, as relevant in determining whether the Motion should be granted:

i) the identity of the Witnesses;

³ *Prosecutor v. Brđanin & Talić*, Case No. IT-99-36-PT, Decision on Motion by Prosecution for Protective measures, 3 July 2000 ("First Protective Measures Decision"), para 26; Second Protective Measures Decision, para 19; Third Protective Measures Decision, para 13.

⁴ First Protective Measures Decision, para 26.

⁵ *Ibid*, para 11.

- ii) the nationality and ethnicity of the Witnesses;
- iii) the role, duties performed and positions occupied by the Witnesses during the course of the conflict in Bosnia-Herzegovina;
- iv) the nature of the evidence that the Witnesses will give before this Trial Chamber;
- v) the events upon which the Witnesses will testify in relation to the Accused before this Trial Chamber.

10. The Trial Chamber also refers to the “Security Assessment for municipalities in BiH” issued by the Office of the High Representative on 6 September 2002.⁶ In the present instance, the Trial Chamber notes that the witnesses are currently residing in municipalities in Republika Srpska that the High Representative has assessed as dangerous.

11. The Trial Chamber further acknowledges Attachment C to the Motion filed *ex parte* in which an investigator of this Tribunal declared that he believed the Witnesses were taking a substantial risk to testify in this trial.⁷

12. The Trial Chamber notes Attachments A and B to the Motion. The Trial Chamber is satisfied that the Witnesses and their families are objectively placed in grave personal danger by cooperating with the Tribunal and by agreeing to testify during this trial. The Witnesses will allegedly provide evidence that much of the responsibility for crimes charged in the Fifth Amended Indictment is attributable to the leadership of the SDS party, including the Accused.

13. In the First Protective Measures Decision issued on 3 July 2000, this Trial Chamber found that it was not possible to lay down, in advance, any particular period which would be applicable to all cases as to the length of time before the trial at which the identity of a witness must be disclosed to the accused and that such period of time depended on the circumstances of each case. The Trial Chamber must strike a balance between the safety of the witnesses and the need for the Defence to be given sufficient opportunity to properly investigate them. The Trial Chamber endorses the position of the previously constituted trial chamber according to which 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, and, once the Defence commences (quite properly) to investigate the background of the witness whose identity has been

⁶ *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-T, Addendum to Prosecution’s Eleventh Motion for Protective measures for Victims and Witnesses filed Confidentially and Under Seal, 26 June 2002.

⁷ *Prosecutor v. Brđanin, Ex Parte* Attachment “C” to Prosecution’s Twelfth Motion for Protective Measures, 20 November 2002.

disclosed to them, there is a risk that those to whom the Defence have spoken may reveal to others the identity of that witness, with the consequential risk that the witness will be interfered with.⁸ The Trial Chamber thus finds that the Prosecution's submissions regarding this matter are appropriate.

14. The Trial Chamber does not agree with the Prosecution's reliance on Rule 66(C). Indeed, Rule 66(C) only applies to situations where the Prosecution seeks to permanently withhold information, 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. On the contrary, the Prosecution, in its Motion, merely seeks to delay the disclosure of the said information. The Trial Chamber thus finds that Rule 66(C) is not applicable to the present case.

⁸ First Protective Measures Decision, para 28.

III. DISPOSITION

For the foregoing reasons,

PURSUANT to Articles 20(1) and 22 of the Statute, Rules 66(A)(ii), 69 and 75 of the Rules,

TRIAL CHAMBER II HEREBY grants the protective measures sought by the Prosecution in the Motion and orders that:

1. The disclosure of the identity and statements of the Witnesses, including Rule 68 material, is delayed until:

- i) 30 days before the first Witness appears for testimony; and
- ii) the other Witness has been successfully relocated to a third country;

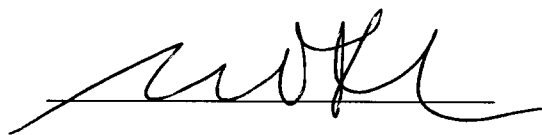
2. Once the identity and statements of the Witnesses are disclosed to the Defence, they shall at no time be disclosed by the Defence to any persons other than the Defence team save it directly and specifically necessary for the preparation and presentation of this case and only after informing the Trial Chamber of the names of such persons.

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

Dated this twelfth day of December 2002,

At The Hague

The Netherlands



Carmel Agius

Presiding Judge

[Seal of the Tribunal]