



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-03-69-PT
Date: 26 October 2004
Original: English

IN THE TRIAL CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge O-Gon Kwon
Judge Iain Bonomy

Registrar: Mr. Hans Holthuis

Decision of: 26 October 2004

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

**DECISION ON CONFIDENTIAL PROSECUTION MOTIONS
FOR PROTECTIVE MEASURES**

The Office of the Prosecutor

Mr. Dermot Groome
Mr. David Re

Counsel for the Jovica Stanišić

Mr. Geert-Jan Alexander Knoops and Mr. Wayne Jordash

Counsel for the Franko Simatović

Mr. Zoran Jovanović

THIS 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 (“International Tribunal”),

BEING SEISED of a (i) “Prosecution Motion for Pre-Trial Protective Measures For Witnesses”, and (ii) “Second Prosecution Motion for Pre-Trial Protective Measures For Witnesses”, filed confidentially by the Prosecution on 18 June 2004¹ and 8 July 2004, respectively (“Motions”), requesting that

- (1) pre-trial protective measures already granted for 17 witnesses in other proceedings be extended to those same witnesses, as identified in the annexes to the Motions, in the instant case; and
- (2) pre-trial protective measures be granted for the first time for 12 witnesses, as identified in the annexes to the Motions,

NOTING that the various confidential and *ex parte* Annexes attached to the Motions (“Annexes”) include, *inter alia*, the identity of the witnesses and statements from the Prosecution’s investigators concerning the relevant circumstances of the witnesses,

NOTING the (i) “Defence Response to Prosecution Motion for Pre-Trial Measures for Witnesses” and (ii) “Response to Second Prosecution Motion for Pre-Trial Protective Measures for Witnesses” filed by the Defence of Jovica Stanišić (“Stanišić”) on 25 June 2004 and 21 July 2004, respectively, and the “Defence Response to Prosecution Motion for Pre-Trial Protective Measures for Witnesses” filed by the Defence of Franko Simatović (“Simatović”) on 1 July 2004 (“Responses”), objecting to the Motions,

NOTING the “Addendum to Prosecution’s First and Second Motions for Pre-Trial Protective Measures for Witnesses”, filed by the Prosecution on 29 September 2004 (“Addendum”); the “Defence Reply to Addendum to Prosecution’s First and Second Motion for Pre-Trial Protective Measure for Witnesses”, filed by the Defence of Simatović on 30 September 2004; and the “Defence Response to Prosecution Addendum to Prosecution’s First and Second Motion for Pre-Trial Protective Measure for Witnesses”, filed by the Defence of Stanišić on 6 October 2004,

NOTING that the 17 witnesses identified as B-104; C-013; C-015; C-017; C-020; K-2; B-071; C-025; B-024; B-129; B-161; C-048; B-174; C-057; B-152; B-108; and C-058 (“Prior

¹ A Corrigendum withdrawing the application of the Prosecution with respect to 4 of the witnesses was confidentially filed on 7 July 2004.

Protected Witnesses”) were granted protective measures in other proceedings, including the identification of the witness by pseudonym,

NOTING paragraph (F) of Rule 75 of the Rules, as follows:

- (F) Once protective measures have been ordered in respect of a victim and witness in any proceedings before the Tribunal (the “first proceedings”), such protective measures:
- (i) shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal (the “second proceedings”) unless and until they are rescinded, varied, augmented in accordance with the procedure set out in this Rule; but
 - (ii) shall not prevent the Prosecutor from discharging any disclosure obligation under the Rules in the second proceedings, provided that the Prosecutor notifies the Defence to whom the disclosure is being made of the nature of the protective measures ordered in the first proceedings.

NOTING that disclosure was delayed with respect to the Prior Protected Witnesses² and that non-disclosure agreement from third parties were required for a number of the Prior Protected Witnesses,³

CONSIDERING that delayed disclosure and the requirement to obtain a non-disclosure agreement from third parties concern the two accused in this case and that they are matters for consideration by this Trial Chamber under Rule 69 of the Rules,

NOTING that the Prosecution requests the following relief with respect to the 12 witnesses, identified as B-189; B-217; B-235; B-252; B-258; C-047; C-063; B-299; B-187; B-221; B-200, and B-224 (“First Instant Witnesses”), for whom protective measures are sought for the first time:

- (1) The Prosecution be relieved of its obligations under Rules 65 *ter* and 66 (a)(ii) of the Rules to disclose the full and prior statement of the witness and related exhibits and be permitted to provide a version which is redacted to protect each witness’s identity;
- (2) Each witness be assigned a pseudonym corresponding to the Prosecution witness number already assigned to the witness;
- (3) Full disclosure of each witness’s identity, statements and related exhibits be delayed until 30 days prior to the expected date of their testimony; and
- (4) Any third party provided with confidential information in preparation of the defence be required by the defence to sign a non-disclosure agreement,

² For instance, the Prosecution in IT-02-54-T was ordered to disclose the full statements and related exhibits of witnesses to the accused in that case, not less than 10 days prior to the testimony of the witnesses. Whereas the Prosecution in IT-00-39&40-PT was ordered to disclose the full statements and related exhibits of witnesses to the accused in that case, not less than 30 days prior to the testimony of the witnesses.

³ With the exception of 4 witnesses, non disclosure agreements from third parties were required for the remaining Prior Protected Witnesses.

CONSIDERING that the Prosecution has not been able to contact witness B-189, and the Prosecution has not indicated whether witness B-221 requests protective measures and if so, what measures are sought,

CONSIDERING that no action is required by the Trial Chamber with respect to witness C-063, since the witness does not request protective measures and the Prosecution states in the Motions that it is not requesting any protective measures for this witness,

NOTING Rule 69 of the Rules which states:

- (A) In exceptional circumstances, the Prosecutor may apply to a Judge or 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.
- (B) In the determination of protective measures for victims and witnesses, the Judge or Trial Chamber may consult the Victims and Witnesses Section.
- (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.

NOTING that this Trial Chamber cited with approval the three criteria set out in the Brđanin Decision⁴ for the grant of applications made under Rule 69(A) of the Rules. They are:

- (a) the likelihood that Prosecution witnesses will be interfered with or intimidated once their identity is made known to the accused and his counsel, but not the public;
- (b) the extent to which the power to make protective orders can be used not only to protect individual victims or witnesses in the particular trial, and measures which simply make it easier for the Prosecution to bring cases against other persons in the future; and
- (c) the length of time before the trial at which the identity of the victims and witnesses must be disclosed to the accused. (The Prosecution accepted in the Brđanin case that, although the shorter the time between disclosure and testifying the less the opportunity will be for interference with that witness, the time allowed for preparation must be time *before trial commences* rather than before the witness gives evidence. What time frame is reasonable will depend on the category of the witness)⁵

CONSIDERING that it is the practice of this Trial Chamber in pre-trial proceedings, except in certain exceptional cases, to order the disclosure of the identities, statements and other

⁴ *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-PT, "Decision on Motion by Prosecution for Protective Measures," 3 July 2000 ("Brđanin Decision").

⁵ *Prosecutor v. Milošević*, Case No-02-54-T, "Decision on Prosecution Motion for Provisional Protective Measures Pursuant to Rule 69," 19 Feb. 2002 ("Provisional Protective Measures Decision"), para. 26 and *Prosecutor v. Milošević*, Case No-02-54-T, "First Decision on Prosecution Motion for Protective Measures for Sensitive Source Witnesses," 3 May 2002 ("Sensitive Source Decision"), para. 3. Furthermore, it was noted in this Decision that fears expressed by potential witnesses are not in themselves sufficient to establish a real likelihood that they may be in danger or at risk and that what is required to interfere with the rights of the accused in this respect is something more. (Para. 4).

relevant material of witnesses who are granted the exceptional protective measure of delayed disclosure pursuant to Rule 69(A) of the Rules, 30 days prior to the anticipated start of trial,⁶

CONSIDERING that Article 20 of the Statute requires the 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 the Trial Chamber is satisfied, on the basis of the information contained in the Motions and their Annexes, that the Prosecution has established the “exceptional circumstances” required by Rule 69 (A) of the Rules, with respect to each of the First Instant Witnesses,⁷ except for witnesses B-189, C-063, and B-221, and with respect to each of the Prior Protected Witnesses,

PURSUANT TO Articles 20 and 22 of the Statute and Rules 54, 69 and 75 of the Rules,

HEREBY DENIES the Motions with respect to witnesses B-189, C-063 and B-221 and **GRANTS** the Motions in part and **ORDERS** as follows:

(1) With respect to the Prior Protected Witnesses:

- (i) The witnesses shall be identified and referred to by the pseudonym used in the Annexes to the Motions;
- (ii) The Prosecution shall disclose the statements and related exhibits of the witnesses in redacted form by 1 November 2004;
- (iii) The Prosecution shall disclose the full and unredacted statements and related exhibits of the witnesses no later than thirty days prior to the anticipated start of trial in this matter, unless otherwise ordered by the Trial Chamber; and
- (iv) The Defence shall not disclose the material relating to these witnesses to third parties except to the extent directly and specifically necessary for the preparation and presentation of the defence case, and shall obtain non-disclosure agreements from any third party as a precondition for release of the material to them.

(2) With respect to the First Instant Witnesses, except for witnesses B-189, C-063 and B-221:

⁶ See *Prosecutor v. Orić*, Case No. IT-03-68-PT, “Decision on Confidential Prosecution Motions for Protective Measures and Nondisclosure,” 28 July 2003.

⁷ See Provisional Protective Measures Decision, paras 17 and 24 and Brdanin Decision, para. 10.

- (i) The witnesses shall be identified and referred to by the pseudonym used in the Annexes to the Motions;
 - (ii) The Prosecution shall disclose the statements and related exhibits of the witnesses in redacted form by 1 November 2004,
 - (iii) The Prosecution shall disclose the full and unredacted statements and related exhibits of the witnesses no later than thirty days prior to the anticipated start of trial in this matter, unless otherwise ordered by the Trial Chamber; and
 - (iv) The Defence shall not disclose the material relating to these witnesses to third parties except to the extent directly and specifically necessary for the preparation and presentation of the defence case, and shall obtain non-disclosure agreements from any third party as a precondition for release of the material to them.
- (3) With respect to witness B-189, the Prosecution shall take appropriate measures to contact the witness and report back to the Trial Chamber by Friday, 19 November, 2004; and
- (4) With respect to witness B-221, the Prosecution shall contact the witness and report to the Trial Chamber by Friday, 12 November 2004, as to whether the witness seeks protective measures and if so, what measures are sought.

For the purpose of this decision, “the public” means and includes all persons, governments, organisations, entities, clients, associations and groups, other than the Judges of the International Tribunal, the staff of the Registry, the Prosecutor and her representatives, the accused in this case, the defence counsel, legal assistants and other members of the Defence team, their agents or representatives. “The public” also includes, without limitation, family, friends, and associates of the accused; accused in other cases or proceedings before the International Tribunal; defence counsel in other cases or proceedings before the International Tribunal and the media and journalists.

Done in English and French, the English text being authoritative



Patrick Robinson
Presiding

Dated this twenty-sixth day of October 2004
At The Hague
The Netherlands

[Seal of the Tribunal]