



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

IF95-13/1-PT
D2022-D2015
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Case No. IT-95-13/1-PT
Date: 9 March 2005
Original: English

IN TRIAL CHAMBER II

Before: Judge Carmel Agius, Presiding Judge
Judge Jean-Claude Antonetti
Judge Kevin Parker

Registrar: Mr. Hans Holthuis

Decision of: 9 March 2005

PROSECUTOR

v.

**MILE MRKŠIĆ
MIROSLAV RADIĆ
VESELIN ŠLJIVANČANIN**

**DECISION ON CONFIDENTIAL PROSECUTION MOTIONS
FOR PROTECTIVE MEASURES AND NONDISCLOSURE AND
CONFIDENTIAL ANNEX A**

The Office of the Prosecutor:

Mr. Jan Wubben

Counsel for the Accused Mile Mrkšić:

Mr. Miroslav Vasić

Counsel for the Accused Miroslav Radić:

Mr. Borivoje Borović
Ms. Mira Tapusković

Counsel for the Accused Veselin Šljivančanin:

Mr. Novak Lukić
Mr. Momčilo Bulatović

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 a “Prosecution’s Motion for Protective Measures of Sensitive Witnesses”, filed confidentially by the Office of the Prosecutor (“Prosecution”) on 17 December 2004 (“First Motion”), seeking orders pursuant to Articles 20 and 22 of the Statute of the Tribunal (“Statute”) and Rules 66 and 69 of the Rules of Procedure and Evidence (“Rules”) for:

- (1) three sensitive witnesses identified as P001, P002 and P003 (“Three Sensitive Witnesses of the First Motion”) to be referred to by pseudonyms during the pre-trial phase; and
- (2) delayed disclosure of the names and unredacted statements of the Three Sensitive Witnesses of the First Motion, until thirty days prior to the start of trial,

FURTHER BEING SEISED OF a “Prosecution’s Motion for Order of Protective Measures”, filed confidentially by the Prosecution on 31 January 2005 (“Second Motion”), seeking orders pursuant to Articles 20, 21 and 22 of the Statute and Rules 53, 54, 69 and 75 of the Rules for:

- (1) two sensitive witnesses identified as P009 and P010 (“Two Sensitive Witnesses of the Second Motion”) to be referred to by pseudonyms during the pre-trial phase of the proceedings; and
- (2) delayed disclosure of the names and unredacted statements of the Two Sensitive Witnesses of the Second Motion, until thirty days prior to the start of trial; and
- (3) fifteen witnesses (“Fifteen Witnesses of the Second Motion”), nine of whom have been granted protective measures in previous trials before the Tribunal (“Nine Witnesses of the Second Motion previously granted Protective Measures”), and out of which two are the Two Sensitive Witnesses of the Second Motion, to be granted protective measures during the trial phase of the proceedings,¹

¹ In its Second Motion, the Prosecution requests that P004, P005, P008, P013, P014 and P016 (none of whom has previously been granted protective measures) be granted pseudonym, image and voice distortion during the trial phase of the proceedings. Further, the Prosecution requests the extension of the protective measures previously granted in the trial phase in other proceedings before the Tribunal to P006 (granted pseudonym, image and voice distortion), P007 (granted pseudonym and image distortion), P009 (granted pseudonym and image distortion), P010 (granted pseudonym, image and voice distortion), P011 (granted pseudonym, image and voice distortion), P012 (granted pseudonym, image and voice distortion), P017 (granted pseudonym, image and voice distortion and closed session), P018 (granted pseudonym, image and voice distortion) and P019 (granted closed session).

NOTING the “Defence Joint Response to Two Prosecution Motions for Protective Measures filed on 17.12.2004 and 31.01.2005”, filed confidentially by the Defence on 14 February 2005 (“Response”), in which the Defence objects to granting the requested protective measures to P004 and P014,

NOTING the Prosecution submissions that the protective measures requested during the pre-trial proceedings for the Three Sensitive Witnesses of the First Motion and the Two Sensitive Witnesses of the Second Motion are consistent with the rights of the accused and are necessary to safeguard the security of the witnesses in question and the integrity of both evidence and proceedings² and that, in the case of each of these witnesses, exceptional circumstances exist to merit the application of protective measures,³

NOTING that Article 20 (1) 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, and that Article 21 (2) of the Statute entitles the accused to a fair and public hearing, subject to Article 22 of the Statute, which states that the Tribunal shall provide, in the Rules, for the protection of victims and witnesses,

CONSIDERING that the requirement that the accused be granted a fair trial dictates that the Trial Chamber should only grant protective measures where it is properly shown, in the circumstances of each witness, that the protective measures sought meet the standards set out in the Statute and the Rules,⁴ as expanded by the Tribunal’s jurisprudence,⁵ and that in the case of protective measures during pre-trial proceedings the balance dictates clearly in favour of the accused’s right to know the identity of witnesses upon which the Prosecution intends to rely,⁶

CONSIDERING that the Trial Chamber is satisfied that, in light of the material provided by the Prosecution,⁷ and in accordance with the criteria set out by the Trial Chamber in previous decisions,⁸ including “the likelihood that Prosecution witnesses will be interfered with or intimidated once their identity is made known to the accused and his counsel” and “the length of

² Prosecution’s Motion for Protective Measures of Sensitive Witnesses, 17 December 2004, (“Motion”) para. 2; Prosecution’s Motion for Order of Protective Measures, 31 January 2005, (“Second Motion”), para. 1.

³ Motion, para. 37; Second Motion, para. 24.

⁴ Rule 69(A) states that: “*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 time as the person is brought under the protection of the Tribunal.” (Emphasis added).

⁵ *Prosecutor v. Slobodan Milošević*, “Decision on Prosecution Motion for Provisional Protective Measures Pursuant to Rule 69”, Case No. IT-02-54-T, 19 February 2002, para. 28.

⁶ *Prosecutor v. Slobodan Milošević*, “Decision on Prosecution Motion for Provisional Protective Measures Pursuant to Rule 69”, Case No. IT-02-54-T, 19 February 2002, para. 32.

⁷ Confidential and *ex parte* Attachment A to the First motion; Confidential and *ex parte* Attachment C to the Second Motion.

⁸ *Prosecutor v. Brđanin and Talić*, “Decision on Motion by Prosecution for Protective Measures”, Case No. IT-99-36-PT, 3 July 2000, paras 24, 29 and 33.

time before the trial at which the identity of the victims and witnesses must be disclosed to the accused”, the Prosecution has established that exceptional circumstances exist to merit the application of the protective measures requested during the pre-trial proceedings for the Three Sensitive Witnesses of the First Motion and the Two Sensitive Witnesses of the Second Motion, namely that their security and that of their families is currently at risk, in that each has been the target of specific incidents of serious physical and verbal threat,

CONSIDERING that the Trial Chamber will follow its own practice and that of other Chambers with respect to the time at which unredacted disclosure of the identities and statements of these witnesses should be made available to the Defence and will fix a period of thirty days prior to the anticipated start of trial as an appropriate time before which the Prosecution must disclose the unredacted statements of witnesses granted protective measures under Rule 69(A) of the Rules,

NOTING the Prosecution’s submissions that the protective measures requested during the trial proceedings for the Fifteen Witnesses of the Second Motion do not interfere with the right of the Accused to a fair trial,⁹ and are required to safeguard the privacy and security interests of the witnesses and to ensure the integrity of the evidence and the proceedings,¹⁰ and that in the case of the Nine Witnesses of the Second Motion previously granted Protective Measures, the initial court order on protective measures should remain unless rescinded by the Trial Chamber that imposed the initial order,¹¹

NOTING further the Defence submission that the requested protective measures should be denied for P004 and P014 as these witnesses have previously testified without any protective measures in other criminal proceedings,¹²

NOTING that Rule 75 (A) of the Rules provides that a Judge or Chamber may order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused, and that Rule 75 (F)(i) provides that once such protective measures have been ordered, they shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal, unless and until they are rescinded, varied or augmented in accordance with the procedure set out in Rule 75,

CONSIDERING that the Trial Chamber has to determine where the balance lies between the accused’s right to a fair and public trial, the right of the public to access of information and the protection of victims and witnesses, and that how this balance is struck will depend on the facts of

⁹ Second Motion, para.8.

¹⁰ Second Motion, para. 1.

¹¹ Second Motion, para. 3.

¹² Response, paras 13 and 15. See additional information in Confidential Annex A, appended to this decision.

each case,¹³ but that any curtailment of the accused's right to a fair trial must be justified by a genuine fear for the safety of the witness or the members of his family,¹⁴

CONSIDERING that the Trial Chamber is satisfied, on the basis of the supporting material provided, that in the cases of P005, P008, P013 and P016, the Prosecution has established, in accordance with the standard set out in previous decisions,¹⁵ that should it become publicly known that the witness has testified, there would be a real risk to the security of the witness or to the security of his or her family,

CONSIDERING that in the cases of the Nine Witnesses of the Second Motion previously granted Protective Measures, the Trial Chamber considers it appropriate to extend the measures granted in previous trials before the Tribunal to the testimony of the witnesses in these proceedings,

CONSIDERING that, given the Defence objection to the protective measures sought for P004 and P014, the Trial Chamber denies the requested protective measures for P004 and P014 pending the provision of further material supporting the existence of a real risk to the security of P004 and P014 or to their families,

FOR THE FOREGOING REASONS

PURSUANT TO Articles 20, 21 (2) and 22 of the Statute and Rules 54, 66, 69, 75 and 79 of the Rules;

HEREBY GRANTS THE MOTION IN PART AND ORDERS THAT:

- (1) until further Order, the Prosecution shall refer to the Three Sensitive Witnesses of the First Motion as P001, P002 and P003, and the Two Sensitive Witnesses of the Second Motion as P009 and P010, in all public proceedings before the Tribunal;
- (2) the Prosecution shall continue to use pseudonyms when referring to the Three Sensitive Witnesses of the First Motion and the Two Sensitive Witnesses of the Second Motion in public until such time as each witness is called to testify and the protection set out in this Decision shall apply to these witnesses until further Order;

¹³ *Prosecutor v. Tadić*, Case IT-94-1-T, "Decision on the Prosecutor's Motion Requesting Protective Measures for Witness R", 31 July 1996, para. 5.

¹⁴ *Prosecutor v. Tadić*, Case IT-94-1-T, "Decision on the Prosecutor's Motion Requesting Protective Measures for Witness R", 31 July 1996, para. 6.

¹⁵ *Prosecutor v. Milošević*, Case IT-02-54-T, "Decision on Prosecution Motion for Trial Related Protected Measures for Witnesses (Bosnia)", 30 July 2002, para. 11.

- (3) the Prosecution shall disclose the full and unredacted statements of the Three Sensitive Witnesses of the First Motion and the Two Sensitive Witnesses of the Second Motion no later than thirty days before the anticipated start of the trial, unless otherwise ordered by the Trial Chamber;
- (4) the Prosecution shall be at liberty to apply for specific protective measures for the Three Sensitive Witnesses of the First Motion, including the use of voice and image distortion and closed session, prior to the date on which each witness is to testify, pursuant to Rule 75 of the Rules;
- (5) the Prosecution shall refer to the Fifteen Witnesses of the Second Motion, with the exception of the two witnesses to whom the Defence has objected, as P005, P006, P007, P008, P009, P010, P011, P012, P013, P016, P017, P018 and P019 in all public proceedings before the Tribunal;
- (6) P005, P006, P008, P010, P011, P012, P013, P016 and P018 shall testify with the protective measures of image distortion and voice distortion, P007 and P009 shall testify with the protective measure of image distortion and P017 and P019 shall testify in closed session;
- (7) until further Order:
 - (i) the names and other identifying data of the witnesses granted protective measures in this Order (“the Protected Witnesses”), including their whereabouts, shall not be disclosed to the public;
 - (ii) the names, addresses, whereabouts of and identifying data concerning the Protected Witnesses shall be sealed and not included in any public records of the Tribunal;
 - (iii) to the extent that the names, addresses, whereabouts or other identifying data concerning the Protected Witnesses are contained in existing public documents of the Tribunal, that information shall be expunged from those documents;
 - (iv) documents of the Tribunal identifying the Protected Witnesses shall not be disclosed to the public or the media;
- (8) all hearings to consider the issue of protective measures for specific witnesses shall be held in closed session and only released to the public and the media after review by the Prosecution, in consultation with the Victims and Witnesses Section;

HEREBY DENIES THE MOTION IN PART AND ORDERS THAT

- (9) the requested protective measures of pseudonym, image distortion and voice distortion for the witnesses identified in the Second Motion as P004 and P014 and identified in Confidential Annex A appended to this decision are denied pending the provision of the material defined in paragraph 10 of the disposition below,

AND FURTHER ORDERS THAT

- (10) the Prosecution may file further material supporting the existence of a real risk to the security of P004 and P014 or to their families, if it so wishes.


For the purpose of this decision, “the public” shall mean and include all persons, governments, organisations, entities, clients, associations and groups, other than the Judges of the 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” shall also include, without limitation, family, friends and associates of the accused; accused in other cases or proceedings before the Tribunal; defence counsel in other cases or proceedings before the Tribunal and the media and journalists.

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

Dated this ninth day of March 2005,

At The Hague

The Netherlands



Carmel Agius

Presiding Judge

[Seal of the Tribunal]