



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of
Former Yugoslavia since 1991

Case No. IT-04-84-PT
Date: 20 May 2005
Original: English

IN TRIAL CHAMBER II

Before: Judge Carmel Agius, Presiding
Judge Hans Henrik Brydensholt
Judge Albin Eser

Registrar: Mr. Hans Holthuis

Decision of: 20 May 2005

PROSECUTOR

v.

**Ramush HARADINAJ
Idriz BALAJ
Lahi BRAHIMAJ**

**DECISION ON PROSECUTION'S APPLICATION FOR
PRE-TRIAL PROTECTIVE MEASURES FOR WITNESSES**

The Office of the Prosecutor:

Ms. Carla del Ponte
Mr. Dermot Groome
Ms. Marie Tuma

Accused / Counsel for the Accused:

Ramush Haradinaj

Idriz Balaj

Lahi Brahimaj

Mr. Rodney Dixon
Mr. Ben Emmerson
Mr. Conor Gearty
Mr. Michael O'Reilly

Mr. Gregor Guy-Smith

Mr. Richard Harvey

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 “Prosecution Motion for Pre-Trial Protective Measures for Witnesses” (“Motion”), filed with confidential and partly *ex parte* Annexes A – J on 7 April 2005, wherein the Office of the Prosecutor (“Prosecution”) requests

- (1) For all potential witnesses mentioned in categories A and B of confidential Annex B and confidential and *ex parte* Annex C to the Motion:
 - (a) the assignment of pseudonyms,¹
 - (b) permission to redact the identities and other identifying information from the witness statements the Prosecution needs to provide to counsel for Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj (collectively “Accused” and “Defence”) in order to meet its disclosure obligations under Rule 66(A)(i) of the Tribunal’s Rules of Procedure and Evidence (“Rules”),² and
 - (c) permission for delayed disclosure to the Defence of identifying information of these witnesses until 30 days before the witness is expected to testify at trial (“First Request”);³
- (2) For all potential witnesses mentioned in category C of confidential Annex B and confidential and *ex parte* Annex C to the Motion: Permission to redact information indicating the current whereabouts of these witnesses and the names of certain third persons from the statements the Prosecution needs to provide to the Defence in order to meet its disclosure obligations under Rule 66(A)(i) of the Rules (“Second Request”);⁴
- (3) That in the event that the Trial Chamber does not issue a decision on the First and Second Request by 13 April 2005, that the Prosecution be permitted to provide the Defence with redacted witness statements until further Order (“Third Request”);⁵

¹ Motion, para. 27(i).

² Motion, para. 27(i) in conjunction with para. 9.

³ Motion, para. 27(i) in conjunction with para. 10.

⁴ Motion, para. 27(ii) in conjunction with paras 11 and 23. Although the request in para. 27(ii) is one for the redaction of “names, identifying information and other information indicating the current whereabouts of witnesses identified ...”, the Trial Chamber understands from para. 23 that the Prosecution only seeks the redaction of “names of people who are or could be sensitive witnesses”, not the names of the providers of the statements.

⁵ Motion, para. 27(iv).

- (4) That in the event that the Trial Chamber deny the requested protective measures for any particular witness the Prosecution's obligation to provide the Defence with the identity of a witness be stayed for a period of at least 30 days in order to allow time for notification of the particular witness ("Fourth Request");⁶
- (5) That the Trial Chamber order third parties who are not part of the Defence receiving confidential information related to the present case sign the non-disclosure agreement attached as Annex A to the Motion, in which they pledge to abide by any Orders issued by the Trial Chamber and voluntarily submit themselves to the jurisdiction of the Tribunal concerning any issues arising out of these Orders ("Fifth Request");⁷

NOTING the Pre-Trial Judge's "Order in Relation to the Prosecution Motion for Pre-Trial Protective Measures for Witnesses", filed on 12 April 2005, which ordered that the Prosecution shall proceed with fulfilling its disclosure obligations under Rule 66(A)(i) of the Rules in the proposed redacted format, but that, taking into account that two of the three Accused at the time had not been formally assigned counsel to represent them, the time-limit provided for in Rule 126*bis* of the Rules for the filing of a response to the Motion should start to run only from such time when all three Accused have appointed or been assigned Defence counsel;

NOTING that, in the meantime, the Prosecution has informed the Trial Chamber that it has completed its disclosure obligations under Rule 66(A)(i) of the Rules, for the time being, in redacted format;⁸

NOTING "Idriz Balaj's and Lahi Brahimaj's Response to 'Prosecution Motion for Pre-Trial Protective Measures for Witnesses with Confidential and *ex parte* Annexes'" ("Balaj and Brahimaj Response"), filed on 2 May 2005, wherein the Balaj Defence and the Brahimaj Defence oppose the First and the Second Request (1) on grounds that the filing of *ex parte* Annexes to the Motion by the Prosecution deprives the Defence of an opportunity to review this material, and, consequently, to comment on the substance,⁹ (2) for the reason that no 'exceptional circumstances' within the parameters of Rule 69(A) of the Rules exist that would justify ordering the non-disclosure of witness identities, moreover, that granting this request would be conflicting with the minimum rights of the Accused, and thus impair the fairness of the proceedings,¹⁰ and (3) because in some

⁶ Motion, para. 27(iii).

⁷ Motion, para. 25.

⁸ Prosecution's Third Report on Rule 66(A)(i) Disclosure, 5 May 2005.

⁹ Balaj and Brahimaj Response, paras 16-24.

¹⁰ Balaj and Brahimaj Response, paras 25-37.

instances, the Prosecution seeks protective measures for witnesses who have not expressed any security concerns themselves¹¹;

NOTING the “Defence Response on Behalf of Ramush Haradinaj to Prosecution Motion for Pre-Trial Protective Measures for Witnesses” (“Haradinaj Response”), filed on 3 May 2005, in which the Haradinaj Defence does not oppose the protective measures sought in the Motion, provided that these measures may be reviewed and varied by the Trial Chamber at a later stage,¹² and in which the Haradinaj Defence further states that it is in a position to commence preparations for trial on the basis of the supporting material disclosed by the Prosecution pursuant to Rule 66(A)(i) of the Rules in redacted format;¹³

CONSIDERING Rule 69 of the Rules, which provides that “(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. [...] (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”;

CONSIDERING Rule 75(A) of the Rules, which provides that “A Judge or a Chamber may, *proprio motu* or *at the request of either party*, or of the victim or witness concerned, or of the Victims and Witnesses Section, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused.”;¹⁴

CONSIDERING that the Trial Chamber has a duty to strike a fair balance between the right of the Accused to a fair trial on the one side, and the protection of victims and witnesses and the right of the public to access of information on the other side, the right of the Accused encompassing, in particular, the right to be allowed adequate time for the preparation of a defence, and to cross-examine witnesses testifying against the Accused;

CONSIDERING that pursuant to Rule 75(A) of the Rules, the Prosecution has standing of its own to request protective measures for a witness, regardless of whether that witness supports the request or not;

CONSIDERING that *ex parte* filings should be accepted only where the disclosure to the other party of the information conveyed by the application would be likely to prejudice unfairly either the party making the application or some person involved in or related to that application, the applicant

¹¹ Balaj and Brahimaj Response, paras 5 and 37.

¹² Haradinaj Response, paras 2, 4 and 7.

¹³ Haradinaj Response, para. 5.

¹⁴ Emphasis added.

being under an obligation to identify why the disclosure of the detail of the application to the other party would cause such unfair prejudice;¹⁵

FINDING that the Annexes to the Motion that were filed on an *ex parte* basis¹⁶ contain sensitive information the disclosure of which to the Defence would not only be likely to cause unfair prejudice to the individuals concerned, but also run contrary to the purposes of the Motion, thus the *ex parte* Annexes to the Motion are accepted;

FINDING with regard to the First Request, balancing the interests involved, the Trial Chamber is satisfied that

- (a) the assignment of a pseudonym is warranted to accommodate the privacy and security of these witnesses and their relatives;
- (b) the redaction of identities and other identifying information from the witness statements is justified considering the circumstances of these witnesses;
- (c) the delayed disclosure to the Defence of identifying information of these witnesses until thirty (30) days before the commencement of trial, or unless the Trial Chamber orders otherwise upon a new application from either party, is justified considering the circumstances of these witnesses, however, the information provided by the Prosecution does not support the necessity of delayed disclosure of identifying information until 30 days before the witness is expected to testify at trial;

FINDING with regard to the Second Request, balancing the interests involved, the Trial Chamber is satisfied that the redaction of information indicating the current whereabouts of certain witnesses from their statements, as well as the names of certain third persons, is justified under the circumstances;

FINDING that there is no need to address the Third and Fourth Request since they are moot;

FINDING with regard to the Fifth Request, that the Defence is always under a duty not to disclose material classified as confidential by the Trial Chamber, and therefore, the Trial Chamber does not consider it useful to impose a general obligation on the Defence to introduce non-disclosure

¹⁵ *Prosecutor v. Simić et al.*, Case No. IT-95-9-PT, Decision on (1) Application by Stevan Todorović to Re-Open the Decision of 27 July 1999, (2) Motion by ICRC to Re-Open Scheduling Order of 18 November 1999, and (3) Conditions for Access to Material, 28 February 2000, para. 41.

¹⁶ Annexes C, D, E, F and G.

agreements,¹⁷ this being an exceptional measure that should be used exclusively in relation to the most sensitive witnesses;

PURSUANT TO Rules 54, 66, 69 and 75 of the Rules

HEREBY GRANTS THE MOTION IN PART and ORDERS AS FOLLOWS:

1. The following potential witnesses shall be assigned the pseudonym they are currently referred to in confidential Annex B to the Motion for use when referring to the protected witness in public until such time when the witness is called to testify and the protection set out in the present Decision shall apply to the protected witnesses until further Order: SST7/01, SST7/02, SST7/03, SST7/04, SST7/05, SST7/06, SST7/07, SST7/08, SST7/09, SST7/10, SST7/11, SST7/12, SST7/13, SST7/14, SST7/16, SST7/17, SST7/18, SST7/19, SST7/20, SST7/21, SST7/22, SST7/23, SST7/24, SST7/25, SST7/26, SST7/27, SST7/28.

2. The Prosecution shall disclose to the Defence the identifying information regarding the potential witnesses named in the previous paragraph no later than thirty (30) days before the commencement of trial, or unless otherwise ordered by the Trial Chamber.

3. The Prosecution is given permission to redact the identities and other identifying information from the witness statements of the potential witnesses mentioned in subparagraph 1 above when disclosing these statements to the Defence in order to meet its disclosure obligations under Rule 66(A)(i) of the Rules. The Prosecution is also given permission to redact information indicating the current whereabouts of witnesses and the names of certain third persons from the witness statements of the potential witnesses mentioned in category C of confidential Annex B to the Motion when disclosing these statements to the Defence in order to meet its disclosure obligations under Rule 66(A)(i) of the Rules.

¹⁷ See also *Prosecutor v. Milošević*, Decision on Prosecution Request to File Confidentially Rule 65ter Witness and Exhibit Lists and Witness Statements Required by Rule 66(A)(ii), 21 March 2002.

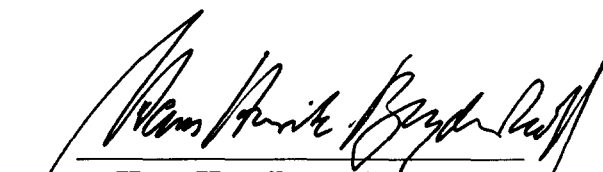
4. The remainder of the Motion is rejected.

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

Dated this twentieth day of May 2005

At The Hague

The Netherlands



Hans Henrik Brydersholt
Pre-trial Judge

[Seal of the Tribunal]