



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-04-79-PT  
Date: 6 June 2005  
Original: English

**IN TRIAL CHAMBER II**

**Before:** Judge Kevin Parker, Presiding  
Judge Krister Thelin  
Judge Christine Van Den Wyngaert

**Registrar:** Mr. Hans Holthuis

**Decision of:** 6 June 2005

**PROSECUTOR**

v.

**MIĆO STANIŠIĆ**

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

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**The Office of the Prosecutor:**

Mr. Alan Tieger

**Counsel for the Accused:**

Branko Lukić

## I. INTRODUCTION

1. This Trial Chamber (“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 seized of two motions from the Prosecution requesting protective measures for victims and witnesses in the case *The Prosecutor v. Mićo Stanišić* (“Prosecution’s Motions”). In the “Prosecution’s Motion for Protective Measures for Victims and Witnesses”, filed on 24 March 2005 (“First Motion”), the Prosecution requests various measures for the protection of the security, confidentiality and integrity of victims, witnesses, evidence and materials which are disclosed to the accused Mićo Stanišić (“Accused”) and his defence in the course of the case.<sup>1</sup> In the “Confidential Prosecution’s Second Motion for Protective Measures for Victims and Witnesses and Notification of Protective Measures in Force”, filed on 1 April 2005 (“Second Motion”), the Prosecution seeks protective measures for the witnesses listed in the confidential annexes to this decision, and notifies the protective measures which are in force for these specific witnesses in other proceedings in the Tribunal.<sup>2</sup>

2. The Defence for Mićo Stanišić (“Defence”) filed a response on 28 April 2005, objecting to the protective measures sought by the Prosecutor in both the First Motion and the Second Motion (“Defence Response”).<sup>3</sup> The Prosecution replied to the Defence Response on 4 May 2005 (“Reply”).<sup>4</sup>

## II. LAW

3. The Prosecution’s Motions are governed by Articles 20 and 22 of the Statute of the Tribunal (“Statute”) and Rules 54, 69, 75 and 79 of the Rules of Procedure and Evidence of the Tribunal (“Rules”).

4. Article 20(1) of the Statute provides that proceedings are conducted “with full respect for the rights of the accused and due regard for the protection of victims and witnesses”, and Article 20(4) of the Statute provides that “the hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence”. Article 22 of the Statute states, that protective measures shall include, but shall not be limited to, the conduct of *in camera* proceedings and the protection of the victim’s identity. The Rules of the Tribunal echo

<sup>1</sup> Prosecution’s Motion for Protective Measures for Victims and Witnesses, 24 March 2005.

<sup>2</sup> Confidential Prosecution’s Second Motion for Protective Measures for Victims and Witnesses and Notification of Protective Measures in Force, 1 April 2005.

<sup>3</sup> Motion Objecting to the Prosecution’s Motion for Protective Measures for Victims and Witnesses, 28 April 2005.

<sup>4</sup> Prosecution’s Reply to Defence Motion Objecting to the Prosecution’s Motion for Protective Measures for Victims and Witnesses, 4 May 2005.

these provisions. In particular Rule 75 of the Rules, which states that a 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 Rule 79 of the Rules which provides that the Trial Chamber may order that the press and the public be excluded from all or part of the proceedings for reasons of *inter alia* “(ii) safety, security or non-disclosure of the identity of a victim or witness as provided in Rule 75.”

5. The Chamber will also consider the Rules on disclosure directly related to the Prosecution’s Motions. Rule 66(A)(i) of the Rules provides that the Prosecution shall disclose to the defence within thirty days of the Accused’s initial appearance and in a language which the accused understands “copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused”. Rule 68(i) of the Rules states that subject to the provisions of Rule 70, the Prosecution shall, as soon as practicable, disclose to the Defence any material which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence”.

### III. DISCUSSION

#### A. Non-Disclosure to the Public and/or Media:

6. The Prosecution requests that the Defence may not disclose to the public and/or media information or material provided to the Defence by the Prosecution, when fulfilling its obligations under Rules 66 and 68 of the Rules, including (i) names and identifying information of potential witnesses or witnesses, (ii) evidence or written statements of witnesses or potential witnesses, (iii) the substance, in whole or in part, of any non public evidence, statement or prior testimony, except when directly and specifically necessary for the preparation and presentation of this case.<sup>5</sup>

7. The Defence objects to it not being allowed to disclose to the public and in particular to prospective Defence witnesses, the above mentioned information and material.<sup>6</sup> The Defence further opposes having to request to the Chamber the disclosure of the information and material for each prospective Defence witness.<sup>7</sup> It, however, agrees not to disclose the identifying information or whereabouts of witnesses or potential witnesses to the media or “general public”.<sup>8</sup>

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<sup>5</sup> First Motion, paras 4-5.

<sup>6</sup> Defence Response, para. 1.

<sup>7</sup> Defence Response, para. 2.

<sup>8</sup> Defence Response, para. 3.

8. In the Reply, the Prosecution accepts the Defence objection and varies its request to the effect that the Defence should not disclose to the public any material disclosed by the Prosecution pursuant to Rules 66 and 68 of the Rules, unless specifically necessary for the preparation and presentation of the Defence case. It further requests that identifying information and whereabouts of witnesses who already enjoy protective measures in other proceedings should not be disclosed to the public.<sup>9</sup>

9. The Chamber notes, that the reasons submitted by the Prosecution for requesting the non-disclosure to the public of material, disclosed by the Prosecution pursuant to Rules 66 and 68 of the Rules, is the security and privacy concerns of victims and witnesses. The Chamber finds that the measure requested by the Prosecution is appropriate and necessary to safeguard the privacy and protection of victims and witnesses and the integrity of the evidence and the proceedings, and further finds it to be consistent with the rights of the Accused in this case. The Chamber, however, notes the distinction made by the Defence between non-disclosure to the “media and the general public” and “prospective witnesses for the Defence”. The Chamber agrees that the Defence will need to discuss information and material disclosed by the Prosecution pursuant Rules 66 and 68 of the Rules with prospective Defence witnesses in order to prepare for trial. Should the Defence deem it necessary to disclose the material to persons specifically for the preparation of the Defence case, the Defence will have to inform the person to whom such material is shown or disclosed, that he or she shall not copy, reproduce or publicise such material, in whole or in part, 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 continued possession of the material by such person is no longer necessary for the preparation and presentation of the Defence case. Therefore, for the purpose of this decision, the term “public” will exclude persons to whom it is necessary for the Defence to disclose the material given to it by the Prosecution in accordance to Rules 66 and 68 of the Rules, for the preparation of the Defence case.

10. As for the Prosecution’s request that identifying information and whereabouts of witnesses who already enjoy protective measures in other proceedings should not be disclosed to the public, the Chamber points out that the Defence has an underlying obligation to safeguard this type of information and that any breach of this obligation will be regarded as contempt of the Tribunal pursuant to Rule 77(A)(ii) of the Rules.

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<sup>9</sup> Reply, paras, 4-6.

## B. Redaction of Statements:

11. The Prosecution requests leave to redact identifying information (i.e. personal identification number and current whereabouts of victims and witnesses) from supporting material which accompanied the Indictment in the present case, and from statements, affidavits of victims and witnesses or potential witnesses, when fulfilling its disclosure obligations pursuant to Rules 66 and 68 of the Rules.<sup>10</sup>

12. The Defence objects to the Prosecution's request to redact identifying information and current whereabouts of witnesses for the Prosecution as it would greatly complicate the ability of the Defence to prepare for trial.<sup>11</sup> The Defence also argues, that the redaction of information on these witnesses would delay the parties' disclosure obligations.<sup>12</sup> Further, the Defence argues that the Prosecution has not shown exceptional circumstances justifying an order for non-disclosure as is required by Rule 69(A) of the Rules.<sup>13</sup>

13. As for the Prosecution's request to redact identifying information (i.e. personal identification number and current whereabouts of victims and witnesses) from supporting material to the Indictment, the Chamber notes that the Prosecution has notified the Chamber that it has fulfilled its disclosure obligations to the Defence pursuant to Rule 66(A)(i), on 18 April 2005, *i.e.* in a timely manner.<sup>14</sup> The Chamber observes that it is not permissible for the Prosecution to redact identifying information and current whereabouts of victims and witnesses before the supporting material of an indictment is disclosed to the accused under Rule 66(A)(i), without the Chamber's authorization to do so. As there has not been an authorisation from the Chamber to redact such material, the Chamber presumes that the Prosecution has completed its obligation pursuant to Rule 66(A)(i) without the redactions requested in the First Motion and will therefore not consider this request further in this Decision. Should this not be the case, the Prosecution will have to file another motion requesting specific redactions for each victim or witness.

14. As for the Prosecution's request to redact identifying information (i.e. personal identification number and current whereabouts of victims and witnesses) from statements and other material, the Chamber observes that the Prosecution has not demonstrated exceptional circumstances justifying an order for non-disclosure as is required by Rule 69(A) of the Rules.<sup>15</sup>

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<sup>10</sup> First Motion, para. 6.

<sup>11</sup> Defence Response, para 5

<sup>12</sup> Defence Response, para. 6.

<sup>13</sup> Defence Response, para. 7.

<sup>14</sup> Prosecution Notice of Compliance of Rule 66(A)(i), 22 April 2005.

<sup>15</sup> See, *Prosecutor v. Brđanin and Talić*, Case No.: IT-99-36-PT, Decision on Motion by Prosecution for Protective Measures, 3 July 2000, para. 16.

The assessment of the risk and danger that justifies the non-disclosure of the identity of a victim or witness must be determined on a case by case basis. The Prosecution bears the onus. To obtain redactions of the identifying information of victims and witness from statements and other material the Prosecution will have to file a fresh motion in which it seeks to justify a protective measures order in relation to specific victims and witnesses.

### C. Intimidation and Harassment of Witnesses:

15. The Prosecution requests that the Defence do not approach a witness listed or identified by the Prosecution without prior written notice to the Prosecution in order to allow the Prosecution to obtain the consent of the witness and take appropriate and necessary steps to protect the security and privacy of the witness.<sup>16</sup>

16. The Defence objects to the Prosecution's request that no interview of witnesses for the Prosecution take place without giving notice to the Prosecution.<sup>17</sup>

17. Normally it is permissible for a party to interview and take statements from a witness or prospective witness, whether or not that witness has been interviewed or called as a witness by the other party. However, in seeking to interview a witness who to the Defence's knowledge is to be called by the Prosecution, the Defence may well expose itself to the suggestion that it has improperly interfered with the witness.<sup>18</sup> In order to avoid allegations of such nature it could be prudent for the Defence to discuss its intention to interview a witness or potential witness with the Prosecution and to record the interview. In the present case, however, in the Chamber's view the ongoing security and privacy threat that exists in Bosnia and Herzegovina for witnesses testifying before this Tribunal, as shown by the Prosecution in its Reply,<sup>19</sup> dictates, that the Defence should not approach a witness or a potential witness identified by the Prosecution, without prior written notice to the Prosecution, in order to allow the Prosecution to take appropriate steps as may be necessary to protect the security and privacy of the witness or potential witness.<sup>20</sup>

18. The Chamber underscores that the Prosecution, in taking appropriate steps to obtain the consent of a particular witness, should, of course, not try to use the notice by the Defence to gain any tactical procedural advantage in the case. In the event the Defence encounters or anticipates any

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<sup>16</sup> First Motion, para. 7.

<sup>17</sup> Defence Response, para. 9.

<sup>18</sup> Rule 77(A)(iv) of the Rules provides that "The Tribunal in the exercise of its inherent power may hold in contempt those who knowingly and wilfully interfere with its administration of justice, including any person who... (iv) threatens, intimidates, causes any injury or offers a bribe to, or otherwise interferes with, a witness who is giving, has given, or is about to give evidence in proceedings before a Chamber, or a potential witness..."

<sup>19</sup> Reply, paras 14-18.

particular difficulties with respect to the requirement to give notice regarding a particular witness, it should have leave to file a motion with the Chamber setting out the circumstances and the relief sought.

D. Return of Material:

19. The Prosecution requests that the Defence return to the Registry all non-public disclosed materials at the conclusion of the proceedings.<sup>21</sup> The Defence does not object to this request.

E. Protective Measure granted by other Trial Chambers:

20. The Prosecution requests that the Chamber grants to the witnesses listed in the confidential annex to this Decision (“Annex I”) and in the confidential and *ex parte* annex to this Decision (“Annex II”), the same protective measures in respect of this trial as have been granted in other proceedings before the Tribunal, as the reasons and circumstances underlying these protective measures have not changed.<sup>22</sup>

21. The Defence objects to the measures sought by arguing that the Prosecution is trying to make the granting of protective measures to witnesses a general rule as opposed to it being an exception.<sup>23</sup>

22. The Chamber observes that Rule 75(F)(i) of the Rules provides that once protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal, the measures shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal unless they are rescinded, varied or augmented. The Chamber sees no reason to vary the protective measures granted in other proceedings to the witnesses listed in Annex I and Annex II. The Chamber notes that the witnesses listed in Annex I and Annex II shall be given new pseudonyms, different from those granted to these witnesses in other proceedings before the Tribunal. The new pseudonym for each witness concerned is listed in Annex I and Annex II. These pseudonyms shall be used whenever referring to the witnesses in question in this trial and related proceedings before the Tribunal and in discussions among parties to the trial.

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<sup>20</sup> On a similar note *See, e.g., The Prosecutor v. Čermak and Markač*, Case No.: IT-03-73-PT, Decision and Order on Prosecution’s Motion for Protective Measures for Victims and Witnesses, para. 7.

<sup>21</sup> First Motion, para. 12.

<sup>22</sup> Second Motion, paras 1, 7-8.

<sup>23</sup> Defence Response, para. 10.

F. Delayed Disclosure of identity of witness listed in Annex II:

23. The Prosecution originally requested to delay the disclosure of the identity of the two witnesses (witness ST26 and witness ST27) until a date to be determined by either the Chamber or the Pre-Trial Judge.<sup>24</sup>

24. The Defence objects to the Prosecution request as the delayed disclosure of the identity of the two witnesses would be detrimental to the preparation of the Defence case.<sup>25</sup>

25. In its Reply, the Prosecution notes, that it has already provided the Defence with the redacted version of witness ST26's statement.<sup>26</sup> In this regard the Chamber would like to stress that pursuant to Rule 69 of the Rules it is not permissible for the Prosecution to redact the names and identifying features of witnesses without the authorization of the Chamber to do so. The Chamber, however, notes, that the delayed disclosure of witness ST26's identity was previously granted as a protective measure in another proceeding before the Tribunal. In accordance with Rule 75(F)(i) of the Rules, this Chamber sees no reason to vary this protective measure for witness ST26. The disclosure of the identity of witness ST26 will therefore be delayed until 30 days before the commencement of the trial or such other date determined by the Pre-Trial Judge or the Chamber at a time when the trial commencement date is known.

26. As for witness ST27, the Prosecution, in its Reply stated, that the statement now has been fully disclosed, following a decision by the Appeals Chamber to vary protective measures, which the Chamber has interpreted as a withdrawal of the Prosecution's request to have the identity of the witness delayed.<sup>27</sup>

#### IV. DISPOSITION

Based on the foregoing, pursuant to Articles 20 and 22 of the Statute and Rules 54, 69 and 75 of the Rules, the Chamber **PARTIALLY GRANTS** the Prosecution's Motions and **ORDERS** as follows:

1) The Defence may not, either directly or indirectly, disclose to the public, any of the information or material, including, the names, identifying information or whereabouts of witnesses or potential witnesses identified by the Prosecution, or any 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,

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<sup>24</sup> Second Motion, para. 9.

<sup>25</sup> Defence Response, paras 10-11.

<sup>26</sup> Reply, para.13.

<sup>27</sup> Reply, para. 13.



statement or prior testimony, provided to it by the Prosecution pursuant to Rules 66 and 68 of the Rules, unless specifically necessary for the preparation and presentation of the Defence case;

2) Should it be necessary for the preparation and presentation of the Defence case to disclose material, provided to it by the Prosecution pursuant to Rules 66 and 68 of the Rules to a person or persons, the Defence shall inform each person to whom such material is disclosed, that he or she shall not copy, reproduce or publicise such material, in whole or in part, and shall not 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 the continued possession of such material is no longer necessary for the preparation and presentation of the Defence case;

3) The Defence may not disclose to the public any confidential or non-public material provided by the Prosecution;

4) The Defence shall return to the Registry, at the conclusion of the proceedings of this case, all confidential or non-public disclosed material and copies thereof which have not become part of the public record;

5) Should a member of the Defence team withdraw from the case, all of the material in his or her possession shall be returned to the person serving as Lead Counsel for the Defence at that time;

6) The Defence shall not approach a witness or a potential witness identified by the Prosecution, without prior written notice to the Prosecution, in order to allow the Prosecution to obtain the consent of the witness and to take steps as may be necessary and appropriate to protect the security and privacy of the witness or potential witness;

7) When contacting a witness or potential witness identified by the Prosecution, any member of the Defence team must identify him- or herself as working for the Defence;

8) The Registry shall maintain a list identifying each person who is part of or who represents the Defence for the purposes of this case and compliance with this decision. The Defence shall file the initial listing of its members within ten days of the date of this decision, and the Registry shall be notified in writing of any change within ten days of such change occurring;

9) The witnesses listed in Annex I and in Annex II shall be permitted to testify with the same protective measures granted in other proceedings before the Tribunal; the specific protective measures granted for each witness are indicated in Annex I and Annex II of this Decision;

10) The witnesses listed in Annex I and Annex II shall be given new pseudonyms, different from those granted to these witnesses in other proceedings before the Tribunal; the new pseudonym

for each witness is listed in Annex I and Annex II of this Decision. These pseudonyms shall be used whenever referring to the witnesses in question in the trial and related proceedings before the Tribunal and in discussions among parties to the trial.

11) The disclosure of the identity of the witness ST26 listed in Annex II will be delayed until 30 days before the commencement of the trial or such other date determined by the Pre-Trial Judge or the Chamber at a time when the trial commencement date is known;

12) The name, address, whereabouts of, and identifying information concerning each of the witnesses identified in Annex I and Annex II of this Decision shall be sealed and not included in any public records of the Tribunal;

13) To the extent that the name, address, whereabouts of, or other identifying data of the witnesses identified in Annex I and Annex II is contained in existing public records of the Tribunal, that information shall be expunged from those documents;

14) All hearings to consider the issue of protective measures for the witnesses identified in Annex I and Annex II shall be held in closed session and edited records and transcripts of the session(s) shall be released to the public and to the media after review by the Prosecution, in consultation with the Victims and Witnesses Section;

15) The public and the media may not photograph, video-record or sketch or in any manner record or reproduce images of the witnesses identified in Annex I and Annex II while, they are in the precincts of the Tribunal.

For the purposes of this decision:

“The Defence” means and includes the Accused, his Defence Counsel and all those approved by the Registry to assist with the Defence of the Accused.

“The public” means and includes all persons, governments, organisations, entities, clients, associations, groups and media, other than judges and staff of the Tribunal Chambers and Registry, the Prosecution, the Defence, and persons to whom it is necessary for the Defence to disclose the material for the preparation and presentation of the Defence case. “The public” specifically includes, without limitation, family, friends and associates of the Accused, the media, the accused in other cases or proceedings before the Tribunal and/or national courts, and defence counsel in other cases or proceedings before the Tribunal and/or national courts.

“The media”, as mentioned above, means and includes all video, audio, electronic and print media personnel, including journalists, reporters, authors, television and radio personnel, as well as their agents and representatives.

27. Nothing herein shall preclude any party or person from seeking such other or additional protective measures or measures as may be appropriate concerning a specific witness or potential witness, or other evidence.

28. The Chamber further **STATES** that any breach of this Decision will be dealt with in accordance with Rule 77 (“Contempt of the Tribunal”) of the Rules.

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

Dated this sixth day of June 2005

At The Hague

The Netherlands



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Kevin Parker

Presiding Judge

[ Seal of the Tribunal ]