



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-04-82-PT
Date: 17 August 2005
Original: English

IN TRIAL CHAMBER II

Before: Judge Albin Eser, Pre-Trial Judge

Registrar: Mr. Hans Holthuis

Decision of: 17 August 2005

PROSECUTOR

v.

**Ljube BOŠKOSKI
Johan TARČULOVSKI**

**DECISION ON "PROSECUTION'S MOTION SEEKING
FURTHER PROTECTIVE MEASURES FOR VICTIMS AND
WITNESSES with CONFIDENTIAL ANNEXES A & B"**

Counsel for the Prosecutor:

Kenneth Scott
William Smith

Counsel for the Accused:

Dragan Godžo for Ljube Boškosi
Antonio Apostolski for Johan Tarčulovski

I, Albin Eser, Pre-Trial Judge 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 SEIZED OF the “Prosecution’s Motion Seeking Further Protective Measures for Victims and Witnesses with Confidential Annexes A & B”, filed confidentially on 7 July 2005 (“Motion”), pursuant to Articles 20 and 22 of the Statute of the Tribunal (“Statute”) and Rules 54, 69, 73 and 75 of the Rules of Procedure and Evidence (“Rules”), in which the Prosecution requests that the Trial Chamber:

- i) Prohibit any member of the public¹ from disclosing and/or publishing any material which is subject to protective measures granted by the Tribunal in this case; and,
- ii) Reconsider its decision dated 20 June 2005, in order to prohibit the Defence² from transmitting any materials disclosed to them by the Prosecution between individuals within the Defence, or between the Defence and any other entity, by any unsecured electronic means including email, internet and facsimile;³

NOTING that the Defence had not filed any response to the Motion by 21 July 2005;⁴

CONSIDERING that the Prosecution filed the Motion confidentially “due to the protected nature of the information contained within, however, the Prosecution requests that if the Trial Chamber grants the motion the decision be filed publicly”;⁵

CONSIDERING the “Decision on Prosecution’s Motion for Protective Measures for Victims and Witnesses” dated 20 June 2005 (“First Protective Measures Decision”) in which a number of protective measures were ordered in this case, all of which remain in force;

BEARING IN MIND that Article 20(1) of the Statute requires that the Trial Chamber “ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of

¹ Definition set out in the Decision on Prosecution’s Motion for Protective Measures for Victims and Witnesses, 20 June 2005, para. 1, p. 5 (“First Protective Measures Decision”): “‘the public’ means and includes all persons, governments, organisations, entities, clients, associations, groups and media, other than the judges and staff of the Tribunal Chambers and Registry, the Prosecution, and the Defence, as defined above. ‘The public’ specifically includes, without limitation, family, friends and associates of each 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’ means all video, audio, electronic and print media personnel, including journalists, reporters, authors, television and radio personnel, their agents and representatives;”.

² *Ibid.*: “‘the Defence’ means only the accused, Ljube Bošković and Johan Tarčulovski, and their respective defence counsel and immediate legal assistants and staff, and such other specific persons assigned by or listed with the Registry as part of their defence team;”.

³ Motion, paras. 6, 16.

⁴ See Rule 126 *bis* of the Rules.

⁵ Motion, para. 15.

procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses”;

CONSIDERING that Article 22 of the Statute requires the Tribunal to provide in its Rules “for the protection of victims and witnesses”;

CONSIDERING the provisions in the Rules concerning the protection of victims and witnesses;

RECALLING that the First Protective Measures Decision stated, *inter alia*:

4. The Defence shall not in any way, either directly or indirectly, disclose to the public (including the media) any of the material (including, without limitation, witness testimony or statements) nor the identity of any witness or group of witnesses (expressly or by implication) provided to them by the Prosecution, except as reasonably necessary to allow them to prepare for and participate in these proceedings and present a defence, or as such material may become public in the course of public and open session proceedings in this case.

5. If the Defence is aware or becomes aware of a Prosecution witness’s current whereabouts, this information shall not be disclosed to the public (including the media), except as reasonably necessary to allow the Defence to prepare for and participate in these proceedings and present a defence or as such material may become public in the course of public and open session proceedings in this case.⁶

CONSIDERING that disclosing and/or publishing any material which is subject to protective measures granted by the Tribunal is prohibited by anyone;

CONSIDERING that the First Protective Measures Decision does not explicitly state that it applies to the public (including the media) and that therefore there a clarification may be warranted;

CONSIDERING that the Motion has not identified any individual, or group of individuals, as being responsible for allegedly disclosing certain protected materials in this case to the media outlet identified in confidential Annex A of the Motion, and that any person who discloses information relating to these proceedings in knowing violation of an order of the Trial Chamber may be liable for contempt of the Tribunal under Rule 77 of the Rules;

CONSIDERING that since confidential Annex A to the Motion consists of an article from a “widely-circulated”⁷ newspaper that was also published on the Internet, there is no reason that this article should remain confidential in these proceedings, and furthermore, making it public may facilitate an investigation related to the means by which this media outlet may have obtained protected materials in these proceedings;

⁶ First Protective Measures Decision, p. 6.

⁷ Motion, para. 5.

NOTING that the First Protective Measures Decision stated, *inter alia*:

CONSIDERING that the Prosecution has failed to provide any evidence or case-law to justify its request for an order that the Defence 'not transmit any material disclosed to them by the Prosecution to anyone by any electronic means including email, internet and facsimile', due to 'the lack of security *generally* associated with the electronic transmission of information';⁸

CONSIDERING that to prohibit a party from using particular modes of communication, special circumstances must be presented;

CONSIDERING that the evidence now relied upon by the Prosecution, set out in confidential Annex B to the Motion, is of a generalised nature and does not raise any special circumstances or concerns specific to this case;

CONSIDERING that the Prosecution has *not* alleged that the media outlet identified in confidential Annex A to the Motion obtained protected information as a result of the Defence transmitting material disclosed to them by the Prosecution by unsecured electronic means;

CONSIDERING that the Defence continues to be bound by the First Protective Measures Decision, including, that the Defence "shall not in any way, either directly or *indirectly*"⁹ make prohibited disclose of protected materials in this case, and that this is sufficient to impose upon the Defence an obligation to ensure, *inter alia*, that whenever it makes allowable transmission of protected materials, it does not directly or indirectly result in the prohibited disclosure of these materials to the public (including media);

FOR THE FOREGOING REASONS

PURSUANT TO Articles 20 and 22 of the Statute and Rules 54, 69, 73 and 75 of the Rules,

HEREBY GRANT the Motion in part **AND ORDER** as follows:

1. The protective measures set out in the First Protective Measures Decision remain in force, and the definitions of "the Defence", "the Prosecution", "the media", "the public", and "material" are incorporated by reference herein. The following further protective measure is hereby ordered:

Any member of the public (including e.g. the media as well as relatives and associates of the accused)¹⁰ is prohibited from disclosing and/or publishing any

⁸ First Protective Measures Decision, p. 3; emphasis in original, footnotes omitted.

⁹ *Ibid.*, p. 6; emphasis added.

¹⁰ Definition set out in the Decision on Prosecution's Motion for Protective Measures for Victims and Witnesses, 20 June 2005, para. 1, p. 5 ("First Protective Measures Decision"): "'the public' means and includes all persons, governments, organisations, entities, clients, associations, groups and media, other than the judges and staff of the Tribunal Chambers and Registry, the Prosecution, and the Defence, as defined above. 'The public' specifically includes, without limitation, family, friends and associates of each accused, the media, the accused in other cases or

material, or information contained therein, which is subject to a protective measures order in this case, except as such material may become public in the course of public and open session proceedings in this case.

2. Nothing herein shall preclude any party or person from seeking such other or additional protective measures or a variation of the terms of this decision, or from the Trial Chamber doing so *proprio motu*, as may be viewed appropriate concerning a specific witness or potential witness, or other evidence.

STATE that any breach of this decision will be dealt with in accordance with Rule 77 (“Contempt of the Tribunal”).

ORDER that the Motion itself and confidential Annex B remain confidential, as filed, but states that confidential Annex A to the Motion may be made public;

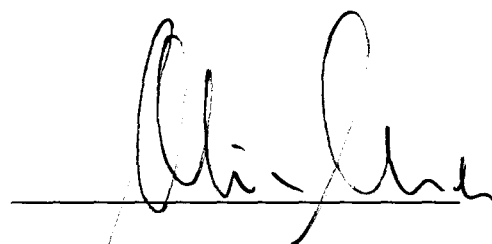
REJECT the remainder of the Motion.

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

Dated this seventeenth day of August 2005,

At The Hague,

The Netherlands

A handwritten signature in black ink, appearing to read 'Albin Eser', is written over a horizontal line.

Judge Albin Eser

Pre-Trial Judge

[Seal of the Tribunal]

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’ means all video, audio, electronic and print media personnel, including journalists, reporters, authors, television and radio personnel, their agents and representatives;”.