



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-01-45-PT
Date: 14 July 2006
Original: English

IN TRIAL CHAMBER II

Before: Judge Carmel Agius, Presiding
Judge Kevin Parker
Judge Christine Van Den Wyngaert

Registrar: Mr. Hans Holthuis

Decision of: 14 July 2006

PROSECUTOR

v.

ANTE GOTOVINA

**DECISION ON PROSECUTION MOTION
FOR NON-DISCLOSURE TO PUBLIC OF MATERIALS
DISCLOSED PURSUANT TO RULES 66 AND 68**

The Office of the Prosecutor:

Mr Alan Tieger
Ms Laurie Sartorio

Counsel for the Defence

Mr Luka S. Mišetić
Mr Gregory Kehoe

TRIAL CHAMBER II 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 (the “Chamber” and the “Tribunal”);

BEING SEIZED OF “Prosecution’s Motion for Non-disclosure to Public of Materials Disclosed pursuant to Rules 66 and 68” filed on 11 January 2006 (“Motion”), whereby the Prosecution requests that the Chamber enters an order of non-disclosure to the public of all supporting and other materials disclosed to the Defence for the Accused Ante Gotovina (“Accused” and “Defence”) pursuant to Rule 66 (A) and 68 in order to ensure the protection of the security, confidentiality and integrity of victims and witnesses;¹

NOTING that following the decision of the Registrar of 17 March 2006 to admit Mr Mišetić to represent the Accused Gotovina before the Tribunal, the Defence filed on 4 April 2006 “Defendant Ante Gotovina’s Response in Opposition to Prosecution’s Motion for Non-Disclosure to Public of Materials Disclosed Pursuant to Rules 66 and 68” (“Response”);

NOTING the Defence submission that the Prosecution has made no showing to justify the relief sought and that granting the Motion would negatively impact upon the Defence’s ability to prepare the defence of the Accused and would violate his fundamental rights to a fair and public trial² given that, in particular:

- the redaction sought would bar the Defence from contacting potential witnesses identified by the Prosecution and compel the Defence to provide prior notice to the Prosecution when it intends to contact potential Prosecution witnesses; that the relief requested would give the Prosecution an unfair advantage and unjustified intrusion into the preparation of the Defence and the Prosecution would then gain insight into the strategy of the Defence;³
- It is incorrect to suggest that disclosure obligations under Rule 66 of the Procedure and Evidence (“Rules”) are subject to Rule 75 as they are only subject to Rule 53 and 69 of the Rules, which requires the showing of “exceptional circumstances”; the Prosecution has made no showing that exceptional circumstances exist under Rules 53 and 69 of the Rules to justify a variance of its obligations under Rule 66 of the Rules;⁴

¹ Motion, p. 2.

² Response, para 1.

³ Response, paras 2, 12-13, 17.

⁴ Response, paras 3-8.

- Rules 53 and 69 of the Rules do not apply to Rule 68 disclosure obligations, which are made contingent upon Rule 70 only; further, variance of Rule 68 obligations should be denied as the Prosecution has made no showing that Rule 70(B) of the Rules applies;⁵

NOTING the “Prosecution’s Motion for Leave to File Reply to Defendant Ante Gotovina’s Response in Opposition to Prosecution’s Motion for Non-Disclosure to Public of Materials Disclosed Pursuant to Rules 66 and 68” (“Prosecution’s Motion for Leave to File a Reply”) and the “Prosecution’s Reply to Defendant Ante Gotovina’s Response in Opposition to Prosecution’s Motion for Non-Disclosure to Public of Materials Disclosed Pursuant to Rules 66 and 68”, filed on 11 April 2006 (“Reply”), whereby the Prosecution submits, in particular, that:

- the Motion is based on Rules 53, 69 and 75 of the Rules;⁶
- Rule 75 of the Rules gives a Trial Chamber broad discretion, at the request of either party or *proprio motu*, to order appropriate measures to protect victims and witnesses, provided that these measures are consistent with the rights of the accused, general protective measures being not only permissible but also standard practice before the Tribunal;⁷
- The relief requested does not require the Defence to obtain permission or does not preclude the Defence from interviewing or contacting witnesses but rather provides the Prosecution with reasonable notice of the Defence’s intent to do so; such procedure would allow the Prosecution to familiarize the witnesses with court procedures or to make arrangement whenever the witnesses do not wish to be approached in their homes or places of business;⁸
- Notice of intent to interview a witness reveals nothing about the content of the interview or the nature of the Defence and, in any event, any hardship cannot be said to rise to the level of “undue” hardship;⁹

NOTING the “Defendant Ante Gotovina’s Response in Opposition to Prosecution’s Motion for Leave to file Reply filed on 11 April 2006” filed on 18 April 2006 (“Defence Opposition for Leave to File a Reply”) in which the Defence argues *inter alia* that:

- The Prosecution contends for the first time in its Reply that the Motion was a motion for protective measures pursuant to Rule 75 of the Rules; the Defence is prejudiced by the Prosecution’s attempt to introduce a new argument in the form of a reply;¹⁰

⁵ Response, paras 9-10.

⁶ Reply, para 6.

⁷ Reply, paras 6-11.

⁸ Reply, para. 14.

⁹ Reply, para. 16.

- A plain reading of the Motion demonstrates that the Motion is pursuant to Rules 66, 69 and 70 of the Rules; the Motion refers only to Rule 75 in that it argues that Rule 75 measures are derivative of Rule 69(c);¹¹
- Rule 66 obligations are not made contingent upon Rule 75 merely because Rule 75 is mentioned in Rule 69(c) which concerns situation in which the Trial Chamber has already found that exceptional circumstances exist justifying an order for non-disclosure under Rule 69 (A) of the Rules;¹²

CONSIDERING that it is appropriate to grant leave to the Prosecution's Motion for Leave to file a Reply although the Chamber takes note only of parts of the contents of this Reply with respect to the relevant provisions of the Statute and the Rules that must be considered in the present case;

CONSIDERING that Article 20 of the Statute of the Tribunal ("Statute") requires the Trial Chamber to ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules, with full respect for the rights of the accused and due regard for the protection of victims and witnesses;

CONSIDERING the rights of the accused as set forth in Article 21 of the Statute, and in particular, the right of the accused to have adequate time and facilities for the preparation of their defence;

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

CONSIDERING that the rights of the Accused are given primary consideration, with the need to protect victims and witnesses being an important but secondary one;¹³

NOTING that the Prosecution notified the Chamber in its Motion that it requested the relief sought "[p]ursuant to Articles 20 and 22 of the Statute [...] and Rules 54, 69, 73 and 75 of the Rules";¹⁴

CONSIDERING however that given the relief requested, the relevant provisions which the Chamber must consider in dealing with this Motion are Articles 20 , 21 and 22 of the Statute and Rules 53(A), 66(A), 68 and 69(A) of the Rules;

¹⁰ Defence Opposition for Leave to File a Reply, paras 3, 7, 9, 11 and 13.

¹¹ Defence Opposition for Leave to File a Reply, paras 3-5.

¹² Defence Opposition for Leave to File a Reply, paras 5-6.

¹³ "Decision on Motion by Prosecution for Protective Measures", *Prosecutor v. Radoslav Brdanin & Momir Talić*, 3 July 2000 ("Brdanin Decision"), Case No. IT-99-36-PT, para 20; "Decision on Prosecution Motion for Provisional Protective Measures Pursuant to Rule 69", *Prosecutor v. Slobodan Milšević*, Case No. IT-02-54-T ("Milošević decision"), para 23.

¹⁴ Motion, p. 2.

CONSIDERING that the disclosure requirements under Rule 66(A) are expressly subject to the provisions of Rules 53 and 69 of the Rules;

CONSIDERING that pursuant to Rule 68 of the Rules, the disclosure of exculpatory and other relevant material is subject to the provisions of Rule 70 of the Rules;

CONSIDERING that pursuant to Rules 53(A) of the Rules, the Trial Chamber may, in exceptional circumstances, order the non-disclosure *to the public* of any documents or information until further order;

CONSIDERING that in exceptional circumstances, the Prosecutor may, on the basis of Rule 69(A) of the Rules, apply to the 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;

CONSIDERING that Rule 69(A) does not provide a blanket protection and places the onus upon the Prosecution to demonstrate, before protective measures will be granted, the exceptional circumstances justifying an order for non-disclosure;¹⁵

CONSIDERING that such exceptional circumstances must be first established with respect to *each witness - or each document* - the Prosecution seeks to protect through redaction of identifying information, at the time service of the supporting material is required;¹⁶

NOTING that the Prosecution “requests that the Trial Chamber enter an order that the Defence shall not in any way, either directly or indirectly, disclose to the public (including the media) any of the material [...] provided to them by the Prosecution, except as it is reasonably necessary to allow them to prepare for and participate in these proceedings or as such material may become public in the course of public and open session proceedings in this case;”¹⁷

CONSIDERING that until the Prosecution seeks *specific measures* in relation to *specific* victims, witnesses or potential witnesses not currently enjoying protective measures and the Trial Chamber decides on whether any protective measures will be granted for specific victims, witnesses or potential witnesses, it is in the interest of justice at this stage of the proceedings that the identity of those persons who may require protective measures not be revealed *to the public*;

CONSIDERING that it appears from the content of the Motion that the Prosecution has not redacted, from the materials already disclosed to the Defence, information concerning the identity

¹⁵ *Brdanin* Decision, paras 16 and 20.

¹⁶ *Brdanin* Decision, para. 10; *Milošević* Decision, para. 24.

of the victims and witnesses and that its request concerns the redaction of information which would lead to the identification of the current whereabouts of those potential witnesses;¹⁸

CONSIDERING the arguments put forward by the Prosecution to justify the relief sought and, in particular, that such procedure was adopted in the case *Prosecutor v. Ivan Čermak and Mladen Markač*,¹⁹ and that it would allow the Prosecution to familiarize the witnesses with court procedures or to make arrangement whenever the witnesses do not wish to be approached in their homes or places of business;²⁰

NOTING that contrary to the submission of the Prosecution, the grounds “acknowledged by the Trial Chamber in the *Čermak and Markač* Decision as justifying the issuance of the order of non-disclosure to the public” are not shown to exist in the present case;²¹

CONSIDERING that where such disclosure regime was accepted, the generality of the Prosecution’s request and the lack of submissions by the Defence were taken into account; that it was assumed that the Defence did not believe that the measures requested would be prejudicial to the preparation of the defence; that these findings were being made, in any event, without prejudice to any future application by the parties;²²

CONSIDERING further that these measures, where ordered, concerned protected witnesses;²³

NOTING that the Defence opposes the non-disclosure regime requested by the Prosecution in the present case;

CONSIDERING that the burden rests on the party seeking protective measures to justify in each case why the measures requested should be granted and that the burden does not rest upon the other party to justify disclosure;²⁴

¹⁷ Motion, para. 10.

¹⁸ Reply, para 11.

¹⁹ “Decision and Order on Prosecution’s Motion for Protective Measures for Victims and Witnesses”, *Prosecutor v. Ivan Čermak and Mladen Markač*, 1 April 2004, Case No. IT-03-73-PT (*Čermak and Markač* Decision).

²⁰ Motion, paras 8-9 and Reply, para 14.

²¹ *Čermak and Markač* Decision; Motion, para. 9: *i.e.* that the “dependence of this and all other Tribunal cases on the ability and willingness of witnesses to give their testimony and provide evidence; the protection of the privacy and safety of the victims and witnesses as well as of their families, as required by Article 20 and 22 of the Tribunal Statute; the compliance with Rule 70; the danger of impairment of other Tribunal investigations or cases; and the integrity of proceedings;”

²² “Order on Prosecution’s Motion for Protective Measures”, *Prosecutor v. Pavle Strugar, Miodrag Jokić & others*, 16 January 2002, Case no. IT-01-42-PT; cf. also *Čermak and Markač* Decision.

²³ “Order for Protective Measures”, *Prosecutor v. Krajišnik and Plavšić*, 9 July 2001, Case No. IT-00-39&40-PT.

²⁴ “Order on Prosecution Motion for Protective Measures”, *Prosecutor v. Pavle Strugar, Miodrag Jokić & Others*, 16 July 2002, Case No. IT-01-42-PT, p. 5.

CONSIDERING that if protective measures are sought with respect to particular witnesses or victims, the Prosecution must demonstrate that the measures sought are justified in that particular case;

NOTING that the Prosecution requests as “a *general protective measure* for the purpose of disclosure to the Defence” that it may, in fulfilling its disclosure obligations under Rule 66 and 68, redact from the statements, affidavits and formal statements of victims and witnesses and potential witnesses all information that would disclose or lead to the disclosure of the current whereabouts of: 1) the maker of the document and/or his family; 2) other individuals named who have made witness statements which the Prosecution has already disclosed or which it intends to disclose; 3) “other individuals who are named in such documents, other than those individuals who are described in any document as having been present at any of those events referred to in the document which are or which may be relevant to the issues at trial;”²⁵

CONSIDERING that the Prosecution has formulated its requests for protective measures in the most general of terms and has not put forward detailed or any reasons in relation to specific and identified material, justifying why in relation to such material the protective measures sought through the proposed disclosure system should be granted;

CONSIDERING however that where witnesses have already been granted protective measures in other proceedings before the Tribunal, those protections should continue and the Chamber will consider appropriate orders with respect to those witnesses, or any other who may need protective measures, when entertaining other such future motions from the Prosecution;

CONSIDERING that for the sake of clarity, and in view of the possible redactions already made to the supporting materials, it is appropriate to ensure full compliance with Rule 66(A) and 68 of the Rules and, in particular, that the Accused be supplied with copies in an unredacted form of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statement obtained by the Prosecutor from the Accused;

RECALLING the obligations imposed by the Code of Professional Conduct for Defence Counsel Appearing before the International Tribunal;

FOR THE FOREGOING REASONS, the Trial Chamber

HEREBY PARTLY GRANTS the Motion and **ORDERS** as follows:

1. For the purposes of this Decision and Order:

²⁵ Motion, p. 6 ¶ F) (emphasis added).

- (a) “the Prosecution” means the Prosecutor of the Tribunal and her staff;
- (b) “the Defence” means only the accused, Ante Gotovina, and his defence counsel and immediate legal assistants and staff, and such other specific persons assigned by or listed with the Registry as part of his defence;
- (d) “the media” means all video, audio, electronic and print media personnel, including journalists, reporters, authors, television and radio personnel, their agents and representatives; and
- (e) “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 Prosecutor 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.
2. For the purposes of this case and compliance with this Decision, the Registry shall maintain a list identifying each person who is part of or who represents the Defence. The Defence shall file the initial listing of its members within ten days of the date of this order, and the Registry shall be notified in writing of all changes to each list within ten days of such change occurring.
3. The Defence may not in any way, either directly or indirectly, disclose to the public (including the media) any of the material or information contained in the material (including, without limitation, witness testimony or statements) provided to them by the Prosecution pursuant to Rule 66(A) and 68 of the Rules, 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 or as it may be disclosed to the public by the Prosecution.
4. If the Defence finds it directly and specifically necessary to disclose any of such material for the purposes outlined in ¶ 3, they shall inform each person among the public 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 such material is no longer necessary for the purposes outlined in ¶ 3.

5. The Defence shall keep a log of the name, address and function of any person or entity receiving the information or document alluded to under ¶ 3 as well as the date of disclosure.

6. Should a situation arise where any lawyer or staff withdraws from or otherwise leaves the Defence, all of the material disclosed or provided to that Defence by the Prosecution, together with all copies of such material, held or possessed by that person will be transmitted or returned, without exception, to the person serving as Lead Counsel for that Defence at that time. The Defence, after the conclusion of all proceedings in this case, including any appeal, remain bound by the obligation spelled out in ¶ 3.

7. The Prosecution must either:

(a) comply within fourteen days with its obligation under Rule 66(A)(i) of the Rules to supply to the Accused copies in an unredacted form of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statement obtained by the Prosecutor from the Accused;

or

(b) in the alternative, file a document with the Chamber within seven days of this order confirming that it has fulfilled its obligations under Rules 66 and 68 of the Rules and that no redactions have been made to the material already disclosed to the Defence;

or

(c) file a motion for protective measures within fourteen days, in relation to particular statements or other material or particular victims or witnesses; in that case, the Prosecution need not supply unredacted copies of those statements or material identified in that motion until that motion has been disposed of by the Trial Chamber, and subject to the term of any order made upon that motion;

8. Upon disclosing material to the Defence under Rule 66(A) and 68 of the Rules, the Prosecution shall identify clearly which parts of the disclosed material are already in the public domain and which parts include statement from victims and witnesses that have not been used before in other proceedings of the Tribunal or have been subject to continuing protective measures and are therefore not in the public domain;

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

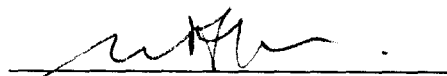
STATES that any breach of this Decision and Order will be dealt with in accordance with Rule 77 of the Rules (“Contempt of the Tribunal”).

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

Dated this fourteenth day of July 2006

At The Hague

The Netherlands



Judge Carmel Agius

Presiding Judge

[Seal of the Tribunal]