



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

Case No. IT-05-88-T
Date: 1 August 2006
Original: English

IN TRIAL CHAMBER II

Before: Judge Carmel Agius, Presiding
Judge O-Gon Kwon
Judge Kimberly Prost

Registrar: Mr. Hans Holthuis

Decision of: 1 August 2006

THE PROSECUTOR

v.

**VUJADIN POPOVIĆ
LJUBIŠA BEARA
DRAGO NIKOLIĆ
LJUBOMIR BOROVCANIN
ZDRAVKO TOLIMIR
RADIVOJE MILETIĆ
MILAN GVERO
VINKO PANDUREVIĆ**

**DECISION ON PROSECUTION'S MOTION FOR ORDER OF
PROTECTION**

The Office of the Prosecutor:

Mr. Peter McCloskey

Counsel for the Accused:

Zoran Živanović and Julie Condon for Vujadin Popović
John Ostojic and Christopher Meek for Ljubiša Beara
Jelena Nikolić and Stéphane Bourgon for Drago Nikolić
Alexander Lazarević and Miodrag Stojanović for Ljubomir Borovčanin
Natacha Fauveau Ivanović for Radivoje Miletić
Dragan Krgović for Milan Gvero
Peter Haynes and Đorđe Sarapa for Vinko Pandurević

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 (“Tribunal”);

BEING SEISED OF the “Prosecution’s Motion for Order of Protection”, filed confidentially on 18 May 2006 (“Motion”), in which the Office of the Prosecutor (“Prosecution”) requests the delayed disclosure of the identity and un-redacted statements of PW-101, PW-104, PW-105, PW-106, PW-107 (“sensitive witnesses”);

NOTING that redacted statements and information reports of the sensitive witnesses are appended in *Confidential Annex A* to the Motion and that the Motion is supported by the declaration of an investigator of the Tribunal appended in *Confidential Annex B* of the Motion;

NOTING that the Prosecution submits that the witnesses, “due to the nature of their testimony, would face a serious risk to their safety if their identity and status as Prosecution witnesses were disclosed at this time”,¹ and that therefore exceptional circumstances warrant deferring the disclosure to the Defence of the name, location and any other sensitive information concerning the identity of the sensitive witnesses until 30 days before each respective sensitive witness is scheduled to testify²;

NOTING that the Prosecution further submits that (i) the deferred disclosure of the identity of the sensitive witnesses is consistent with the rights of the Accused in the Case No. IT-05-88-PT (“Accused”) in so far that “a basic summary of anticipated testimony or descriptive title” and redacted statements were provided to the Defence respectively as part of the Prosecution’s Rule 65ter submission and along with the Motion, thus putting the Defence on notice of the basic nature of the evidence to be provided by the sensitive witnesses,³ and that (ii) “although the evidence these witnesses will present is sensitive and important to the Prosecution’s case, it does not pertain to topics or issues so different from the evidence to be presented by other witnesses that delayed disclosure will prejudice the defence’s preparation of trial”;⁴

NOTING that defence counsel for Drago Nikolić, Ljubiša Beara, Radivoje Miletić, Vinko Pandurević and Ljubomir Borovčanin (respectively “*Nikolić Defence*”, “*Beara Defence*”, “*Miletić*”

¹ Motion, para. 1.

² Motion, para. 3.

³ Motion, para. 13.

⁴ Motion, para. 15.

Defence”, “*Pandurević* Defence” and “*Borovčanin* Defence”, altogether with defence counsel for Vujadin Popović and Milan Gvero, “Defence”) filed confidential responses on 1 and 2 June 2006;⁵

NOTING that the *Beara* Defence opposes the Motion on the basis that the Prosecution failed to identify objective threats faced by the sensitive witnesses⁶ and that deferring disclosure would violate the right of Ljubiša Beara to adequately prepare the cross-examination of the sensitive witnesses⁷;

NOTING that the *Beara* Defence requests that all information pertaining to the sensitive witnesses be disclosed no later than 60 days prior to the commencement of trial;⁸

NOTING that the *Nikolić* Defence submits that deferred disclosure is prejudicial to the preparation of the case for the Defence,⁹ that the measures taken by the Prosecution are insufficient to minimise such prejudice¹⁰ and that the Prosecution has failed to demonstrate the existence of ‘exceptional circumstances’, which would justify deferred disclosure, for at least three of the sensitive witnesses;¹¹

NOTING that the *Nikolić* Defence requests that the Prosecution be ordered to disclose (i) the information provided by the sensitive witnesses without delay, and (ii) the name, location and other sensitive information concerning their identity before the commencement of trial;¹²

NOTING further that the *Borovčanin* Defence joins the *Nikolić* Response in its entirety as does the *Pandurević* Defence, the latter requesting, in addition, the date of the statements as “the date upon which a witness speaks to the Prosecution is always a highly relevant piece of information, not just to the context of the witness under consideration but also to the overall picture of the investigation”;¹³

⁵ “Defence Response on Behalf of Drago Nikolić to Prosecution Motion for Order of Protection” filed *confidentially* on 1 June 2006 (“*Nikolić* Response”); “Defendant Ljubiša Beara’s Response to the Prosecution’s Motion for Order of Protection” filed *confidentially* on 1 June 2006 (“*Beara* Response”); “Réponse du General Miletić á la Requête du Procureur aux Fins de Mesures de Protection” filed *confidentially* on 1 June 2006 (“*Miletić* Response”); “Borovčanin Defence Notification on Joining ‘Confidential Defence Response on Behalf of Drago Nikolić to Prosecution Motion for Order of Protection’” filed *confidentially* on 2 June 2006 (“*Borovčanin* Response”); and “Defence Response on Behalf of Vinko Pandurević to Prosecution Motion for Order of Protection” filed *confidentially* on 2 June 2006 (“*Pandurević* Response”).

⁶ *Beara* Response, para. 8.

⁷ *Beara* Response, para. 6.

⁸ *Beara* Response, para. 7.

⁹ *Nikolić* Response, para. 9.

¹⁰ *Ibid.*

¹¹ *Nikolić* Response, para. 10.

¹² *Nikolić* Response, para. 30.

¹³ *Pandurević* Response, paras 4, 6.

NOTING in addition that the *Miletić* Defence challenges the Motion on the basis that the deferred disclosure does not allow adequate time to prepare the case for Radivoje Miletić, that the redactions cover substantive matters making it impossible for the *Miletić* Defence to understand the redacted statements and that the Prosecution failed to explain the exceptional circumstances which would justify the late disclosure of the identity of the sensitive witnesses and the submission of the redacted statements, but nonetheless submits that it will not oppose the Motion in the event that the evidence given by the sensitive witnesses is not relevant to Radivoje Miletić¹⁴;

NOTING the “Consolidated Reply to Defence Responses to the Prosecution’s Motion for Order of Protection” filed confidentially by the Prosecution on 8 June 2006 (“Reply”), in which the Prosecution reiterates its previous submissions set out in the Motion, submits that there is no valid ground for the *Pandurević* Defence requesting the disclosure of the date of the statements and that disclosing such dates may reveal the identity or location of the sensitive witnesses,¹⁵ further expounds on the ‘objective foundation of the fears of the sensitive witnesses’,¹⁶ and confirms that none of the statements of the sensitive witnesses goes to the acts and conduct of Radivoje Miletić¹⁷;

NOTING further the “Submission of Additional Support for Prosecution’s Motion for Order of Protection with Confidential and *Ex Parte* Annex” filed by the Prosecution on 17 July 2006 (“Additional Prosecution Submission”), in which the Prosecution, upon the Trial Chamber’s request of 13 July 2006,¹⁸ provides more detailed information in support of its application for the delayed disclosure of the identity and un-redacted statements of the sensitive witnesses;

NOTING that Rule 69 of the Rules provides that in exceptional circumstances, the Prosecution 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, and that subject to Rule 75 of the Rules, 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;

NOTING that Rule 75(A) of the Rules provides that a Judge or 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;

¹⁴ *Miletić* Response, paras 11, 14, 18-19.

¹⁵ Reply, para. 15.

¹⁶ Reply, paras 22-24.

¹⁷ Reply, para. 25.

¹⁸ Pre-Trial Conference, 13 July 2006, T. 252-255; *see also* Pre-Trial Conference, 14 July 2006, T. 335-337.

CONSIDERING that it is in the interests of justice and of the proper conduct of trial that the Prosecution disclose to the Defence the identity of the sensitive witnesses it intends to call within a reasonable time to enable the Defence to adequately prepare for their cross-examination;¹⁹

RECALLING that “[w]hilst it is extremely important to provide adequately for the protection of victims and witnesses, the requirement that the accused be given a fair trial dictates that Trial Chambers only grant protective measures where it is properly shown in the circumstances of each such witness that the protective measures sought meet the standards set out in the Statute and Rules of the Tribunal, and expanded in its jurisprudence” and that “the balance dictates clearly in favour of an accused’s right to the identity of witnesses which the Prosecution intends to rely upon”;²⁰

CONSIDERING that the subjective fears of a potential witness that he or she may be in danger or at risk are not, *per se*, sufficient to establish any real likelihood that the witness may actually be in danger or at risk from disclosure of his or her identity to the opposing party, that there must be an objective foundation for these fears and that factors to be considered for such determination are the identity of the witnesses, the nationality and ethnicity of the witnesses, the role, duties performed and positions occupied by the witnesses during the conflict, the nature and contents of the evidence to be given by the witnesses;²¹

CONSIDERING that the Trial Chamber recognises the concerns expressed by the Prosecution in respect of the safety of the sensitive witnesses and that in particular, it understands that once the Defence commences its investigations into the background of witnesses whose identity has been disclosed to them, there is a risk that those to whom the Defence has spoken may reveal to others the identity of these witnesses, with the potential consequential risk that the witnesses will be interfered with;²²

CONSIDERING that the Prosecution Additional Submission provides the Trial Chamber with concrete foundations for the fears expressed by the sensitive witnesses that they may be in danger or at risk, with the exception of PW-106 for whom the Prosecution does not expound on the reasons set out in the Motion;

¹⁹ *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Order to the Accused on Protective Measures for Defence Witnesses, 27 May 2004.

²⁰ *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Provisional Protective Measures Pursuant to Rule 69, 19 February 2002, paras 28, 32.

²¹ *Prosecution v. Radoslav Brđanin*, Case No. IT-99-36-T, Decision on Prosecution’s Twelfth Motion for Protective Measures for Victims and Witnesses, 12 December 2002, paras 8-9; *see also Prosecution v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-PT, Decision on Second Motion by Prosecution for Protective Measures, 27 October 2000, para. 19.

²² *Prosecution v. Radoslav Brđanin*, Case No. IT-99-36-T Decision on Motion by Prosecution for Protective Measures, 3 July 2000, para. 28.

PURSUANT TO Articles 20(1), 21(2), 21(4)(b) and 22 of the Statute and Rules 69 and 75 of the Rules,

HEREBY GRANTS the Motion in part and **ORDERS** that

- (1) until further order or until the said witness is called to testify, the Prosecution shall refer to the sensitive witnesses by the requested pseudonyms of PW-101, PW-104, PW-105, PW-106 and PW-107, in all proceedings before the Tribunal;
- (2) the Prosecution shall disclose to the Defence the identity, location and any other sensitive information concerning the identity of PW-101, PW-104, PW-105 and PW-107 as well as their un-redacted statements no later than thirty days before the anticipated date of their respective testimony, unless otherwise ordered by the Trial Chamber;
- (3) the Prosecution shall disclose to the Defence the identity, location and any other sensitive information concerning the identity of PW-106 as well as the un-redacted statement of PW-106 no later than ten days before the scheduled date of the opening statement for the Prosecution, namely no later than Friday 11 August 2006, unless otherwise ordered by the Trial Chamber;
- (4) thereafter and until further order, the Defence shall not disclose to the public the names, addresses, whereabouts and any other identifying data of the sensitive witnesses, save it is directly and specifically necessary for the preparation and presentation of this case and only after informing the Trial Chamber of the names of such persons of the public;
- (5) the Prosecution shall be at liberty to apply for specific protective measures at trial for individual witnesses when testifying, including the use of pseudonyms, voice and image distortion and closed sessions, prior to the date each witness is scheduled to testify.

For the purpose of this decision, the 'public' means and includes 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 teams, their agents or representatives. 'The public' also includes, without limitation, family, friends, accused in other cases or proceedings before the Tribunal, defence counsel in other cases or proceedings before the Tribunal and the media.

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

Dated this first day of August 2006

At The Hague

The Netherlands



Judge O-Gon Kwon

[Seal of the Tribunal]