



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-95-11-T

Date: 18 August 2006

Original: English

IN TRIAL CHAMBER I

Before: Judge Bakone Justice Moloto, Presiding
Judge Janet Nosworthy
Judge Frank Höpfel

Registrar: Mr. Hans Holthuis

Decision of: 18 August 2006

PROSECUTOR

v.

MILAN MARTIĆ

**DECISION ON DEFENCE MOTION FOR PROTECTIVE
MEASURES FOR WITNESSES MM-096, MM-116 AND
MM-090**

The Office of the Prosecutor:

Mr. Alex Whiting
Ms. Anna Richterova
Mr. Colin Black
Ms. Nisha Valabhji

Counsel for the Accused:

Mr. Predrag Milovančević
Mr. Nikola Perović

TRIAL CHAMBER I (“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 “Motion for Protective Measures for Witnesses MM-096, MM-116 and MM-090” filed confidentially by the Defence on 11 August 2006 (“Motion”), whereby it seeks an order granting, *inter alia*, protective measures of pseudonym and closed session for Witness MM-090;

NOTING the oral response of the Prosecution on 14 August 2006 (“Prosecution Oral Response”), in which it objected to the requested closed session for Witness MM-090 because the necessary protection would be achieved through image and voice distortion and partial private session;¹

NOTING the oral decision of the Trial Chamber on 14 August 2006, whereby it granted the requested protective measures for Witnesses MM-096 and MM-116 and deferred its decision on the protective measures for Witness MM-090 pending the submission of a reply by the Defence;²

NOTING the “Defence Reply to Prosecution Response to Motion for Protective Measures in Respect of Witness MM-090” filed confidentially on 15 August 2006 (“Defence Reply”);

NOTING the “Prosecution Response to Defence Reply to Prosecution Response for Protective Measures in Respect of Witness MM-090” filed confidentially on 16 August 2006 (“Prosecution Written Response”);

GRANTING leave to the Prosecution to reply to the Defence Reply;

NOTING Article 20 (1) of the Statute of the Tribunal (“Statute”) requiring the Trial Chamber to ensure 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 providing that “[t]he hearing shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence”;³

¹ Hearing 14 August 2006, T. 6360-6362 (private session): The Prosecution stated that it had no objection to the requested protective measures for Witnesses MM-096 and MM-116. Nor did it object to the assignment of a pseudonym to Witness MM-090.

² Hearing 14 August 2006, T. 6430 (private session). The Trial Chamber granted the Defence leave to file a written reply to the Prosecution Oral Response, Hearing 14 August 2006, T. 6363-6364 (private session).

³ See also Rule 78 of the Rules.

NOTING Article 21 (2) of the Statute providing that “the accused shall be entitled to a fair and public hearing subject to article 22” and Article 22 of the Statute holding that “[the Tribunal] shall provide in its rules of procedure and evidence for the protection of victims and witnesses”;

NOTING Rule 75(A) of the Rules, which provides that “[...] a Chamber may [...] order appropriate measures for the privacy and protection of [...] witnesses, provided the measures are consistent with the rights of the accused”;

NOTING also Rule 79(A) of the Rules, which reads in its relevant parts that “[t]he Trial Chamber may order that the press and the public be excluded from all or part of the proceedings for reasons of [...] safety, security or non-disclosure of the identity of a [...] witness as provided in Rule 75”;

NOTING the submission of the Defence in the Defence Reply that “the only interest that is to be balanced against the interest of witnesses to be protected are the rights of the [A]ccused [...] who is entirely agreeable [*sic*] to the proposed protective measures”;⁴

NOTING the argument of the Prosecution that the Defence submission is “an incorrect statement of the law” and “contrary to the position taken by the Defence during the Prosecution case”;⁵

CONSIDERING that as a general matter of law and contrary to the Defence submission, the rights of the Accused, while very important, are not the only factor to be weighed against the need to ensure that witnesses enjoy privacy and protection when determining whether to grant certain protective measures for a particular witness;⁶

CONSIDERING that the Defence has indicated that the Accused does not object to hearing this witness’ evidence in closed session;

CONSIDERING that the jurisprudence of the Tribunal shows that in relation to a request for the attribution of protective measures, the party seeking such measures must demonstrate the existence of an objectively grounded risk to the security or welfare of the witness or the witness’ family,

⁴ Defence Reply, para. 3.

⁵ Prosecution Written Response, para. 4.

⁶ See, e.g., *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Decision on the Appellant’s Motion for Protective Measures for New Witnesses on Appeal, 27 May 2002, in which the Appeals Chamber balanced the proposed measures against the Prosecution’s obligation to disclose exculpatory material in accordance with Rule 68 of the Rules, and also took other factors into consideration, such as the importance of the testimony for the case and the possibility that the witness may refuse to testify if protective measures are not allowed. See also, *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995 (“*Tadić* Decision”), paras 31-43 on the right to a public hearing and restriction of that right. In this respect, the Trial Chamber takes particular note of para. 32 of that decision.

should it become publicly known that the witness gave evidence,⁷ and that with regard to closed session, the more extreme the protection sought, the more onerous will be the obligation upon the applicant to establish the risk asserted;⁸

CONSIDERING the personal circumstances of Witness MM-090 as expressed in the filings relating to the Motion;

CONSIDERING that the witness alleges that he received threats in the past and that in the past few days he has received new threats in connection with his upcoming testimony in the instant proceedings;⁹

CONSIDERING that the Defence has shown a very real and objectively grounded risk to the security or welfare of Witness MM-090;

CONSIDERING that in light of the expected specificity of the witness' evidence, providing evidence in public session with short periods of private session may not sufficiently protect the identity of the witness and therefore that the extraordinary protective measure of closed session is warranted;

CONSIDERING that the requirements of Rule 75 (A) are met;

PURSUANT TO Articles 20, 21 and 22 of the Statute and Rules 54, 75 and 79 of the Rules,

HEREBY GRANTS the Motion and

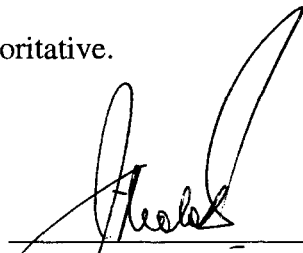
ORDERS that Witness MM-090 shall be assigned this pseudonym and testify in closed session.

⁷ *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-R, Decision on Application for Protective Measures and Motion to Enlarge Time, 8 November 2005, p. 5; *Prosecutor v. Mile Mrkšić, Miroslav Radić and Veselin Šljivančanin*, Case No. IT-95-13/1-T, Decision on Prosecution's Additional Motion for Protective Measures of Sensitive Witnesses, 25 October 2005 ("Mrkšić Decision"), para. 5; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Decision on Motion for Clarification and Motions for Protective Measures, 13 October 2003, para. 23; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Prosecution's Motion for Trial Related Protective Measures (Bosnia), 30 July 2002 ("Milošević Decision"), para. 5; *Tadić* Decision, para. 62.

⁸ *Mrkšić* Decision, para. 6; *Milošević* Decision, para. 6.

⁹ Defence Reply, para. 2.

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



Judge Bakone Justice Moloto
Presiding

Dated this eighteenth day of August 2006

At The Hague

The Netherlands

[Seal of the Tribunal]