



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-04-84-PT

Date: 22 November 2006

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IN TRIAL CHAMBER II

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

Registrar: Mr. Hans Holthuis

Decision of: 22 November 2006

PROSECUTOR

v.

**RAMUSH HARADINAJ
IDRIZ BALAJ
LAHI BRAHIMAJ**

**DECISION ON SECOND HARADINAJ MOTION TO LIFT
REDACTIONS OF PROTECTED WITNESS STATEMENTS
WITH CONFIDENTIAL ANNEX**

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THIS 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”), is seised of the “Confidential Defence Motion to Lift Redactions for Certain Categories of Witness Statements for the Defence Only”, filed by Ramush Haradinaj on 8 August 2006 (“Motion”), in which Haradinaj requests that the Trial Chamber vary the protective measures ordered for certain Prosecution witnesses in its “Decision on Prosecution’s Application for Pre-Trial Protective Measures for Witnesses” of 20 May 2005 (“May 2005 Decision”) and in several subsequent decisions.¹ Specifically, Haradinaj seeks an order from the Trial Chamber requiring the Prosecution to disclose to him and his defence team the unredacted statements of 40 witnesses immediately, instead of the previously ordered 30 days prior to trial.² The Chamber hereby renders its decision on the Motion.

I. LAW ON PROTECTIVE MEASURES

1. A proper understanding of the issues raised in the Motion requires a brief review of the relevant law on protective measures.
2. Rule 66 places an obligation on the Prosecution to disclose certain documents and other information to the accused, including the supporting material accompanying the indictment when confirmation is sought, and copies of the statements of all witnesses whom the Prosecution intends to call to testify at trial. Rule 69 allows the Prosecution, through an order of the Trial Chamber, to either delay or bypass its Rule 66 obligations to the extent the Rule requires the Prosecution to disclose to the accused the identity of a witness who may be in danger. The Chamber will only issue the order for non-disclosure, however, where the Prosecution demonstrates the existence of “exceptional circumstances” in respect of the witness—that is, specific evidence of an identifiable risk to the security and welfare of the particular witness or to his or her family.³ Broad allegations

¹ See *infra* para. 5 (discussing these decisions).

² See *infra* para. 8 (discussing the Motion in further detail).

³ *Prosecutor v. Kordić and 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. Haradinaj, Balaj, and Brahimaj*, Case No. IT-04-84-PT (“*Haradinaj et al.*”), Confidential Order on Motion for Protective Measures, 12 October 2006 (“*Haradinaj et al.* 12 October 2006 Order”), p. 3; *Prosecutor v. Milutinović, Šainović, Ojdanić, Pavković, Lazarević, Đorđević, and Lukić*, Case No. IT-05-87-PT, Decision on Prosecution Sixth Motion for Protective Measures, 1 June 2006 (“*Milutinović et al.* Decision”), paras. 21–22; *Prosecutor v. Limaj, Bala, and Musliu*, Case No. IT-03-66-PT, Decision on the Prosecutor’s Motion for Protective Measures Regarding Disclosure, 30 September 2003 (“*Limaj et al.* Decision”), pp. 5, 7; *Prosecutor v. Blagojević, Obrenović, Jokić, and Nikolić*, Case No. IT-02-60-PT, [Confidential] Decision on Prosecution’s Motion for Order of Protection, 18 February 2003 (“*Blagojević et al.* Decision”), para. 12; *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-PT, Decision on Second Motion by Prosecution for Protective Measures, 27 October 2000 (“*Brđanin and Talić* October 2000 Decision”), para. 18; *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-PT, Decision on Motion by Prosecution for Protective

of dangerous conditions for victims and witnesses in general will not suffice to show the existence of exceptional circumstances justifying an order for non-disclosure.⁴

3. When a Trial Chamber grants a request for non-disclosure of a witness's identity under Rule 69, it does so pursuant to Rule 75(A), which provides that a Chamber may order appropriate measures for the privacy and protection of victims and witnesses, as long as these measures are not inconsistent with the rights of the accused. The Trial Chamber thus has a duty to strike a fair and proper balance between two interests: the right of the accused to a fair trial, on the one hand, and the protection of the witness for whom such measures are sought, on the other.⁵ Although the proper manner of striking this balance depends on the facts of each case,⁶ and while it is extremely important to provide adequately for the protection of witnesses, the jurisprudence has consistently held that the balance favours the accused's right to the identity of the witnesses upon whom the Prosecution intends to rely to prove his guilt.⁷ Specifically, the Trial Chamber must pay close attention to the accused's right to prepare his or her defence,⁸ and will refuse to grant an order for

Measures, 3 July 2000 ("*Brđanin and Talić* July 2000 Decision"), para. 16; *Prosecutor v. Milošević*, Case No. IT-02-54-T, [Partly Confidential and *Ex Parte*] Decision on Prosecution Motion for Provisional Protective Measures pursuant to Rule 69, 19 February 2002 ("*Milošević* Decision"), paras. 23, 28.

⁴ See *Prosecutor v. Popović, Beara, Nikolić, Borovčanin, Tolimir, Miletić, Gvero, and Pandurević*, Case No. IT-05-88-T, Decision on Prosecution's Motion for Order of Protection, 1 August 2006 ("*Popović et al.* Decision"), p. 5; *Limaj et al.* Decision, *supra* note 3, p. 7; *Blagojević et al.* Decision, *supra* note 3, para. 12; *Brđanin and Talić* July 2000 Decision, *supra* note 3, para. 11 ("[T]he prevailing circumstances within the former Yugoslavia cannot by themselves amount to exceptional circumstances.") (emphasis removed). See also *Prosecutor v. Haradinaj, Balaj, and Brahimaj*, Case No. IT-04-84-AR65.1, Decision on Ramush Haradinaj's Modified Provisional Release, 10 March 2006, para. 46; *Haradinaj et al.*, Further Decision on Lahi Brahimaj's Motion for Provisional Release, 3 May 2005, para. 39.

⁵ *Haradinaj et al.* 12 October 2006 Order, *supra* note 3, p. 2; *Popović et al.* Decision, *supra* note 4, p. 5; *Haradinaj et al.*, Decision on Prosecution's Application for Pre-Trial Protective Measures for Witnesses, 20 May 2005 ("*Haradinaj et al.* May 2005 Decision"), p. 4; *Blagojević et al.* Decision, *supra* note 3, para. 8; *Prosecutor v. Tadić*, Case No. IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Witness L, 14 November 1996 ("*Tadić* Decision"), para. 11. See also Article 20(1) of the Statute ("The Trial Chambers shall ensure ... that proceedings are conducted ... with full respect for the rights of the accused and due regard for the protection of victims and witnesses.").

⁶ *Blagojević et al.* Decision, *supra* note 3, para. 8; *Brđanin and Talić* July 2000 Decision, *supra* note 3, para. 7; *Tadić* Decision, *supra* note 5, para. 11.

⁷ *Milutinović et al.* Decision, *supra* note 3, para. 22; *Prosecutor v. Lazarević and Lukić*, Case No. IT-03-70-PT, Decision on Prosecution's Motion for Protective Measures and Request for Joint Decision on Protective Measures, 19 May 2005, p. 4; *Prosecutor v. Milutinović, Šainović, and Ojdanić*, Case No. IT-99-37-PT, Decision on Prosecution's Motions for Protective Measures, 17 July 2003, p. 4; *Milošević* Decision, *supra* note 3, para. 32; *accord ibid.* para. 24 (observing that this issue "goes to the heart of an accused's right to a fair trial by enabling him to investigate the case against him"); *Blagojević et al.* Decision, *supra* note 3, para. 9 ("The jurisprudence of the Tribunal has established the first consideration of a Trial Chamber to be the rights of the accused and particularly the right to a fair trial, and the affirmative obligation to protect victims and witnesses—while one this Trial Chamber takes very seriously—as a secondary one."); *Brđanin and Talić* July 2000 Decision, *supra* note 3, para. 20.

⁸ See *Haradinaj et al.* 12 October 2006 Order, *supra* note 3, p. 3; *Popović et al.* Decision, *supra* note 4, p. 5 (holding that "it is in the interests of justice and 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 to Defence to adequately prepare for their cross-examination"); *Haradinaj et al.* May 2005 Decision, *supra* note 5, p. 4; *Blagojević et al.* Decision, *supra* note 3, para. 14. See also Article 21(4)(b) of the Statute (providing that the accused is entitled "to

non-disclosure—even where the Prosecution has demonstrated that exceptional circumstances exist in respect of a given witness—where such order would unduly infringe this right.⁹ Two key factors to consider in this regard are the nature and quantity of the material already disclosed to the accused in non-redacted form compared with that for which the non-disclosure order is sought,¹⁰ and the approaching start date of trial.¹¹

II. RELEVANT PROTECTIVE-MEASURES REGIME IN THIS CASE

A. May 2005 Decision and Subsequent Protective-Measures Orders

4. The foundation for the relevant protective-measures regime in this case is the May 2005 Decision.¹² In that decision the Trial Chamber, upon balancing the need to protect potentially at-risk witnesses against the right of Haradinaj, Idriz Balaj, and Lahi Brahima (collectively, “Accused”) to have sufficient time for the preparation of their respective cases, decided that protective measures were warranted for several witnesses. Noting in particular that Haradinaj did not oppose the measures sought by the Prosecution, “provided that these measures may be reviewed and varied by the Trial Chamber at a later stage”,¹³ the Chamber assigned pseudonyms to 27 witnesses¹⁴ and directed the Prosecution to disclose their identities to the Accused “no later than thirty (30) days before the commencement of trial, or unless otherwise ordered by the Trial Chamber.”¹⁵ The Chamber additionally authorised the Prosecution to redact the identifying information of these 27

have adequate time ... for the preparation of his defence”); Rule 69(C) (“Subject to Rule 75, 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.”).

⁹ See *Haradinaj et al.*, Confidential Decision on Prosecution’s Motion for Exceptional Protective Measures for a Potential Witness and on Defence Motion to Lift Redactions on Certain Witness Statements, 10 April 2006 (“*Haradinaj et al.* April 2006 Decision”), para. 27; *Blagojević et al.* Decision, *supra* note 3, para. 8; *Brđanin and Talić* July 2000 Decision, *supra* note 3, para. 34 (“The witnesses whose identity is of much greater importance to the accused in the preparation of the defence are those who directly implicate the accused[.]”); *Tadić* Decision, *supra* note 5, para. 11.

¹⁰ See *Blagojević et al.* Decision, *supra* note 3, para. 23 (“[T]he time period for delayed disclosure is case-specific, and will depend upon the number of witnesses to be investigated and the circumstances under which that investigation will have to take place[.]”).

¹¹ See *Limaj et al.* Decision, *supra* note 3, p. 6; *Haradinaj et al.* April 2006 Decision, *supra* note 9, para. 27; *Milošević* Decision, *supra* note 3, para. 26; *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-PT, Decision on Confidential Prosecution Motions for Protective Measures, 26 October 2004, p. 4; *Brđanin and Talić* October 2000 Decision, *supra* note 3, para. 18 (“[T]he greater length of time between the disclosure of the identity of a witness and the time when the witness is to give evidence, the greater the potential for interference with that witness[.]”); *Blagojević et al.* Decision, *supra* note 3, paras. 16, 23 (same); *Brđanin and Talić* July 2000 Decision, *supra* note 3, para. 24 (same).

¹² See *Haradinaj et al.* May 2005 Decision, *supra* note 5.

¹³ *Ibid.*, p. 4.

¹⁴ *Ibid.* p. 6 (paragraph 1 of the disposition). These 27 witnesses were SST7/01, SST7/02, SST7/03, SST7/04, SST7/05, SST7/06, SST7/07, SST7/08, SST7/09, SST7/10, SST7/11, SST7/12, SST7/13, SST7/14, SST7/16, SST7/17, SST7/18, SST7/19, SST7/20, SST7/21, SST7/22, SST7/23, SST7/24, SST7/25, SST7/26, SST7/27, and SST7/28.

witnesses from their statements before disclosing them to the Accused under Rule 66, along with “information indicating the current whereabouts of witnesses and the names of certain third persons” from the statements of 35 other witnesses for whom pseudonyms were not requested.¹⁶ While the Chamber did not explicitly state in the May 2005 Decision when the Prosecution would be obliged to disclose the unredacted statements of these 62 witnesses, it subsequently clarified that such disclosure must occur “at the latest 30 days before the commencement of trial.”¹⁷

5. In the period since the May 2005 Decision, the Trial Chamber and Pre-Trial Judge have issued five additional decisions granting protective measures to witnesses. In these decisions, pseudonyms were assigned to a total of nine witnesses.¹⁸ In respect of five of these nine, moreover, the Prosecution was authorised to disclose redacted statements to the Accused, and to withhold disclosure of the unredacted statements until 30 days prior to trial.¹⁹

B. April 2006 Decision

6. The “Confidential Decision on Prosecution’s Motion for Exceptional Protective Measures for a Potential Witness and on Defence Motion to Lift Redactions on Certain Witness Statements”, issued on 10 April 2006 (“April 2006 Decision”), altered the protective measures of nine of the witnesses granted such measures in the May 2005 Decision. As in the Motion presently before the Trial Chamber,²⁰ Haradinaj argued that his investigations had reached a stage at which access to the identities and unredacted statements of these nine witnesses were critical for the adequate preparation of his defence.²¹ Considering the increasing proximity of trial,²² and that the protective

¹⁵ *Ibid.* (paragraph 2 of the disposition).

¹⁶ *Ibid.* (paragraph 3 of the disposition). These 35 witnesses were those listed in Category C of confidential Annex B to the “Prosecution Motion for Pre-Trial Protective Measures for Witnesses” of 7 April 2005. Category C additionally lists—apparently through inadvertence—a witness who also appears in Category A along with those witnesses for whom the Prosecution sought the assignment of pseudonyms. The Trial Chamber granted this witness the pseudonym SST7/28, and authorised the Prosecution to withhold disclosure of his unredacted statement until 30 days prior to trial. *Haradinaj et al.* May 2005 Decision, *supra* note 5, p. 6 (paragraphs 1–2 of the disposition).

¹⁷ *Haradinaj et al.* April 2006 Decision, *supra* note 9, para. 27.

¹⁸ *Haradinaj et al.*, Confidential Order on Motion for Protective Measures, 25 October 2006, p. 4 (Witness SST7/38); *Haradinaj et al.* 12 October 2006 Order, *supra* note 3, p. 4 (Witness SST7/56); *Haradinaj et al.*, Confidential Decision on Prosecution Motion for Protective Measures for Witnesses SST7/53 and SST7/55, 14 June 2006, p. 3 (Witnesses SST7/53 and SST7/55); *Haradinaj et al.*, Confidential Decision on Prosecution Motion for Protective Measures for Three Witnesses, 16 May 2006, p. 3 (Witnesses SST7/49, SST7/50, and SST7/52); *Haradinaj et al.*, Confidential Decision on Prosecution’s Motion for Exceptional Protective Measures for a Potential Witness, 3 May 2006, pp. 3–4 (Witness SST7/29); *Haradinaj et al.* April 2006 Decision, *supra* note 9, para. 30 (Witness SST7/30).

¹⁹ See sources cited in note 18 *supra*. These five witnesses were SST7/29, SST7/30, SST7/38, SST7/53, and SST7/56. Thus, although Witnesses SST7/49, SST7/50, SST7/52, and SST7/55 enjoy the protection of pseudonyms, their unredacted statements have already been disclosed to the Accused.

²⁰ See Motion, paras. 9, 28.

²¹ *Haradinaj et al.* April 2006 Decision, *supra* note 9, para. 13.

²² *Ibid.* para. 27.

measures granted in the May 2005 Decision were “not set in stone”,²³ the Chamber determined that Haradinaj had “set forth very good reasons” justifying disclosure of the unredacted statements of the witnesses in question to him and his defence team, but not to the general public.²⁴ The Trial Chamber accordingly ordered the Prosecution to disclose these materials to Haradinaj within three weeks of that decision, and enjoined Haradinaj not to divulge them to any third person “[s]ave as is directly and specifically necessary for the preparation and presentation of this case”.²⁵ The Chamber subsequently extended the terms of the April 2006 Decision to Balaj and Brahimaj.²⁶

7. There consequently remain a total of 58 witnesses whose unredacted statements have not been disclosed to the three Accused.²⁷ Pursuant to the May 2005 Decision and the subsequent decisions referred to in paragraph 5 above (collectively, “Protective Measures Decisions”), the Prosecution remains under an obligation to disclose the unredacted statements of the 58 witnesses to the Accused no later than 30 days prior to trial.

III. SUBMISSIONS OF THE PARTIES

8. In the Motion, Haradinaj requests the Trial Chamber to vary the regime established by the Protective Measures Decisions in respect of 40 of the 58 witnesses whose unredacted statements have yet to be disclosed. He seeks an order requiring the Prosecution to hand over these statements immediately, instead of 30 days prior to trial, “in order that the Defence can adequately prepare its case in respect of the allegations contained in these statements before the commencement of trial.”²⁸ According to Haradinaj, the work required to fully investigate the persons and incidents referred to in the redacted statements “cannot be undertaken 30 days before trial or during the trial if it is to be completed and the Defence is to be prepared effectively for trial.”²⁹ He emphasises that he is not seeking the disclosure of the unredacted statements to the general public, nor that the general public have access to the identities of the 20 witnesses subject to the Motion who have been assigned

²³ *Ibid.* para. 24.

²⁴ *Ibid.* para. 25.

²⁵ *Ibid.* para. 30. These nine witnesses are SST7/03, SST7/05, SST7/06, SST7/07, SST7/11, SST7/12, SST7/13, SST7/23, and SST7/24.

²⁶ *Haradinaj et al.*, Decision on Motions on Behalf of Idriz Balaj and Lahi Brahimaj to Receive Ten Unredacted Witness Statements, 3 May 2006 (“*Haradinaj et al.* Decision Extending April 2006 Decision to Balaj and Brahimaj”), pp. 2–3.

²⁷ These include 23 that have been assigned pseudonyms—SST7/01, SST7/02, SST7/04, SST7/08, SST7/09, SST7/10, SST7/14, SST7/16, SST7/17, SST7/18, SST7/19, SST7/20, SST7/21, SST7/22, SST7/25, SST7/26, SST7/27, SST7/28, SST7/29, SST7/30, SST7/38, SST7/53, and SST7/56—and the 35 witnesses without pseudonyms referred to in note 16, *supra*.

²⁸ Motion, para. 1.

²⁹ *Ibid.* para. 9. *Accord ibid.* paras. 12, 14, 17, 20, 22, 27–28.

pseudonyms.³⁰ He requests, however, that he be allowed to make the details of the unredacted statements available to certain members of the public as is strictly necessary for the proper conduct of his investigations, and recommends in this regard that the Chamber impose the same conditions as were set forth in the April 2006 to regulate the further disclosure of the information in question to members of the public.³¹

9. The Prosecution filed its confidential “Prosecution Response to Accused Ramush Haradinaj’s Motion Dated 8 August 2006 for Lifting Redactions” (“Response”) on 31 August 2006, requesting that the Trial Chamber deny the Motion in its entirety.³² The Prosecution argues that Haradinaj “endeavours to obtain the removal of practically the entire regime of protective measures ordered by the Trial Chamber”,³³ and that “if the ... Motion were to be granted, the Prosecution would face the increasingly difficult task of ensuring the continued co-operation of victims and witnesses who would expose themselves to even graver risks.”³⁴ It contends that Haradinaj’s generalised assertion that he needs the unredacted statements in question to proceed with his investigations is insufficient to show the requisite material change in circumstances to warrant reconsideration of the Protective Measures Decisions.³⁵ In the view of the Prosecution, limiting disclosure of this material to Haradinaj and his defence team would be “an exercise in futility”, even with the restriction that further disclosure may be made only to members of the public where directly and specifically necessary for the preparation of Haradinaj’s case, because “the principal threats to the lives of [P]rosecution witnesses in this case emanate from the Accused and persons close to them.”³⁶ Appended to the Response is an *ex parte* Annex (“Response Annex”) discussing the security situation of the witnesses in question as of 31 August 2006.³⁷

10. Haradinaj in the Motion and the Prosecution in the Response have both exceeded the 3,000-word limit prescribed in the Practice Direction on the Length of Briefs and Motions

³⁰ *Ibid.* para. 5. These 20 witnesses are SST7/01, SST7/02, SST7/04, SST7/08, SST7/09, SST7/10, SST7/14, SST7/16, SST7/17, SST7/18, SST7/19, SST7/20, SST7/21, SST7/22, SST7/25, SST7/26, SST7/27, SST7/28, SST7/29, and SST7/30. *Ibid.* paras. 10, 13, 16, 19, 25.

³¹ *Ibid.* para. 6 (referring to *Haradinaj et al.* April 2006 Decision, *supra* note 9, para. 30(5)–(6)).

³² Response, paras. 2, 49. The Response was filed in a timely manner in accordance with an order of the Pre-Trial Judge. See *Haradinaj et al.*, Confidential Order Granting Extension of Time, 21 August 2006, p. 1 (ordering the Prosecution to file its response to the Motion by 31 August 2006).

³³ Response, para. 8.

³⁴ *Ibid.* para. 11.

³⁵ *Ibid.* paras. 12–14.

³⁶ *Ibid.* paras. 23–25 (quotations at para. 23). *Accord ibid.* para. 24 (“Such disclosure, without any recourse to the Prosecution or the supervision of the Trial Chamber, ... would seriously imperil the lives of these protected witnesses and consequently gravely undermine the co-operation that this Tribunal receives from victims and witnesses.”).

³⁷ See *Haradinaj et al.*, *Ex Parte* Annex A to Prosecution’s Response to Accused Haradinaj’s Motion Dated 8 August 2006 for Lifting Redactions, 31 August 2006.

(“Practice Direction”).³⁸ Each seeks leave to exceed this limit, arguing that the broad and complex nature of the issues raised in the Motion constitutes “exceptional circumstances” necessitating the oversized filing.³⁹ The Trial Chamber agrees that exceptional circumstances exist in this instance, and accordingly grants leave to Haradinaj and the Prosecution to exceed the word limit.

11. Haradinaj filed his “Confidential Defence Reply to Prosecution’s Response to Defence Motion to Lift Redactions for Certain Categories of Witness Statements for the Defence Only” on 7 September 2006 (“Reply”), in which he seeks leave pursuant to Rule 126 *bis* to file the Reply,⁴⁰ purports to refute several of the arguments made in the Response,⁴¹ and puts forth several illustrations of how his investigations have been impeded by the continued non-disclosure of the unredacted statements of the witnesses in question.⁴² He also denies the Prosecution’s claim that he has “directly or indirectly interfered with ... witnesses”, and states that the Prosecution has failed to identify any evidence of threats or interference emanating from him.⁴³ The Trial Chamber considers that the present Decision is aided by consideration of the Reply, and therefore grants leave under Rules 126 *bis* for it to be filed.

12. On 8 November 2006, Balaj filed the “Confidential Motion by the Defence for Idriz Balaj for Access to Unredacted Witness Statements and Request for an Order of a Filings Regime” (“Balaj Motion”). Citing the precedent of the April 2006 Decision,⁴⁴ Balaj submits that the interests of justice and judicial economy dictate that whatever relief may be granted to Haradinaj as a result of this Decision should also extend to him.⁴⁵ He also recommends that the Trial Chamber “establish a regime” whereby the ambit of all future decisions would extend to all three Accused if the interests of justice so allow, even though one or two of the Accused may not have filed motions of their own or have expressly joined the third Accused’s motion.⁴⁶ The Prosecution responded on

³⁸ Practice Direction on the Length of Briefs and Motions, IT/184/Rev. 2, 16 September 2005, para. 5. *See also ibid.* para. 7 (“A party must seek authorization in advance from the Chamber to exceed the word limits in this Practice Direction and must provide an explanation of the exceptional circumstances that necessitate the oversized filing.”).

³⁹ Response, para. 8 (seeking leave to exceed the word limit by 1,467 words); *Haradinaj et al.*, Motion for Leave to Exceed the Word Count of Confidential Defence Motion to Lift Redactions for Certain Categories of Witness Statements for the Defence Only Filed 8 August 2006, 3 November 2006, para. 4 (seeking leave to exceed the word limit by 70 words).

⁴⁰ Reply, para. 1.

⁴¹ *Ibid.* paras. 10–17.

⁴² *Ibid.* paras. 2–9.

⁴³ *Ibid.* para. 16.

⁴⁴ *See Haradinaj et al.* Decision Extending April 2006 Decision to Balaj and Brahimaj, *supra* note 26, pp. 2–3. *See also supra* para. 6 (describing the April 2006 Decision).

⁴⁵ Balaj Motion, paras. 7, 10.

⁴⁶ *Ibid.* para. 8. *Accord ibid.* para. 11.

15 November 2006, stating its agreement with Balaj that the suggested filings regime should be established, “save under exceptional circumstances”.⁴⁷

13. In the Chamber’s view, although there is a certain appeal to the suggested regime, it is impossible to foresee whether such automatic extension would be suitable on the facts of every case, particularly without having heard from all the Accused in question. It would not be appropriate simply to presume that the three Accused take the same view on every issue that may be raised before the Trial Chamber. An example is the recent series of filings concerning a Prosecution source who may be able to provide the Accused with exculpatory information, in which Haradinaj, Balaj, and Brahimaaj have adopted positions not entirely in line with one another, and have sought different types of relief.⁴⁸ Nonetheless, in the present circumstances the application of this Decision to Balaj and Brahimaaj is appropriate and necessary, as it would run contrary to the interests of justice and judicial economy to have separate protective-measures regimes in place in respect of different Accused.⁴⁹ Therefore, while the Trial Chamber will refer only to the arguments of Haradinaj throughout this Decision as the other two Accused have made no substantive arguments, the Chamber’s ultimate disposition will apply equally to all three Accused.

14. Although the Trial Chamber would have preferred to have specific submissions on the part of Haradinaj and the Prosecution demonstrating the necessity of filing the Motion, the Response, and the Reply on a confidential basis, the sensitive nature of the information discussed in these filings warrants the maintenance of their confidential status. The Prosecution has, however, made an express argument as to why it filed the Response Annex on an *ex parte* basis,⁵⁰ and the Chamber

⁴⁷ *Haradinaj et al.*, Prosecution’s Response to the Confidential Motion Dated 8 November 2006 Filed by the Defence of Idriz Balaj for Access to Un-Redacted Witness Statements and Request for an Order of a Filing Regime, 15 November 2006, para. 2.

⁴⁸ Compare *Haradinaj et al.*, Confidential Response by the Defence for Idriz Balaj to “Prosecution Motion for Protective Measures Concerning the Identity of a Person Who Can Provide Rule 68 Information Concerning Third Parties”, 7 November 2006 with *Haradinaj et al.*, Response by Defence for Lahi Brahimaaj to “Prosecution Motion for Protective Measures Concerning the Identity of a Person Who Can Provide Rule 68 Information Concerning Third Parties”, 8 November 2006 and *Haradinaj et al.*, [Confidential] Defence Response on Behalf of Ramush Haradinaj to Prosecution Motion for Protective Measures Concerning the Identity of a Person Who Can Provide Rule 68 Information Concerning Third Parties, 8 November 2006.

⁴⁹ Cf. *Haradinaj et al.* Decision Extending April 2006 Decision to Balaj and Brahimaaj, *supra* note 26, p. 2 (considering that “it is in the interests of justice that all three defence teams have access to the same unredacted statements” for which disclosure was ordered in the April 2006 Decision); *Prosecutor v. Limaj, Bala, and Musliu*, Case No. IT-03-66-A, Decision on Haradinaj Motion for Access, Balaj Motion for Joinder, and Balaj Motion for Access to Confidential Materials in the *Limaj* Case, 31 October 2006, para. 18 (granting Brahimaaj access to the same confidential material provided to Haradinaj and Balaj “in the interests of justice”, even though he did not himself make a motion for access and did not move to join Haradinaj’s motion).

⁵⁰ Response, para. 31 (explaining that the Response Annex was filed *ex parte* “due to its highly sensitive information about witnesses that justifies the retention, not the removal, of existent protective measures”).

is satisfied that this filing has properly been given *ex parte* status.⁵¹ Balaj has omitted to show good cause for filing the Balaj Motion confidentially,⁵² and the Trial Chamber is of the view that this document contains no sensitive information warranting its confidential status. The Chamber will therefore order the Registry to lift the confidentiality of the Balaj Motion.⁵³

IV. DISCUSSION

A. Applicable Legal Standard for Modification of Protective Measures

15. The parties seem to be in agreement regarding the standard to be applied when re-assessing protective measures granted in an earlier decision. Haradinaj invokes the April 2006 Decision as establishing a precedent whereby the Accused retain the ability to apply for variations of the protective-measures regime as trial approaches and circumstances change.⁵⁴ The Prosecution appears to concur with this view, but adds that the Accused, in making such an application, have a duty to “rebut the *status quo* of the continuing exceptional circumstances that originally warranted the ordering of protective measures”⁵⁵ by demonstrating a “material change of individual circumstances”.⁵⁶

16. The Trial Chamber considers that the parties have, in general, set forth the correct standard. The Chamber in the April 2006 Decision recognised that, while “the increasing proximity of trial does not diminish ‘exceptional circumstances’ within the meaning of Rule 69(A)”, “the nearing start date of trial proceedings certainly has an impact on balancing the right of the accused to a fair

⁵¹ See *Haradinaj et al.* 12 October 2006 Order, *supra* note 3, p. 3 (holding that “*ex parte* filings ... should be accepted only where disclosure to the other party of the information conveyed in the filing would likely prejudice unfairly either the party making the filing, or some person involved in or related to that filing” and that “the party making the filing is under an obligation to identify why disclosure of the filing to the other party would cause such prejudice”); *Haradinaj et al.* 20 May 2005 Decision, *supra* note 5, pp. 4–5 (same).

⁵² See *Haradinaj et al.*, Decision on Motion to Amend the Indictment and on Challenges to the Form of the Amended Indictment, 25 October 2006 (“*Haradinaj et al.* Indictment Decision”), para. 5 (Trial Chamber recalling its many statements that Article 20(4) of the Statute of the Tribunal and Rule 78 demand that all proceedings before the Tribunal take place in public unless good cause can be shown to the contrary, and lifting the confidential status of certain filings where no good cause had been shown); *Haradinaj et al.*, Order Requesting Assistance of UNMIK with Certain Investigations, 19 October 2006, p. 2:

Haradinaj, the other Accused, and the Prosecution must to do their utmost to maintain, as far as possible, the public and *inter partes* nature of these proceedings by making confidential or *ex parte* filings only when strictly necessary, and utilising confidential or *ex parte* annexes, where necessary, so that the filing itself may remain public[.]

⁵³ See *infra*. para. 25(h) (Disposition). Balaj may have filed the Balaj Motion on a confidential basis because the Balaj Motion mentions the name of one of the Trial Chamber’s legal officers. He does not explain that this is the reason for the filing’s confidentiality, however, nor indeed does he make any argument whatsoever attempting to show good cause. The Trial Chamber notes that the legal officer’s name could just as easily have been placed in a confidential annex to a public motion or simply omitted altogether, as it adds nothing of substance.

⁵⁴ Reply, paras. 2–3 (citing *Haradinaj et al.* April 2006 Decision, *supra* note 9, para. 27).

⁵⁵ Response, para. 12.

⁵⁶ *Ibid.* para. 13.

trial against the measures in place for the protection of victims and witnesses.”⁵⁷ In issuing the Protective Measures Decisions, the Trial Chamber and Pre-Trial Judge determined that protective measures were warranted for all the witnesses in question, and that such measures must apply not only in relation to the general public, but to the Accused as well.⁵⁸ As such, the Prosecution has already met its burden of showing that exceptional circumstances exist and will continue to exist in respect of these witnesses until at least 30 days before trial. Hence, the Prosecution need not proffer additional evidence and arguments justifying the maintenance of such measures every time one of the Accused makes an application to vary them, although it may, if it wishes, provide the Chamber with updated information on the exceptional circumstances of a given witness. Instead, it is the Accused who must demonstrate that, notwithstanding the continued existence of exceptional circumstances, their right to adequately investigate and prepare their respective cases now dictates that the protective measures of a given witness be lifted immediately, and not 30 days prior to trial.⁵⁹ The Chamber has applied this standard in evaluating the Motion.

B. Inadvertent Revelation of the Identities of Witnesses with Pseudonyms

17. Haradinaj’s first argument is that the Prosecution has already disclosed to him, inadvertently through other materials, the identities of 19 of the 20 witnesses with pseudonyms to whose unredacted statements he seeks access.⁶⁰ He appends, as an annex to the Motion, a letter sent to the Prosecution in which he lists the pseudonyms of 16 of these witnesses, the counts of the Indictment to which they relate, and a “possible” or “likely” identity;⁶¹ in the Motion and Reply he purports to have identified three additional witnesses.⁶² In most cases, Haradinaj lists what is ostensibly the actual name of the witness, but in three instances he merely identifies the witness as, for example, a “relative” or “brother” of another witness in this case.⁶³ He argues that, as a result of these revelations, “it is ... pointless to keep the names redacted for the Defence”.⁶⁴ All redactions of the identities and other identifying information of these witnesses should therefore be lifted, so that he

⁵⁷ *Haradinaj et al.* April 2006 Decision, *supra* note 9, para. 27.

⁵⁸ See *Blagojević et al.* Decision, *supra* note 3, para. 15 (holding that, in making the initial determination as to whether exceptional circumstances exist, “the ‘danger’ or ‘risk’ to the victims or witnesses if their identities or whereabouts were to be disclosed to the Accused and their defence teams is what must be considered, and not the danger or risk if the identity of victims or witnesses were disclosed to the public”) (emphasis removed).

⁵⁹ See *Haradinaj et al.* April 2006 Decision, *supra* note 9, paras. 24–27.

⁶⁰ Motion, para. 7.

⁶¹ See *ibid.*, Confidential Annex A (purporting to identify Witnesses SST7/01, SST7/02, SST7/04, SST7/08, SST7/09, SST7/10, SST7/14, SST7/16, SST7/17, SST7/19, SST7/20, SST7/21, SST7/22, SST7/25, SST7/26, and SST7/27).

⁶² See *ibid.* para. 7 (purporting to identify Witnesses SST7/18 and SST7/30); Reply, para. 11 (purportedly identifying SST7/29).

⁶³ See *ibid.*, Confidential Annex A.

⁶⁴ *Ibid.* para. 8.

can “be fully informed” about each witness, the allegations made by the witness, and “the names of the persons whom the witness claims to have met at the relevant time”.⁶⁵ In the Reply, Haradinaj emphasises that the revelation of these witnesses’ identities by the Prosecution has removed any “legitimate continuing interest” in maintaining confidentiality vis-à-vis him and his defence team.⁶⁶

18. The Prosecution responds that, even if it has inadvertently revealed the identity of a given witness to Haradinaj and the other Accused, such revelation does not alone justify lifting the redactions of the witness’s identifying information from his or her statement or from those of other witnesses.⁶⁷ The Prosecution submits that Haradinaj is merely “guessing” about the witnesses’ identities, and takes no position on whether his purported identifications are correct.⁶⁸

19. Although the Trial Chamber similarly expresses no view on whether Haradinaj has correctly identified any of these 19 witnesses, it notes with concern the possible revelation of the identities of witnesses determined by the Chamber and Pre-Trial Judge to be in sufficient danger to warrant the assignment of pseudonyms. The Chamber need not remind the Prosecution that exposing the identities of these witnesses to persons or entities outside the Office of the Prosecutor, this Trial Chamber, and the Tribunal’s Registry—including, for the time being, the three Accused and their defence teams—would constitute a violation of the Protective Measures Decisions.

20. Nevertheless, in relation to Haradinaj’s submission that such inadvertent revelation justifies the lifting of the protective measures of these witnesses for him and his team, the Trial Chamber agrees with the Prosecution. Whether or not he has correctly guessed the identity of any of these witnesses is irrelevant to the legal test to be applied in deciding whether the relevant redactions should be lifted. As discussed above,⁶⁹ Haradinaj must show that his right to adequately prepare his case necessitates the removal of the redactions in spite of the continued existence of exceptional circumstances. To hold otherwise would only serve to encourage the sort of behaviour in which Haradinaj has engaged here and which, in the Chamber’s view, also contravenes the Protective Measures Decisions: Haradinaj has taken advantage of the Prosecution’s carelessness to cobble together what he believes to be the true identities of persons whose identities the Chamber and Pre-Trial Judge determined must be kept secret, even from him. This submission of Haradinaj is accordingly dismissed.

⁶⁵ *Ibid.*

⁶⁶ Reply, para. 10.

⁶⁷ Response, para. 18. *Accord ibid.* para. 34.

⁶⁸ *Ibid.* paras. 21–22.

⁶⁹ *See supra* para. 16.

C. Whether the Lifting of Protective Measures Is Warranted for the Witnesses in Question

21. The Trial Chamber now analyses the parties' arguments concerning the 40 witnesses to whose unredacted statements Haradinaj seeks access. Since this analysis requires the Trial Chamber to discuss sensitive information that has not been placed in the public domain, it appears in the confidential Annex to this Decision.

22. As the Trial Chamber concludes in the Annex,⁷⁰ Haradinaj has demonstrated that his right to adequately prepare his defence necessitates, at this time, the disclosure to him of several of the witness statements in question without redaction, notwithstanding the continued existence of exceptional circumstances in respect of these witnesses. These statements are those of the witnesses listed in the first sentence of paragraph 15 of the Annex. The Chamber will accordingly order that the Prosecution effect such disclosure pursuant to Rule 66, although the Prosecution may leave intact those redactions that conceal the identifying information of other witnesses whose identity has not yet been disclosed to Haradinaj. With respect to all other witnesses subject to the Motion, the Trial Chamber is of the view that the disclosure of their unredacted statements to Haradinaj 30 days before trial will give him sufficient time to adequately prepare his case. The Chamber notes in this regard that 30 days before trial is a relatively lengthy period of time when compared to the delayed disclosure ordered in several decisions of this Tribunal.⁷¹

23. Two key factors that have motivated the Trial Chamber's decision to allow Haradinaj access to the unredacted statements of the witnesses listed in the first sentence of paragraph 15 of the Annex are the fast approaching start date of trial, which may begin as early as February 2007,⁷² and the narrow nature of the disclosure ordered—that is, to the Accused and their defence teams only.⁷³

⁷⁰ See paras. 4, 15 of the Annex, *infra*.

⁷¹ See, e.g., *Popović et al.* Decision, *supra* note 4, p. 6 (ordering the disclosure of the unredacted statements of certain witnesses "no later than thirty days before the anticipated date of their respective testimony"); *Blagojević et al.* Decision, *supra* note 3, p. 14 (same); *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution's Fourth Omnibus Motion for Leave to Amend the Witness List and Request for Protective Measures, 21 November 2003, p. 6 (ordering disclosure of the unredacted statements of several witnesses "to the *amici curiae* not less than 30 days, and to the Accused and his appointed associates not less than 21 days, before the witness is expected to testify"); *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion to Amend Witness List and for Protective Measures for Sensitive Source Witnesses, 13 March 2003, p. 9 (ordering disclosure of the unredacted statements of several witnesses "to the *amici curiae* not less than 30 days, and to the accused and his appointed associates not less than 10 days, before the witness is expected to testify").

⁷² See *Haradinaj et al.* Indictment Decision, *supra* note 52, para. 11 n. 33; *Haradinaj et al.*, Transcript of Status Conference, T. 187 (13 October 2006).

⁷³ Cf. *Haradinaj et al.* April 2006 Decision, *supra* note 9, para. 29 (finding that, "[w]hile no protective measures can provide an absolute safeguard against [improper disclosure of protected information], the risk can be minimised by issuing appropriate orders to the Haradinaj Defence").

As it has done at least twice in the past,⁷⁴ the Chamber will impose on Haradinaj, the other Accused, their respective defence counsel, counsel's legal assistants, and the defence investigators an obligation not to disclose this confidential material to members of the general public, except where directly and specifically necessary for the preparation and presentation of the Accused's respective cases. Haradinaj has pledged to abide by such a limitation, as he submits he has done in respect of the identical limitation imposed in the April 2006 Decision.⁷⁵ The Chamber will additionally place upon the Accused an obligation to maintain a log of all disclosures made by them and their defence teams to members of the general public, not only of the information provided to them as a result of the present Decision, but also of that given to them in the wake of the April 2006 Decision. The Accused shall surrender this log to the Trial Chamber for inspection upon request.

24. The Trial Chamber has had no credible indication that the Accused have violated the limitations laid down in past decisions concerning the further disclosure of materials to members of the general public. The Chamber remains unconvinced by the Prosecution's broad and unsubstantiated claim that "the principal threats to the lives of prosecution witnesses in this case emanate from these Accused and persons close to them", and it does not agree with the Prosecution that the narrow disclosure ordered in this Decision is untenable.⁷⁶

V. DISPOSITION

25. For the reasons discussed above, pursuant to Articles 20, 21, and 22 of the Statute of the Tribunal and Rules 54, 65 *ter*, 66, 69, 75, and 126 *bis* of the Rules, the Trial Chamber hereby grants the Motion in part, and orders as follows:

- a. Haradinaj and the Prosecution are granted leave to exceed the word limit set forth in the Practice Direction.
- b. Haradinaj is granted leave to file the Reply.
- c. For purposes of this Disposition, the term "Defence teams" includes, exhaustively, Haradinaj, Balaj, and Brahimaj, their respective defence counsel, counsel's legal assistants, and the defence investigators.
- d. In variation of the Protective Measures Decisions, the Prosecution shall disclose to all three Accused the unredacted statements of the witnesses listed in the first sentence of paragraph 15 of the confidential Annex within two weeks of the issuance of this Decision.

⁷⁴ See *ibid.* p. 10; *Haradinaj et al.*, Order on Motions for Access to Confidential Material, 27 September 2006, pp. 6–7.

⁷⁵ See Motion, para. 6; Reply, paras. 16–17.

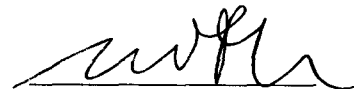
⁷⁶ Response, para. 23. See also *Brđanin and Talić* July 2000 Decision, *supra* note 3, para. 27 (finding that there was "some justification" behind the complaint of defence counsel that their integrity had been impugned by Prosecution assertions that they would improperly interfere with witnesses); *ibid.* para. 28 (holding that there must be "specific evidence of ... a risk relating to particular witnesses" to justify non-disclosure of a witness's identity to the accused).

- e. Save as is directly and specifically necessary for the preparation and presentation of the Accused's respective cases, the Defence teams shall not disclose to any person, organisation, or entity other than the Judges of the Tribunal, the staff of the Trial Chamber and the Tribunal's Registry, and the Prosecution:
 - i. the names, identifying information, or whereabouts of any of the individuals referred to in subparagraph (d) above; or
 - ii. any evidence (including documentary, physical, or other evidence) or any written statement of any of the individuals referred to in subparagraph (d) above, or the substance, in whole or part, of any such non-public evidence, statement, or prior testimony.
- f. If the Defence teams find it directly and specifically necessary to disclose such information for the preparation and presentation of the Accused's respective cases, the Defence teams shall inform each person to whom non-public material or information is shown or disclosed that he or she is not to copy, reproduce, or publicise such material or information, 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 teams when it is no longer necessary for the preparation and presentation of the Accused's respective cases.
- g. The Defence teams shall keep a log of all disclosures of the information referred to above. They shall also keep a log of all disclosures occurring subsequent to the date of the present Decision of the information disclosed to them as a result of the April 2006 Decision. These log entries shall include to whom the information in question was disclosed, on what date, and for what purpose. This log shall be made available to the Trial Chamber upon request.
- h. The Registry shall lift the confidentiality of the Balaj Motion.

26. The Motion is denied in all other respects.

27. Balaj's request to establish a regime by which all future decisions apply automatically to all three Accused is denied.

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



Carmel Agius
Presiding

Dated this twenty-second day of November 2006
At The Hague
The Netherlands

[Seal of the Tribunal]