

ANNEX B

IT-98-32/1-PT
~~D-88-D-94~~
~~02 NOVEMBER 2005~~

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**UNITED
NATIONS**



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-98-32/1-PT
Date: 2 November 2005
Original: English

IN THE TRIAL CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge O-Gon Kwon
Judge Iain Bonomy

Registrar: Mr. Hans Holthuis

Decision of: 2 November 2005

THE PROSECUTOR

v.

**Milan LUKIĆ &
Sredoje LUKIĆ**

**DECISION ON PROSECUTOR'S MOTION FOR
ORDER ON PROTECTIVE MEASURES**

Office of the Prosecutor:
Mr. Mark Harmon

Counsel for the Accused:
Mr. Stevo Bezbradica

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 (the “Tribunal”) is seized of a motion from the Office of the Prosecutor (“Prosecution”) concerning protective measures for victims and witnesses, and hereby renders a decision thereon.

A. Submissions of the Parties

1. On 5 October 2005, the Prosecution filed a partly confidential, partly *ex parte* “Prosecutor’s Motion Pursuant to Rules 11 *bis*(D) and 75(F)(G) of the Rules for Order to Maintain Inforce [*sic*] and Vary Protective Measures” (“Motion”). In its Motion, the Prosecution requests three forms of relief:

- (a) an order from the Trial Chamber that general and specific protective measures granted by Trial Chamber II in the case *Prosecutor v. Mitar Vasiljević* (“*Vasiljević* case”) remain in force;
- (b) that these protective measures be extended in their entirety to cover the accused Milan Lukić and Sredoje Lukić; and
- (c) that the Trial Chamber note the Prosecution’s right, at any stage of proceedings in this case, to file any further motion requesting protective measures for additional victims and witnesses, and to file any further motion seeking to rescind, vary or augment existing protective measures.

The protective measures that the Prosecution seeks to have applied in the present case were granted by Trial Chamber II in the *Vasiljević* case in a Decision of 8 September 2000,¹ an Order of 26 September 2000,² and an Order of 24 July 2001.³

2. On 17 October 2005, the Defence for Sredoje Lukić (“Defence”) filed a “Defence Counsel’s Response to Prosecutor’s Motion pursuant [*sic*] Rules 11 *bis*(D) and 75(F)(G) of the Rules for Order to Maintain in Force and Vary Protective Measures” (“Response”). In its Response, the Defence agrees that the protective measures granted by Trial Chamber II in the *Vasiljević* case in its Decision of 8 September and Order of 26 September 2000 should be applied in the present case. The Defence does not, however, agree that the measures granted in the Order of 24 July 2001

¹ *Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-PT, Decision on Motion by Prosecution for Protective Measures, 8 September 2000.

² *Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-PT, Order, 26 September 2000.

should remain in force and be extended to Sredoje Lukić.⁴ In particular, these measures are that certain witnesses identified by pseudonym should be referred to at all times by their pseudonym, and that these witnesses identified by pseudonym should be shielded from public view when testifying before the International Tribunal. The Defence argues that the Prosecution has not demonstrated the exceptional circumstances required to justify the non-disclosure of the identities of these witnesses.⁵ The Defence further argues that the trial of Sredoje Lukić cannot be fair if the accused cannot see the statements of witnesses against him with knowledge of their identity.⁶ The Defence concludes that the Trial Chamber should order the Prosecution to comply with its obligation under Rule 66(A) of the Rules of Procedure and Evidence of the International Tribunal (“Rules”) to supply each of the accused with unredacted copies of witness statements supporting the indictment.⁷

3. On 25 October the Prosecution filed a “Prosecutor’s Application for Leave to Reply and Reply to the Defence Counsel’s Response to Prosecutor’s Motion pursuant to Rules 11 *bis*(D) and 75(F)(G) of the Rules for Order to Maintain in Force and Vary Protective Measures” (“Reply”). The Reply asserts that the Response “contains misconceptions as to the effect of the several orders for protective measures” and that, as a result of Rule 75(F), the protective measures contained in the Order of 24 July 2001 remain in force in the present case.⁸ The Prosecution argues that the Order of 24 July 2001 is directed at the protection of witnesses *vis-à-vis* the public, and does not preclude disclosure to the Defence of their identities.⁹ It further clarifies that it has disclosed to the Defence material supporting the indictment in the present case, but that this material has been redacted to remove the names and identifying information of witnesses.¹⁰ The Prosecution seeks, by its Motion, an order from the Trial Chamber putting in place the same protective measures as were contained in the Order of 8 September 2000, before it will disclose to the Defence the material supporting the indictment in unredacted form.¹¹

³ *Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-PT, Order on Protective Measures for Witnesses at Trial, 24 July 2001.

⁴ Response at para. 7.

⁵ Response at para. 10.

⁶ Response at para. 18.

⁷ Response at para. 19.

⁸ Reply at paras. 2 and 4.

⁹ Reply at para. 5.

¹⁰ Reply at para. 7.

B. Discussion

4. The submissions of the Prosecution and the Defence demonstrate some confusion over the protective measures granted in the *Vasiljević* case and the effect of Rule 75(F) and (G). Indeed, the Motion itself is not sufficiently specific as to the exact nature of the protective measures that the Prosecution seeks to have applied in the present case, generating the “misconception” on the part of the Defence, which it asserts in its Reply.

5. As noted above, Trial Chamber II granted certain protective measures in the *Vasiljević* case in the following decisions:

(a) In its Decision On Motion by Prosecution for Protective Measures, of 8 September 2000, the Trial Chamber ordered that the Prosecution should provide the defence in that case with copies in unredacted form of material supporting the indictment, pursuant to Rule 66(A)(i) within a certain time-period (several months later than the 30-day time-limit specified in Rule 66(A)(i)), provided that, should the Prosecution file a motion for protective measures with regard to particular witnesses or particular statements, it need not supply unredacted copies of that material until the motion for protective measures is disposed of. The Trial Chamber further ordered the defence in that case, *inter alia*, not to disclose to the public the names, identifying information or whereabouts of any witnesses, or potential witnesses, identified to it by the Prosecution, or any evidence or written statement of a witness or potential witness;

(b) In its Order of 26 September 2000, the Trial Chamber varied the Decision of 8 September to the extent that the order to disclose material supporting the indictment to the defence in that case in unredacted form was stayed until further order;

(c) In its Order on Protective Measures for Witnesses at Trial, issued on 24 July 2001, the Trial Chamber granted a motion from the Prosecution that certain witnesses should be referred to at all times in the course of their testimony, or whenever referred to in the course of proceedings, by pseudonym. The Trial Chamber also ordered that these witnesses be shielded from public view when testifying before the International Tribunal.

6. It is therefore clear that Trial Chamber II ordered two forms of protective measures in the *Vasiljević* case. One of these was the protection of witnesses from public identification. The other was the delayed disclosure of unredacted material supporting the indictment to the defence in that

¹¹ Reply at para. 10.

case, such that the identities of certain witnesses whose statements were part of the material supporting the indictment was not made known to the defence until a later date.

7. Rule 75(F) provides that:

Once protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal (the "first proceedings"), such protective measures:

- (i) shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal (the "second proceedings") unless and until they are rescinded, varied or augmented in accordance with the procedure set out in this Rule; but
- (ii) shall not prevent the Prosecutor from discharging any disclosure obligation under the Rules in the second proceedings, provided that the Prosecutor notifies the Defence to whom the disclosure is being made of the nature of the protective measures ordered in the first proceedings.

By virtue of this provision, the Trial Chamber finds that any protective measures granted in the *Vasiljević* case automatically continue to have effect in the present case, insofar as those protective measures relate to the protection of witnesses from public identification. The Prosecution's Motion is unnecessary unless it seeks in some way to rescind, vary, or augment these protective measures, triggering the application of Rule 75(G). The majority of the Trial Chamber, Judge Kwon dissenting, also finds that the delayed disclosure of unredacted Rule 66(A)(i) material is also a form of protective measure to which Rule 75(F) applies, and the Prosecution's Motion is similarly unnecessary.¹²

8. The Prosecution seems to take the view that by seeking to have the protective measures granted in the *Vasiljević* case extended to the present case, this constitutes a variation of their terms. However, the effect of the term "*mutatis mutandis*" in Rule 75(F)(i) is to render a motion for variation unnecessary when the only variation sought is to ensure that the substance of the protective measures granted in one case continues to apply in another case.

9. The appropriate action for the Prosecution to have taken would have been to disclose redacted Rule 66(A)(i) material to the Defence, while informing it of the existence of the protective

¹² Judge Kwon dissenting on the application of Rule 75(F) to delayed disclosure of Rule 66(A) material. See "Dissenting Opinion of Judge O-Gon Kwon", appended to *Prosecutor v. Lazarević & 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.

measures ordered in the *Vasiljević* case and reminding it of their continued application. However, it would appear from the Reply that the Prosecution has disclosed the Rule 66(A)(i) material to the Defence in a redacted form, but that it is willing to provide all of that material in unredacted form once the protective measures contained in the 8 September 2000 Order are in place. Given that these protective measures are automatically carried over to the present case by virtue of Rule 75(F), it would therefore appear that the delayed disclosure of Rule 66(A)(i) material in unredacted form was unnecessary.

10. The Trial Chamber therefore finds that the first two forms of relief sought in the Motion are unnecessary insofar as they relate to the protection of witnesses from public identification, in that the protective measures granted in the *Vasiljević* case continue in effect in the present case, until such time as they are rescinded, varied or augmented. For the same reason, the majority of the Trial Chamber, Judge Kwon dissenting, also finds that the first two forms of relief sought in the Motion are unnecessary insofar as they relate to delayed disclosure of unredacted Rule 66(A)(i) material.¹³ The Trial Chamber further notes that the Prosecution may file a motion at any time in the present proceedings requesting additional protective measures, or the rescission, variation or augmentation of existing protective measures, and that, therefore, the third form of relief sought in the Motion is also unnecessary.

11. For these reasons, pursuant to Rule 126 *bis* and Rule 54 of the Rules, the Trial Chamber **HEREBY UNANIMOUSLY:**

GRANTS LEAVE to the Prosecution to file its Reply;


REMINDS the Defence that it must comply with the directions contained in the Order issued by Trial Chamber II on 8 September 2000, in the *Vasiljević* case; and

DENIES the Motion insofar as it relates to measures protecting witnesses from public identification,

and also, **BY A MAJORITY**, Judge Kwon dissenting,¹⁴

DENIES the Motion insofar as it relates to delayed disclosure of Rule 66(A)(i) material.

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



Judge Robinson
Presiding

Done this second day of November 2005
At The Hague
The Netherlands

[Seal of the Tribunal]

¹³ *Ibid.*

¹⁴ *Ibid.*