



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-04-74-T
Date: 20 March 2008
Original: ENGLISH
French

IN TRIAL CHAMBER III

Before: Judge Jean-Claude Antonetti
Judge Árpád Prandler
Judge Stefan Trechsel
Reserve Judge Antoine Kesia-Mbe Mindua

Registrar: Mr Hans Holthuis

Decision of: 20 March 2008

THE PROSECUTOR

v.

**Jadranko PRLIĆ
Bruno STOJIĆ
Slobodan PRALJAK
Milivoj PETKOVIĆ
Valentin ČORIĆ
Berislav PUŠIĆ**

PUBLIC

Decision on Slobodan Praljak's Motion for Protective Measures

The Office of the Prosecutor:

Mr Kenneth Scott
Mr Douglas Stringer

Counsel for the Accused:

Mr Michael Karnavas and Ms Suzana Tomanović for Jadranko Prlić
Ms Senka Nožica and Mr Karim A. A. Khan for Bruno Stojić
Mr Božidar Kovačić and Ms Nika Pinter for Slobodan Praljak
Ms Vesna Alaburić and Mr Nicholas Stewart for Milivoj Petković
Ms Dijana Tomašegović-Tomić and Mr Dražen Plavec for Valentin Čorić
Mr Fahrudin Ibršimović and Mr Roger Sahota for Berislav Pušić

TRIAL CHAMBER III (“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”),

SEIZED of “Slobodan Praljak’s Motion Requesting Limited Protective Measures in Order to Avoid Requesting “Category B” Protective Measures”, filed on 5 March 2008 by Counsel for the Accused Praljak (“Praljak Defence”), in which the Praljak Defence requests the Chamber to order the Office of the Prosecutor (“Prosecution”): (1) to inform the Praljak Defence before attempting to contact a small number of sensitive witnesses and inform it of the times and places of the meetings between the Prosecution and these sensitive witnesses (“First Request”) and (2) not to make inquiries of any employer, neighbour or government official of the Republic of Bosnia and Herzegovina about the said sensitive witnesses (“Second Request”) (together the “Motion”),

NOTING the “Decision Establishing Guidelines for Requests for Protective Measures for Defence Witnesses”, rendered by the Chamber on 22 February 2008, in which the Chamber adopted several guidelines for the Defence in respect of any potential requests for protective measures for its witnesses (“Decision of 22 February 2008”),

NOTING the “Prosecution Response Opposing the Praljak Defence Motion Requesting Limited Protective Measures in Order to Avoid Requesting “Category B” Protective Measures”, filed confidentially by the Prosecution on 12 March 2008, in which the Prosecution partially objects to the First Request and objects to the Second Request (“Response”),

NOTING the oral decision rendered by the Chamber on 17 March 2008, in which the Chamber in particular set out the disposition of this decision and indicated to the Praljak Defence that it would render this decision promptly,¹

¹ Oral Decision of 17 March 2008, court transcript in French (“T(F)”), pp. 27240-27242.

CONSIDERING that in the Decision of 22 February 2008, the Chamber made the distinction between the protective measures which will prevent a witness's identity or location from being disclosed to the public ("Category A Protective Measures") and the protective measures intended to delay the disclosure of a witness's identity to the other parties to the trial ("Category B Protective Measures"),

CONSIDERING that within the context of this decision, the Chamber specifically invited the Defence to file the requests for Category A Protective Measures at the latest at the same time as the filing of the lists pursuant to Rule 65 *ter* (G) of the Rules, that is 31 March 2008, and the requests for Category B Protective Measures by 17 March 2008 at the latest,

CONSIDERING that in the Motion, the Praljak Defence immediately points out that it is currently in the process of selecting the witnesses who are likely to request the protective measures sought in the Motion ("Sensitive Witnesses") and that it anticipates that there will be approximately 10 or 12 Sensitive Witnesses,²

CONSIDERING that in support of the First Request, the Praljak Defence submits that it continuously informed the Prosecution before contacting a Prosecution witness and that on such occasions it gave the Prosecution the opportunity to be present during meetings between the Praljak Defence and a Prosecution witness,³

CONSIDERING that in support of the Second Request, the Praljak Defence argues that the Prosecutor's inquiries with third parties in Bosnia and Herzegovina may exacerbate the now prevailing climate of fear in Bosnia and Herzegovina and, as a result, cause professional and personal harm to the Defence witnesses,⁴

CONSIDERING that the Praljak Defence generally argues that the Chamber's granting of the Motion would result in greater transparency, fewer omissions and potential complications during the Praljak Defence case; that, conversely, if the Chamber does not grant the Motion, the risk of witnesses being intimidated would

² Praljak Motion, p. 2.

³ Praljak Motion, p. 3.

⁴ Praljak Motion, pp. 3 and 4.

increase and that such a decision would result in the unequal treatment of the parties to the trial and a waste of judicial resources,⁵

CONSIDERING finally that the Praljak Defence submits that the purpose of the Motion is to minimize, and even eliminate, the number of witnesses seeking Category B Protective Measures,⁶

CONSIDERING that in the Response, the Prosecution first states that it agrees to the First Request and that, consequently, it will inform the Praljak Defence before contacting the Sensitive Witnesses and will provide it with the information regarding the times and places of the Prosecution meetings with them,⁷

CONSIDERING nonetheless that the Prosecution objects to the Chamber's ordering it to first inform the Praljak Defence before contacting the Sensitive Witnesses,⁸

CONSIDERING that as regards the Second Request, the Prosecution submits that the Motion does not satisfy the conditions for granting protective measures as set out in Rules 69 and 75 of the Rules of Procedure and Evidence (the "Rules"),⁹

CONSIDERING that, more specifically with regard to the application of Rule 75 of the Rules, the Prosecution submits that the Motion contains no information about the Sensitive Witnesses and that as a result the Chamber is not in a position to determine whether the requests for protective measures are necessary and appropriate,¹⁰

CONSIDERING furthermore that according to the Prosecution, neither the Statute of the Tribunal ("Statute") nor the Rules contain a provision limiting the Prosecutor's authority to conduct his investigations during the trial and that the Prosecution, like the Defence, has the right and the duty to investigate witnesses and prepare for the cross-examination of the witnesses of the opposing party,¹¹

⁵ Praljak Motion, pp. 3 to 5.

⁶ Praljak Motion, p. 3.

⁷ Response, p. 3.

⁸ Response, p. 3.

⁹ Response, pp. 4 to 7.

¹⁰ Response, pp. 5 and 6.

¹¹ Response, pp. 6 and 7.

CONSIDERING that with regard to the First Request, the Chamber takes note of the Prosecution's agreement to inform the Praljak Defence before contacting the Sensitive Witnesses and to provide it with the information on the times and places of its meetings with them,

CONSIDERING nonetheless that the Chamber sees no need or basis to order the Prosecution to do so, but invites the Prosecution to inform the Praljak Defence each time, as a matter of courtesy and precaution, of its intention to contact a Sensitive Witness,

CONSIDERING as a result that the Chamber partially grants the First Request,

CONSIDERING that in respect of the Second Request, the Chamber first raises the question as to whether the Prosecution's power to investigate witnesses of the opposing party during the defence case may be limited to the extent requested by the Praljak Defence in its Second Request,

CONSIDERING that Article 18 (2) of the Statute and Rule 39 of the Rules authorize the Prosecution to question suspects, hear victims and witnesses, collect evidence and conduct on-site investigations; that nevertheless these provisions deal with the initial investigation and investigation phase conducted before the pre-trial and trial phase, such that they are of limited assistance in the context of the present case,

CONSIDERING that the absence of similar rules applying to the pre-trial and trial phase must not be interpreted as a prohibition on the Prosecution to conduct the necessary investigations during these phases of the case; that in fact, although silent on this issue, the Rules make no provision which might suggest that restrictions must be placed on the Prosecution's power to investigate witnesses of the opposing party during the defence case,

CONSIDERING, of course, that certain principles apply, such as those related to tampering with witnesses or any other persons,¹²

¹² See Rule 77 (A) (iv) and (v) of the Rules.

CONSIDERING that in the opinion of the Chamber, the Prosecution's power to investigate and verify the information provided by the witnesses of the opposing party through third parties during the defence case may prove necessary not only to prepare the cross-examination of the defence witnesses but also to ascertain the need to present rebuttal evidence,¹³

CONSIDERING that this power moreover dovetails the principle enshrined by the Appeals Chamber and in the subsequent case law according to which witnesses are not the property of the Prosecution or the Defence and the parties are equally entitled to question them,¹⁴ a principle not disputed by the Praljak Defence,

CONSIDERING that the Chamber consequently holds that the Prosecution's power to investigate witnesses of the opposing party during the presentation of the defence case is justified,

CONSIDERING that the exercise of this power may, where appropriate, be limited temporarily but solely in the context of a request for special protective measures seeking to delay the disclosure of the identity of a witness to the other parties to the trial, that is a request for Category B Protective Measures,

CONSIDERING nevertheless that the Praljak Defence did not present the Second Request in the context of such a request for protective measures,¹⁵ even though it was so instructed by the Decision of 22 February 2008,

¹³ See also: *The Prosecutor v. Mile Mrkšić, Miroslav Radić and Veselin Šljivančanin*, Case No. IT-95-13/1-T, "Decision on Prosecution's Motion to Interview Defence Witnesses", 1 September 2006 ("Mrkšić Decision").

¹⁴ *The Prosecutor v. Mile Mrkšić*, Case No. IT-95-13/1-AR73, "Decision on Defence Interlocutory Appeal on Communication with Potential Witnesses of the Opposite Party", 30 July 2003, para. 15; *The Prosecutor v. Mićo Stanišić*, Case No. IT-04-79-PT, "Decision on Prosecution's Motion for Protective Measures for Victims and Witnesses", 6 June 2005, para. 17. It is to be noted that these two decisions were rendered in the context of pre-trial proceedings. For the application of this principle at the trial phase, see *The Prosecutor v. Naser Orić*, Case No. IT-03-68-T, oral decision of 7 December 2005, T(F) pp. 14516-14521; *Mrkšić Decision*, p. 1.

¹⁵ The Chamber notes that although paragraphs 3, 4 and 20 of the Motion refer to Rules 69 and 75 (A) of the Rules, the Motion does not request the delayed disclosure of the identity of Sensitive Witnesses to the other parties to the trial, but amounts to an *alternative* to the requests for Category B Protective Measures. In support of this analysis, the Chamber refers in particular to paragraph 7 of the Motion which states: "*The aim and purpose of requesting these protective measures (...) is to minimize or eliminate the number of witnesses requiring Category B Protective Measures*".

CONSIDERING that, although not the case here, assuming the Praljak Defence had presented the Second Request in such a context, it must be noted that it did not provide the names or the exceptional circumstances justifying the requests for Category B Protective Measures, such that the Chamber would not have been in a position to ascertain whether the protective measures sought were necessary and appropriate for these witnesses,

CONSIDERING that, accordingly, for all of the reasons set out above, the Chamber denies the Second Request,

FOR THESE REASONS,

IN ACCORDANCE with Rules 54, 69, 70 and 75 of the Rules,

PARTIALLY GRANTS the Motion,

TAKES NOTE of the Prosecution's agreement to inform the Praljak Defence before contacting the Sensitive Witnesses and to provide it with the information on the times and places of its meetings with them, and **INVITES** the Prosecution to do so each time it intends to contact a Sensitive Witness,

DENIES the remainder of the Motion,

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

/signed/

Jean-Claude Antonetti
Presiding Judge

Done this twentieth day of March 2008
At The Hague
The Netherlands

[Seal of the Tribunal]