



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-99-36/2-PT
Date: 30 July 2008
Original: English

IN TRIAL CHAMBER II

Before: Judge O-Gon Kwon, Presiding
Judge Kimberly Prost
Judge Ole Bjørn Støle, Pre-Trial Judge

Registrar: Mr. Hans Holthuis

Decision of: 30 July 2008

PROSECUTOR

v.

STOJAN ŽUPLJANIN

PARTLY CONFIDENTIAL AND *EX PARTE*

**DECISION ON PROSECUTION'S MOTIONS FOR
PROTECTIVE MEASURES FOR VICTIMS AND WITNESSES**

The Office of the Prosecutor:

Ms Anna Richterova

Counsel for the Accused:

Mr Tomislav Višnjić

1. Trial Chamber II (“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 seized of the “Prosecution Motion for Protective Measures for Victims and Witnesses”, filed publicly by the Office of the Prosecutor (“Prosecution”) on 11 July 2008 (“First Motion”) and the “Prosecution Motion for Protective Measures for Victims and Witnesses and Notification of Protective Measures in Force with an *ex parte* Attachment”, filed confidentially by the Prosecution on 11 July 2008 (“Second Motion”).

2. On 24 July 2008, the Defence of the Accused, Stojan Župljanin, (“Defence”) filed publicly a “Response to Motion for Protective Measures for Victims and Witnesses” (“First Response”) and “Response to Prosecution Motion for Protective Measures for Witnesses from Other Cases” (“Second Response”).

1. First Motion

3. In the First Motion, the Prosecution seeks an order from the Trial Chamber to protect the confidentiality of materials disclosed to the Defence, and to protect the security and privacy of victims and witnesses. The Prosecution also seeks an order from the Trial Chamber that it may, in fulfilling its disclosure obligations under Rules 66 and 68 of the Rules of Procedure and Evidence (“Rules”), make certain redactions from the statements, transcripts and affidavits of victims, witnesses and potential witnesses. In the First Response, the Defence does not object to the First Motion except for one aspect of the redactions sought in that motion.

4. Article 20(1) of the Statute of the Tribunal (“Statute”) requires 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 provides that “the hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence”. The Trial Chamber takes note of the rights of the accused as set forth in Article 21 of the Statute and, in particular, the right of the accused to have adequate time and facilities for the preparation of his defence. Article 22 of the Statute requires the Tribunal to provide in its Rules for the protection of victims and witnesses including the “conduct of in camera proceedings and the protection of the victim’s identity”. There are provisions concerning the protection of victims and witnesses in the Rules. The Trial Chamber notes the obligations imposed by the Code of Professional Conduct for Defence Counsel Appearing before the International Tribunal.

(a) Redaction of whereabouts of witnesses and other persons

5. The Prosecution seeks authorisation to redact from materials disclosed under Rules 66 and 68 of the Rules information about the whereabouts and the personal identification numbers of potential witnesses and other persons.¹ The Defence does not object to the redactions sought by the Prosecution, except for redactions relating to “the present whereabouts of persons who are not [Prosecution] witnesses”.²

6. Rule 69(A) of the Rules provides that, in exceptional circumstances, the Prosecutor may apply to a 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. Rule 69(A) does not provide a blanket protection and places the onus upon the Prosecution to demonstrate, before protective measures will be granted, the exceptional circumstances justifying an order for non-disclosure.³

7. The Prosecution submits that “the former Yugoslavia, including the Republic of Bosnia and Herzegovina, remains a difficult environment for persons who agree to provide evidence before this Tribunal”.⁴ The Trial Chamber is of the view that this is not on its own sufficient to justify restrictions to the disclosure of information about the whereabouts of persons who gave statements to the Prosecution and/or may testify as Prosecution witnesses. The Trial Chamber, however, notes that the Defence does not object to redactions in respect of these persons. The Chamber finds that, in the circumstances, an order authorising such redactions is justified.

8. The Trial Chamber observes that the Prosecution does not allege the existence of exceptional circumstances in respect of persons other than those “who agree to provide evidence before this Tribunal”.⁵ The Trial Chamber finds that restrictions to the disclosure of information about the whereabouts of persons other than those who gave statements to the Prosecution and/or may testify as Prosecution witnesses may be, as the Defence submits,⁶ prejudicial to the preparation of the defence case. The Trial Chamber notes that the Prosecution may seek orders authorising redactions with respect to specific persons upon demonstrating the existence of exceptional circumstances.

¹ First Motion, para 7.

² First Response, paras 4-6.

³ See *Prosecutor v. Ante Gotovina*, Case No.: IT-01-45-PT, Decision on Prosecution Motion for Non-Disclosure to Public of Materials Disclosed Pursuant to Rules 66 and 68, 14 July 2006, p 5; *Prosecutor v. Mićo Stanišić*, Case No.: IT-04-79-PT, Decision on Prosecution’s Motions for Protective Measures for Victims and Witnesses, 6 June 2005, para 14.

(b) Non-disclosure to the Public and/or Media

9. The Prosecution seeks an order preventing disclosure of materials to the public and it submits that such disclosure may violate the privacy of victims and witnesses, and potentially compromise their security and expose them to the risk of harassment.⁷ The Trial Chamber is of the view that until the Prosecution seeks specific measures in relation to specific victims, witnesses or potential witnesses not currently enjoying protective measures and the Trial Chamber decides on whether any protective measures will be granted for specific victims, witnesses or potential witnesses, it is in the interest of justice at this stage of the proceedings that the identity of those persons who may require protective measures not be revealed to the public.

10. The Prosecution is seeking the Trial Chamber's ruling that "disclosure to the media is *per se* not reasonably necessary to allow the Defence to prepare for and participate in [the] proceedings [in this case]".⁸ The Trial Chamber is, however, of the view that the issue whether an exceptional disclosure to the public, including the media, of the material provided to the Defence by the Prosecution is "reasonably necessary" for the Defence's preparations for and participation in the proceedings should be considered on a case by case basis and that there is no need for the Trial Chamber to make a general ruling on this matter at this stage.

2. Second Motion

11. The Prosecution seeks the same protective measures in respect of the present proceedings as have been granted in other proceedings before the Tribunal.⁹ In the Second Response, the Defence does not object to the use of new pseudonyms or measures to keep identities from being disclosed to the public but does oppose a decision at this stage on the continuation of other protective measures and the delayed disclosure to the Defence of the identity of any witness.

12. Under Rule 75(F)(i) of the Rules, "once protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal [...], such protective measures [...] shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal". The Appeals Chamber held that "the meaning of the expression "*mutatis mutandis*" itself requires a flexible application of the principle enshrined in this rule and suggests the same kinds of protection given to a witness in one case should be automatically extended to the witness in a later case,

⁴ First Motion, para 12.

⁵ First Motion, para 12.

⁶ First Response, para 5.

⁷ First Motion, paras 4-5.

⁸ First Motion, para 13(a).

⁹ Second Motion, para 1.

regardless of whether this is literally continuation”.¹⁰ It was the “view of the Appeals Chamber that, if [sensitive witnesses in the *Brđanin* Case] are going to testify in another case, the information about them from the *Brđanin* Case should similarly be subject to delayed disclosure to the defendants in these other cases (unless an order pursuant to Rule 75(G) is made)”.¹¹

13. The Trial Chamber finds no reason to vary the protective measures granted in other proceedings to the witnesses listed in Annexes I and III to this Decision. These witnesses shall be given pseudonyms different from those granted to them in other proceedings. The Trial Chamber also confirms that the protective measure of delayed disclosure remains applicable in respect of the witness referred to in Annex III.¹²

14. The Trial Chamber, however, notes that the protective measures granted in other proceedings, by decisions and orders relied on by the Prosecution in the Second Motion, to the witnesses listed in Annex II to this Decision differ from those sought by the Prosecution in the Second Motion. Before the Trial Chamber decides on protective measures to be granted in respect of these witnesses, the Prosecution should clarify whether it seeks a continued application or a variation of measures granted in other proceedings before the Tribunal.

3. Disposition

For the foregoing reasons, pursuant to Articles 20 and 22 of the Statute and Rules 54, 69, 70, 73 and 75 of the Rules, the Trial Chamber **HEREBY GRANTS** the First and the Second Motions **IN PART** and **ORDERS** as follows:

- 1) For the purposes of this Decision:
 - (a) “the Prosecution” means the Prosecutor of the Tribunal and his staff;
 - (b) “the Defence” means only the Accused, Stojan Župljanin, and his Defence Counsel and immediate legal assistants and staff, and such other specific persons assigned by or listed with the Registry as part of his defence;

¹⁰ *Prosecutor v Radoslav Brđanin*, Case No. IT-99-36-A, Decision on Mićo Stanišić’s Motion for Access to All Confidential Materials in the *Brđanin* Case, 24 January 2007 (“*Brđanin* Decision”), para 17.

¹¹ *Brđanin* Decision, para 17.

(c) “the media” means all video, audio, electronic and print media personnel, including journalists, reporters, authors, television and radio personnel, their agents and representatives; and

(d) “the public” means and includes all persons, governments, organisations, entities, clients, associations, groups and media, other than the judges and staff of the Tribunal Chambers and Registry, the Prosecutor and the Defence, as defined above. “The public” specifically includes, without limitation, family, friends and associates of each accused, the media, the accused in other cases or proceedings before the Tribunal and/or national courts, and defence counsel in other cases or proceedings before the Tribunal and/or national courts.

2) For the purposes of this case and compliance with this Decision, the Registry shall maintain a list identifying each person who is part of or who represents the Defence. The Defence shall file an initial listing of its members within ten days of the date of this Decision, and the Registry shall be notified in writing of all changes to the list within ten days of such change occurring.

3) The Defence may not in any way, either directly or indirectly, disclose to the public (including the media) any of the materials (including, without limitation, witness testimony or statements) provided to it by the Prosecution, except as reasonably necessary to allow it to prepare for and participate in these proceedings and present a defence or as such material may become public in the course of public and open session proceedings in this case or as it may be disclosed to the public by the Prosecution. The Defence shall return to the Registry, at the conclusion of the proceedings of this case, all confidential or non-public disclosed material and copies thereof which have not become part of the public record.

4) If the Defence finds it directly and specifically necessary to disclose any of such material for the purposes outlined in paragraph 3 of the Disposition, it shall inform each person among the public to whom such material is shown or disclosed, that he or she shall not copy, reproduce or publicise such material, in whole or in part, 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 when such material is no longer necessary for the purposes outlined in paragraph 3 of the Disposition.

¹² *Brdanin* Decision, paras 17; 25.

- 5) Should a situation arise where any lawyer or staff member withdraws from or otherwise leaves the Defence, all of the material disclosed or provided to the Defence by the Prosecution, together with all copies of such material, held or possessed by that person will be transmitted or returned, without exception, to the person serving as Lead Counsel for the Defence at that time.
- 6) As a general protective measure for the purpose of disclosure to the Defence, the Prosecution may redact from the statements, affidavits and formal statements of victims, witnesses and potential witnesses:
- (a) any information which discloses, or might lead to the disclosure of, the current whereabouts of the maker of any such document and/or his or her family;
 - (b) any information contained within such documents which discloses, or might lead to the disclosure of, the current whereabouts of individuals named within them who have made witness statements which the Prosecution has already disclosed or which it intends to disclose; and
 - (c) in respect of persons referred to in subparagraphs 6(a) and (b) above, the personal identification number given to citizens of the former Yugoslavia which appears on statements taken by the Bosnian authorities.
- 7) If the Defence is aware or becomes aware of the current whereabouts of a witness or potential witness identified by the Prosecution, this information shall not be disclosed to the public (including the media), except to the limited extent reasonably necessary for the preparation and presentation of this case (as discussed above in paragraph 3 of the Disposition), and neither the Defence, nor anyone acting on its behalf, will approach a witness or potential witness identified by the Prosecution without prior written notice to the Prosecution, in such time and circumstances as will allow the Prosecution to take steps as may be necessary and appropriate to protect the security and privacy of the witness or potential witness. When contacting a witness or potential witness identified by the Prosecution, any member of the Defence must identify him or herself as working for the Defence.
- 8) To the extent reasonably necessary to allow the Defence to prepare for and participate in these proceedings and present a defence, the Defence may seek to obtain from the Prosecution the current whereabouts of a witness or potential witness.

9) Nothing herein shall preclude any party or person from seeking such other or additional protective measures or measures or a variation of the terms of this Decision, or from the Trial Chamber doing so *proprio motu*, as may be viewed appropriate concerning a specific witness or potential witness, or other evidence.

10) The witnesses listed in Annexes I and III to this Decision shall be permitted to testify with the same protective measures granted in other proceedings before the Tribunal; the specific protective measures granted for each witness are indicated in Annexes I and III.

11) The witnesses listed in Annexes I and III shall be given new pseudonyms, different from those granted to these witnesses in other proceedings before the Tribunal; the new pseudonym for each witness is listed in Annexes I and III. These pseudonyms shall be used whenever referring to the witnesses in question in the trial and related proceedings before the Tribunal and in discussions among parties to the trial.

12) The disclosure of the identity and statements of the witness referred to in Annex III shall be delayed until 30 days before the commencement of the trial in this case, unless an order is given by the competent Chamber to further delay the disclosure.

13) The name, address, whereabouts of, and identifying information concerning each of the witnesses identified in Annexes I and III to this Decision shall be sealed and not included in any public records of the Tribunal.

14) To the extent that the name, address, whereabouts of, or other identifying data of the witnesses identified in Annexes I and III is contained in existing public records of the Tribunal, that information shall be expunged from those documents.

15) All hearings to consider the issue of protective measures for the witnesses identified in Annexes I and III shall be held in closed session.

16) The public and the media may not photograph, video-record or sketch or in any manner record or reproduce images of the witnesses identified in Annexes I and III while they are in the precincts of the Tribunal.

17) The Prosecution shall, within 21 days from the issuing of this Decision, provide information as to whether it seeks variation of protective measures with respect to the witnesses listed in Annex II to this Decision;

STATES that any breach of this Decision will be dealt with in accordance with Rule 77 (“Contempt of the Tribunal”);

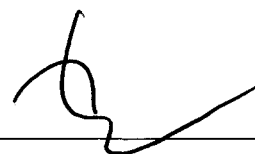
DENIES the First and Second Motions in all other respects.

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

Dated this thirtieth day of July 2008,

At The Hague

The Netherlands



Judge O-Gon Kwon
Presiding Judge

[Seal of the Tribunal]