

**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-04-75-PT
Date: 30 November 2011
Original: English

IN THE TRIAL CHAMBER

Before: Judge Guy Delvoie, Presiding
Judge Burton Hall
Judge Antoine Kesia-Mbe Mindua

Registrar: Mr. John Hocking

Decision: 30 November 2011

PROSECUTOR

v.

GORAN HADŽIĆ

PUBLIC

**DECISION ON PROSECUTION SECOND MOTION FOR
PROTECTIVE MEASURES FOR VICTIMS AND WITNESSES AND
DOCUMENTARY EVIDENCE**

The Office of the Prosecutor:

Mr. Douglas Stringer

Counsel for the accused:

Mr. Zoran Živanović

1. **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 “Prosecution’s Second Motion for Protective Measures for Victims and Witnesses and Documentary Evidence”, filed 1 November 2011 (“Motion”).

A. Submissions of the Parties

2. In the Motion, the Prosecution states that it is preparing Rule 66(A)(ii), Rule 66(B), and Rule 68 material (“material”) for disclosure to the Defence. It therefore seeks an order for protective measures and non-disclosure for these materials (witness statements, documents, and other materials).¹

3. The Defence responds that it does not oppose the Prosecution’s Motion in so far as it seeks prohibition of disclosure to the public; permission to redact information as to the whereabouts, identification numbers, or passport numbers of victims and witnesses; and the return of material by members of the Defence team leaving the case.² The Defence, however, opposes the protective measures related to the redaction from the material of information identifying any witnesses for whom delayed disclosure may be sought if this protective measure has not been granted in prior proceedings.³ The Defence also requests that the Trial Chamber require the Prosecution to disclose public/redacted and confidential/unredacted versions of the material.⁴

4. The Prosecution seeks leave to reply and replies that the parties are largely in agreement as to the protective measures that may be granted.⁵ In respect of delayed disclosure, the Prosecution states that it is in the process of reviewing and updating necessary witness-related information and that the majority of delayed disclosure witnesses have been granted this protective measure in prior proceedings. Moreover, the Prosecution states that it intends to apply to the Trial Chamber for delayed disclosure status for any witnesses who have not already been granted this protective measure.⁶ In respect of the Defence request for both public/redacted and confidential/unredacted

¹ Motion, paras 2-5.

² Defence Response to the Prosecution’s Second Motion for Protective Measures for Victims and Witnesses and Documentary Evidence, 14 November 2011 (“Response”), para. 5.

³ Response, paras 6-21.

⁴ Response, para. 22.

⁵ Prosecution Request for Leave to Reply and Reply to “Defence Response to Prosecution’s Second Motion for Protective Measures for Victims and Witnesses and Documentary Evidence”, 18 November 2011 (“Reply”), paras 1-3. The Prosecution notes that the Defence agrees that the materials disclosed to it by the Prosecution are confidential and should not be disclosed to the public, except as directly and specifically necessary for the case; the Prosecution may redact information as to the whereabouts, identification numbers, and passport numbers of the victims and witnesses; and members of the Defence team who withdraw or otherwise leave the Defence team shall hand over to Lead Counsel all the materials disclosed by the Prosecution. Reply, para. 3.

⁶ Reply, para. 4.

versions of the material, the Prosecution avers that no purpose would be served by this because the Defence will be able to disclose confidential materials to the public if directly and specifically necessary for the case. According to the Prosecution, all disclosure materials should be confidential *vis-à-vis* the public, except as necessary to enable the Defence to participate in the proceedings.⁷

B. Applicable Law

5. The Chamber notes that Article 20(4) of the Statute of the Tribunal requires that hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence. Article 20(1) requires the 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. Article 21(2) provides that the accused is entitled to a fair and public hearing of the charges against him, subject to Article 22, which requires the Tribunal to provide in its rules of procedure and evidence for the protection of victims and witnesses, including, but not limited to, the conduct of *in camera* proceedings and the protection of the victim's identity. Article 21(4)(b) requires that the accused have adequate time and facilities for the preparation of his defence.

6. Rule 66(A)(ii) of the Rules of Procedure and Evidence requires the Prosecution to disclose to the accused, within the time limit prescribed by the Chamber or by the Pre-Trial Judge, copies of the statements of all witnesses whom the Prosecution intends to call to testify at trial and copies of all transcripts and written statements taken in accordance with Rule 92 *bis*, Rule 92 *ter*, and Rule 92 *quater*. However, this disclosure requirement is expressly subject to Rule 53 and Rule 69. Rule 53 provides that, "in exceptional circumstances" and where the interests of justice require, non-disclosure to the public may be ordered with respect to any document or information. Rule 69 provides that "in exceptional circumstances", the Prosecution may apply to the Chamber for 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.

7. Rule 66(B) provides that the Prosecution shall, upon request, permit the Defence to inspect any books, documents, photographs, and tangible objects in the Prosecution's custody or control that are material to the preparation of the Defence or are intended for use by the Prosecution as evidence at trial or were obtained from or belonged to the accused.

8. Rule 68 lays out the obligation of the Prosecution to disclose to the Defence exculpatory and other relevant material. These disclosure obligations are subject to Rule 70, paragraph (B) of which provides that, if the Prosecution is in possession of information that has been provided to it on a

⁷ Reply, paras 5-6.

confidential basis and that has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without consent of the person or entity providing the initial information and shall in any event not be given in evidence without prior disclosure to the accused.

9. Rule 75(F) provides that any protective measures ordered for victims or witnesses in prior proceedings before the Tribunal continue to have effect in these proceedings unless and until such measures are eventually rescinded, varied, or augmented. Such continuation includes the protective measure of delayed disclosure pursuant to Rule 69.⁸

C. Discussion

10. In its “Decision on Prosecution Motion for Protective Measures for Victims and Witnesses and Documentary Evidence”, issued on 23 August 2011, the Trial Chamber granted protective measures in relation to material to be disclosed to the Defence by the Prosecution pursuant to Rule 66(A)(i).

11. At the status conference held on 10 November 2011, the Pre-Trial Judge indicated that, after the Chamber had issued its decision on the Defence’s preliminary motion, he would issue an order setting deadlines for various pre-trial tasks, including the disclosure of witness statements and transcripts pursuant to Rule 66(A)(ii).⁹ The decision on the preliminary motion was issued later that day,¹⁰ and the Pre-Trial Judge is in the process of formulating the pre-trial work plan for the case. Thus, no deadlines have been set yet for Rule 66(A)(ii) disclosure, and Prosecution is therefore poised to disclose such material to the Defence in advance of any deadlines to be set, subject to protective measures being granted to the material.

12. There are two contested issues in the Motion. First, the Prosecution seeks, at the present time, to withhold from the Defence information in the material related to the identity of witnesses who have been granted delayed disclosure in prior proceedings or for whom the Prosecution will apply for delayed disclosure. The Chamber is of the view that, at this early stage of the proceedings, it is appropriate for the Prosecution to withhold the identities of witnesses who have been granted delayed disclosure or for whom the Prosecution will apply for delayed disclosure. The Chamber notes, in this regard, that the Prosecution is disclosing the material *in advance* of any deadlines set by the Chamber. When the Pre-Trial Judge sets the deadline for the completion of all Rule 66(A)(ii)

⁸ *Prosecutor v. Brdanin*, Case No. IT-99-36-A, Decision on Mićo Stanišić’s Motion for Access to All Confidential Materials in the *Brdanin* Case, 24 January 2007, para. 17; see *Prosecutor v. Karadžić*, Case No. IT-95-5/18-PT, Decision on Protective Measures for Witnesses, 30 October 2008, para. 21.

⁹ T. 19 (10 November 2011).

¹⁰ Decision on Defence Motion Alleging Defects in Form of First Amendment Indictment, 10 November 2011.

material—that is, for all the statements and transcripts of the witnesses in the Prosecution’s case-in-chief—the Prosecution will also be expected to provide, with specificity, the decisions and/or orders wherein any witnesses were granted protective measures (including delayed disclosure) or a motion requesting protective measures, with specific reasons why that relief should be granted. And this will be well in advance of the commencement of the trial. The Prosecution should also be aware that the Chamber expects that the information relating to delayed disclosure witnesses will be provided to the Defence by no later than 30 days prior to the commencement of the trial.

13. Second, the Defence seeks public/redacted and confidential/unredacted versions of the material. The Prosecution’s position is that all the material is confidential, but may be disclosed by the Defence to members of the public, provided that the disclosure is directly and specifically necessary to participate in the proceedings. The Prosecution also states that no purpose would be served by attempting to distinguish between the two versions of the disclosed material. The Chamber disagrees. It is reasonable for the Defence to know what material will be confidential in the trial and what material will be public, and there is no need for the Prosecution to designate material as confidential if there is no intention for it to be used as such during the proceedings. Moreover, the Prosecution may designate as confidential material that may later become confidential, for example, the statement of a witness for whom the Prosecution intends to apply for protective measures. In respect of the Rule 66(A)(i) material, the Chamber ordered that the Prosecution disclose public/redacted and confidential/unredacted versions of the supporting material that accompanied the indictment.¹¹ In the “Prosecution’s Notice Regarding Rule 66(A)(i) Materials Disclosed on 8 and 24 August 2011”, filed on 22 September 2011, the Prosecution complied with this order by providing the Defence with an index individually listing each of the items that made up the Rule 66(A)(i) material and indicating whether each item was confidential or public, so that the Defence was fully informed as to which materials may be considered public and which confidential. The Chamber is of the view that the same, or similar, procedure should be followed for Rule 66(A)(ii), Rule 66(B), and Rule 68 material.

14. The Chamber, in due course, will set deadlines for the disclosure of material pursuant to Rule 66(A)(ii) and any applications for protective measures in relation thereto, including the protective measure of delayed disclosure.

15. Material subject to Rule 70 restrictions need not be disclosed until the Prosecution has received permission from the Rule 70 providers for such disclosure. However, pursuant to Rule 68(iii), the Prosecution shall take reasonable steps, if confidential information is provided to it

under Rule 70(B) and contains Rule 68(i) material, to obtain the consent of the provider to the disclosure of that material to the accused; and, Rule 68(iii) implies that such “reasonable steps” be taken in a timely manner.

D. Disposition

16. Pursuant to Articles 20, 21, and 22 of the Statute of the Tribunal and Rules 53, 54, 66, 69, 70, 75, and 126 *bis* of the Rules of Procedure and Evidence of the Tribunal, the Trial Chamber hereby GRANTS leave to the Prosecution to file the Reply; GRANTS the Motion in part; and ORDERS as follows:

- a. When disclosing to the Defence Rule 66(A)(ii), Rule 66(B), and Rule 68 material (“material”), the Prosecution shall provide to the Defence
 - i. both a confidential/unredacted version and a public/redacted version of the material;
 - ii. an index individually listing each of the items of the material, indicating whether each item is confidential or public; or
 - iii. some other means of designating the material as either public or confidential.

- b. As a general protective measure for the purpose of disclosure to the Defence, the Prosecution may redact from the Rule 66(A)(ii), Rule 66(B), and Rule 68 material:
 - i. any information that discloses, or might lead to the disclosure of, the current whereabouts of the maker of any such document and/or his or her family;
 - ii. any information contained within such documents that discloses, or might lead to disclosure of, the current whereabouts of individuals named within them who have made statements that the Prosecution has already disclosed or that it intends to disclose;

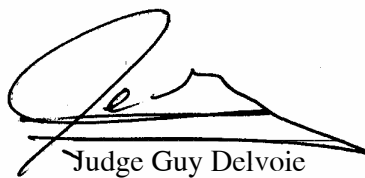
¹¹ Decision on Prosecution Motion for Protective Measures for Victims and Witnesses and Documentary Evidence, 23 August 2011, para. 14(a).

- iii. the personal identification number or passport number of victims, witnesses, or potential witnesses; and
 - iv. information identifying any witness for whom delayed disclosure has been granted in prior proceedings or for whom delayed disclosure may be sought.
- c. If the Defence is aware or becomes aware of the current whereabouts of a victim, witness, or potential witness identified by the Prosecution, this information shall not be disclosed to the public, except to the limited extent that such disclosure is directly and specifically necessary for the preparation and presentation of the case, pursuant to subparagraph (e) below.
- d. The Defence shall not approach a victim, 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 victim, witness, or potential witness. When contacting a victim, witness, or potential witness identified by the Prosecution, the Defence must identify itself. To the extent reasonably necessary to allow the Defence to prepare for and participate in these proceedings and present a defence, it may seek to obtain from the Prosecution the current whereabouts of a victim, witness, or potential witness.
- e. The Defence shall not disclose to the public any confidential portions of the Rule 66(A)(ii), Rule 66(B), and Rule 68 material described in the foregoing paragraphs (including, but not limited to, the names, identifying information, and whereabouts of any victim, witness, or potential witness), except to the limited extent that such disclosure is directly and specifically necessary for the preparation and presentation of the case. If the Defence finds it directly and specifically necessary to make disclosures pursuant to this limited purpose, it shall inform each person among the public to whom non-public material or information is shown or disclosed, that such person is not to copy, reproduce, or publicise such material or information, and is not to show, disclose, or convey it to any other person. If provided with the original or any copy or duplicate of such material or information, such person shall return it to the Defence when continued possession of the material or information is no longer necessary for the preparation and presentation of the case. The Defence shall maintain a list of persons to whom the material is disclosed, recording the name of the persons, a description of the material disclosed, and the dates of both disclosure and return of the material.

- f. Should a member of the Defence withdraw or otherwise leave the Defence team, all the materials disclosed by the Prosecution, together with copies of such material, held or possessed by this member shall be handed over to the person serving as Lead Counsel for the Defence at the time.
- g. Except as provided for by sub-paragraph (e) above, any person, including members of the Defence, who knowingly and wilfully discloses the identifying information of any protected victim, witness, or potential witness, or any other information sufficient to identify these individuals, shall be in violation of this Decision and Order, and may be subject to prosecution for contempt of the Tribunal pursuant to Rule 77.
17. For the purposes of this decision, the “public” means all persons, including corporations; governments and organs/departments thereof; organisations; entities; associations; groups; family members, friends, and associates of Goran Hadžić; accused and defence counsel in other proceedings before the Tribunal (and/or national courts); and the media. However, for purposes of this decision, the “public” does not mean Judges of the Tribunal; staff of the Registry and the Office of the Prosecutor; Goran Hadžić himself; or members of the Defence.
18. Beyond that specified in the orders in the disposition above, all other requests for relief made by the Prosecution in the Motion are hereby DENIED.

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

Done this thirtieth day of November 2011,
At The Hague,
The Netherlands.



Judge Guy Delvoic
Presiding

[Seal of the Tribunal]