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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-T
Date: 30 March 2009
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IN TRIAL CHAMBER III

Before: **Judge Patrick Robinson, Presiding**
Judge Christine Van den Wyngaert
Judge Pedro David

Acting Registrar: **Mr. John Hocking**

Decision of: **30 March 2009**

PROSECUTOR

v.

MILAN LUKIĆ
SREDOJE LUKIĆ

PUBLIC

DECISION ON MILAN LUKIĆ'S MOTION TO COMPEL DISCLOSURE OF CONTACT INFORMATION AND ON THE PROSECUTION'S URGENT MOTION TO COMPEL PRODUCTION OF CONTACT INFORMATION

The Office of the Prosecutor

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TRIAL CHAMBER III ("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 "Milan Lukić's motion to compel disclosure of contact information", filed confidentially by the Defence of Milan Lukić ("Defence") on 1 December 2008 ("Defence Motion"). The Trial Chamber is also seised of the "Prosecution urgent motion to compel production of contact information with confidential annexes A, B and C", filed confidentially on 11 February 2009 ("Prosecution Motion").

A. Preliminary observation

1. The Trial Chamber considers the Defence Moton and the Prosecution Motion in a combined decision as they raise substantively similar matters. Furthermore, the Trial Chamber issues this decision as a public decision, in view of the importance of the subject-matter to the fairness of the proceedings.

B. Arguments in relation to the Defence Motion

1. Defence submissions

2. The Defence requests the Trial Chamber to order the Prosecution to disclose to the Defence the contact information in the possession of the Prosecution pertaining to VG-10, VG-26, VG-31, VG-55, VG-59, VG-60, VG-81, Fikret Cocalić and a person, whom the Chamber will refer to as CW2.[1] The Defence submits that these persons "possess information that may be of use to the Defence and release of this contact information is the only way the Defence can ascertain what information these witnesses may have beyond their statements."[2] The Defence submits that it has requested the relevant information from the Prosecution but that the Prosecution "has refused" to provide it.[3]

3. The Defence notes that the Prosecution case-in-chief has closed and that "these are not witnesses [the Prosecution] will call"[4] and further that CW2, as far as the Defence is aware, has never been a Prosecution witness.[5] Rather, "the Prosecution unilaterally redacted contact

[1] Defence Motion, p. 7.
[2] Defence Motion, p. 2.
[3] Defence Motion, para. 8, where the Defence also refers to a statement of the Prosecution that it does not "feel comfortable handing over to Milan Lukic the addresses and the phone numbers of witnesses without their consent" (Hearing, 1 Dec 2008, T. 3608) but that it is "mindful that [it has] no ownership of witnesses" (*id*, T. 3607).
[4] Defence Motion, para. 10. See also *id*, para. 9, where the Defence submits that if the persons "had given statements of testimony in conjunction with proceedings, they must have known the potential to be contacted by the parties; in fact the 'Witness Acknowledgment' at the end of each ICTY statement acknowledges just that." The Defence states that the Witness Acknowledgment reads in the relevant part "I have given this Statements voluntarily and am aware that it may be used in proceedings [...] and that I may be called to give evidence in public before the Tribunal."
[5] Defence Motion, para. 8.

information from [CW2's] statements disclosed to them from other sources without seeking protective measures of the Chambers."[6] In respect of CW2, the Defence refers to filings made whereby it requested disclosure by the Prosecution pursuant to to Rule 68 of two statements that CW2 gave to national Bosnian institutions.[7]

4. In the Defence's view, witnesses of the Tribunal "are neither the property of the Prosecution nor the Defence".[8] It is submitted that allowing property in a witness "could create a risk that a party could block opportunity to contact 'crucial individuals witnesses [*sic*] simply by placing them on its witness list.'"[9] The Defence therefore submits that "[i]f the Prosecution has no ownership of the witness, it should possess no ownership of contact information"[10] and that "[t]o allow the Prosecution to withhold this contact information is to actually give them property in these witnesses."[11]

2. Prosecution submissions

5. On 5 December 2008, the Prosecution responded, objecting "to disclosure of contact information to Defence counsel without prior consent of the potential witnesses and proposes the use of a neutral intermediary in order to obtain consent and/or facilitate contact with them."[12] The Prosecution further "moves for protective measures for the potential witnesses relating to contact by the Accused Milan Lukić himself."[13]

6. The Prosecution's first argument is that it has "an obligation to take measures to ensure the privacy and safety of the potential witnesses."[14] This, the Prosecution submits, is the reason it refused the Defence's request for the contact information, not that it opposes the Defence calling these persons or that they are the property of the Prosecution.[15] The Prosecution states that "[i]t is common practice of the Prosecution not to provide contact information for a victim or witness prior

[6] Defence Motion, para. 8, referring to the previous Defence submission concerning this person, see Milan Lukić's submission pursuant to order of 21 November 2008 regarding disclosure, 28 Nov 2008.
[7] Defence Motion, para. 8, fn 12.
[8] Defence Motion, para. 5, citing *Prosecutor v. Mrkšić*, Case No. IT-95-13/1-AR73, Decision on defence interlocutory appeal on communication with potential witnesses of the opposing party", 30 Jul 2003, para. 15; *Prosecutor v. Halilović*, Case No. IT-01-48-AR73, Decision on the issuance of subpoenas, 21 Jun 2004, para 12 ("*Halilović* Decision"). The Defence also refers to this Chamber's statement to the same effect, Hearing, 8 Oct 2008, T. 2673.
[9] Defence Motion, para. 7, citing *Halilović* Decision, para. 12, where it was held that "[w]here a witness is listed by one party as expected to testify on its behalf with respect to certain issues, it does not necessarily follow that this witness will have no information of value to the opposing party on other issues related to the case."
[10] Defence Motion, para. 13.
[11] Defence Motion, para. 14.
[12] Prosecution response to 'Milan Lukić's motion to compel disclosure of contact information' and motion for protective measures, filed confidentially on 5 December 2008 ("Prosecution Response"), para. 4.
[13] *Ibid.*
[14] Prosecution Response, para. 5.
[15] Prosecution Response, para. 5.

to receiving the consent of that individual."[16] The Prosecution therefore recommends that the Tribunal's Victims and Witnesses Section ("VWS") function as a neutral intermediary that would make the initial contact with the relevant person. The VWS would:

> see if [the potential witnesses] consent to giving their information to Defence counsel. If a witness does not consent, then VWS can canvas whether the witness would be willing to speak with Defence without providing contact information. VWS could perhaps set up a conference call between Defence counsel and the witness or make some other arrangement that facilitiates the communication and honours the express wish of the witness.

The Prosecution states that if the witness refuses even under these conditions, the Defence may apply for a subpoena.[17]

7. The Prosecution's second argument relates to alleged conduct of Milan Lukić. The Prosecution submits that on 7 and 8 November 2008, Milan Lukić telephoned on numerous occasions the family of Zehra Turjačanin, a witness who testified for the Prosecution.[18] The Prosecution submits that during these telephone calls, Milan Lukić "disguised his identity and posed as a Bosnian Muslim friend of the family" and that, "[u]sing a ruse", he obtained the contact information for the brother of Zehra Turjačanin.[19] The Prosecution states that:

> Milan Lukić is innocent until proven guilty in these proceedings, but [the father of Zehra Turjačanin], who has been told by his daughter that Milan Lukić is responsible for what happened to her and the rest of their family, believes him to be guilty of those crimes. [The father] then receives a call from this very man, from prison. [The father] had the right to know that he was talking to the Accused person who he believes murdered his family. He also had the right to make an informed decision about whether he wanted to give the Accused person the contact information for one of his surviving children.[20]

The Prosecution attaches, as annexes B and C to its response, transcripts of telephone conversations with the Turjačanin family. The Prosecution submits that its concern about disclosing the contact information of the nine persons to the Defence:

> is amplified in this case due to evidence of Milan Lukić's harassment and deceitful conduct with victims as well as the failure of Defence counsel to acknowledge the impropriety of their client's conduct.[21]

The Prosecution argues that the telephone conversations "were obviously painful and disturbing"[22] and that "after figuring out who had made the calls, both [the father and the brother of Zehra Turjačanin] were extremely upset and fearful for their family."[23] The Prosecution also refers to the testimony of its own witness, Hamdija Vilić, who provided "sworn testimony describing phone

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[16] *Id*, para. 6.
[17] *Id*, para. 8.
[18] *Id*, para. 10.
[19] *Ibid.*
[20] *Id*, para. 11.
[21] Prosecution Response, paras 9, 22. See also *id*, para. 25, where the Prosecution submits that it "cannot but conclude that the Defence team fails to understand how a disguised phone call from Milan Lukić to a victim or family member may constitute a further trauma to an already traumatised person."
[22] Prosecution Response, para. 12.

calls which Milan Lukić placed from the detention unit in order to lay the foundation for an attempt to bribe a witness to testify in his favour."[24]

8. The Prosecution's third argument is that it claims to have "reason to believe that Milan Lukić would obtain the contact information of the potential witnesses from Defence counsel".[25] With reference to the Defence's stipulation that it "will abide by all protective measures in place from the Vasiljević Trial and would not disclose any information to other parties", the Prosecution states that:

> it is unable to consider the information safe in the hands of the Defence team as long as there is a possibility that they will provide it to the Accused Milan Lukić himself. The Defence team's actions thus far suggest that they would do that.[26]

The Prosecution also submits that the Defence has "failed to acknowledge any impropriety or make any representations of future conduct, for example, that Milan Lukić would not disguise his identity in the future."[27]

9. The Prosecution also addresses the Defence's request in relation to CW2 and confirms that this person was never a Prosecution witness, but that the Defence is incorrect in submitting that the Prosecution "unilaterally redacted" the contact information.[28] The Prosecution submits that it did "seek permission from the Chamber to make the redactions to [CW2's] statements in *ex parte* filings."[29] The Prosecution refers to several disclosure-related *ex parte* submissions made by it concerning CW2, and states that:

> the filings were *ex parte* due to concerns in light of potential contempt of court by members of the Defence team.[30]

The Prosecution submits that its concerns were due to CW2's relationship to a Prosecution witness, VG-035, and that "disclosing [CW2's] contact information could put the witness at risk."[31] In view of the fact that the Prosecution had knowledge of two statements given by CW2 to other

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[23] *Id*, para. 17.
[24] *Id*, para. 18.
[25] *Id*, p. 6.
[26] *Id*, paras 19-20, referring to Motion, para. 11.
[27] *Id*, para. 22. The Prosecution adds that "[g]iven the failure to acknowledge any wrong-doing on the part of their client, and the characterisation of the conversation [with Zehra Turjačanin's brother] as legitimate witness contact, the Prosecution cannot but conclude that the Defence team fails to understand how a disguised phone call from Milan Lukić to a victim or family member may constitute a further trauma to an already traumatised person", *id*, para. 25.
[28] Prosecution Response, para. 26.
[29] *Ibid.*
[30] *Id*, fn. 21. The filings referred to are the Prosecution's motion for redacted disclosure, 10 Sep 2008, the Prosecution's second motion for redacted disclosure, 3 Oct 2008, and Submission in response to decisions of 6 oct 2008 on Prosecution's motion for redacted disclosure, 8 Oct 2008.
[31] VG-35 testified on 15 September 2008.

organisations, "it disclosed redacted versions of both statements to comply with its Rule 68 obligations."[32]

10. The Prosecution states that when, on 8 October 2008, the Defence made an oral application for full disclosure of CW2' statements, the Prosecution responded that it had "reassessed the situation and acknowledged that the circumstances justifying its concern had changed."[33] Subsequent to this, on 9 and 14 October 2008, the Prosecution disclosed the statements with only information about CW2's current whereabouts redacted.[34] The Prosecution repeats that it "does not object to the Defence team contacting [CW2]", but states "that it has concerns about providing Milan Lukić with the contact information."[35] In this respect, the Prosecution argues that:

> it is useful to note that [CW2] does not assert that Milan Lukić did not kill Hajira Korić, rather that he and another individual both shot her. [CW2] describes Milan Lukić yelling to her and a group of women that they were surrounded, threatening their lives and then shooting Hajira Korić.

The Prosecution states that the above information was available "in the redacted version of the first statement" and, therefore, that "[w]hile the version of events differs from that told by VG-035, thereby leading to the Rule 68 disclosure, it is quite likely that [CW2] would be seriously frightened by a phone call from Milan Lukić."[36]

11. The Prosecution's fourth and final argument is that protective measures should be provided to the nine persons who are subject of the Defence Motion. The Prosecution submits that this request is justified by "the evidence of Milan Lukić's dishonesty and harassment towards the Turjačanin family, and his alleged attempts to bribe witnesses".[37] The measure sought is "restrictions on Milan Lukić's contact with the potential witnesses and any other victims the Defence may seek to contact."[38] Referring to Rule 75(A) fo the Rules of Procedure and Evidence ("Rules"), the Prosecution submits that "the potential witnesses can receive protection whether or not they have testified in the *Vasiljević* trial or were ever on the Prosecution's witness list.[39] The Prosecution submits that the protective measure requested is consistent with the rights of the accused because Milan Lukić is represented by counsel and because "his counsel will be in contact with the potential witnesses, if they agree."[40] The Prosecution "also does not object to Milan Lukić's participation in a conversation if Milan Lukić properly identifies himself, the witness

[32] Prosecution Response, para. 26.
[33] *Id*, para. 26.
[34] *Ibid.*
[35] *Id*, para. 27.
[36] *Ibid.*
[37] *Id*, para. 28.
[38] *Ibid.*
[39] *Id*, para. 29.
[40] Prosecution Response, para. 30.

knowingly consents, and the conversation is supervised by Defence counsel with the assistance of an interpreter, if necessary."[41]

3. Submissions of the VWS

12. On 9 December 2008, the Chamber ordered the VWS to make a submission concerning the Defence Motion and the Prosecution Response. The VWS filed its submission on 12 December 2008.[42] The VWS states that, as a section within the Registry of the Tribunal, it serves both the Prosecution and the Defence on an equal basis.[43] The VWS is regularly requested to contact witnesses of one Party to enquire if they would agree to meet with the other Party or have their contact details provided to the other Party".[44] However, the VWS states that:

> [i]n view of its experience, the VWS is concerned that, in this case, the witnesses who have given their statement to the Office of the Prosecutor are highly likely to raise a number of substantial questions as to why the Office of the Prosecutor did not call them as witnesses in the *Lukić et al.* case and/or why the Defence of Milan Lukić would like to contact them and call them as witnesses. They may also wish to discuss the content of the evidence to be provided.[45]

On the basis of its neutral role, the VWS submits that it "cannot answer these questions and will not attempt to convince a witness to testify for any Party to the proceedings or risk to be perceived as doing so."[46] For this reason, the VWS submits that "the Office of the Prosecutor is better placed to explain to the witnesses that the Defence of Milan Lukić is interested in obtaining their contact details and to call them as witnesses."[47]

13. In case the Trial Chamber would find that the VWS is the appropriate body to contact the witnesses, then "it can only ask whether they would agree that their contact information be passed on to the Defence of Milan Lukić."[48] In this respect, the VWS states that it can answer "general questions about their rights under the Rules of the Tribunal but would refer further questions on the evidence itself to a Party or to the Trial Chamber."[49] The VWS also has a concern regarding the Prosecution's suggestion that the VWS organise conference calls between the Defence of Milan Lukić and any one of the nine persons who does not consent to the disclosure of their contact

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[41] *Ibid.*
[42] Rule 33(B) submission in compliance with the "Order to the Registry" dated 9 December 2008, filed confidentially on 12 December 2008 ("VWS Submission").
[43] VWS Submission, para. 3.
[44] *Ibid.*
[45] *Id*, para. 4.
[46] *Ibid.*
[47] *Id*, para. 5, where the VWS also states that "the Defence of Milan Lukić may not find this alternative suitable."
[48] VWS Submission, para. 6.
[49] *Ibid.*

information to the Defence. The VWS is opposed to this "as it is likely to be perceived by the witnesses as assisting a Party to convince them to testify."[50]

14. In view of its concerns, the VWS submits that its role be "limited to inquiring whether the witnesses agree to their contact information being passed on to the Defence of Milan Lukić."[51] In the alternative, the VWS submits that "a representative of the Trial Chamber assisted by a VWS representative could telephone the nine (9) witnesses so that questions regarding the content of the evidence can be appropriately addressed by the representative of the Trial Chamber."[52]

4. Defence submissions in reply

15. On 12 December 2008, the Defence filed a motion seeking leave to reply, with incorporated reply.[53] The Chamber grants leave to reply. The Defence takes issue with the Prosecution's "overarching statement" that "Milan Lukić has harassed, lied to and frightened victims and witnesses."[54] It is argued that this statement does not take into account the decision of the Vice-President of the Tribunal, which, in the Defence opinion:

> concerned the alleged phone harassment of Milan Lukić; the disposition being a lifted phone ban, a finding of 'lack of evidence of the Applicant's intent to intimidate the witness', a finding that the two-week ban was 'somewhat excessive' and that the ban did 'restrict the preparation which the [Accused] may wish to undertake independent of, or in cooperation with, his Counsel'.[55]

16. The Defence stresses that it was not informed in advance by Milan Lukić of any of his actions. Moreover, the Defence submits that "none of the information used by the Accused in attempting to make investigations in his case was provided to the Accused by the Defence Team."[56] The Defence further submits that the "sole purpose of this contact information request is to get proper, direct contact information to get in touch with the invidivuals professionally and openly and see what information they have regarding the present case. In no way should it be construed that the Defence is gathering information to give to the Accused to allow him to 'harass' or 'intimidate' witnesses."[57]

17. The Defence also argues that attaching, as the Prosecution has done to its response, the transcripts of the two telephone conversations of Milan Lukić "serves no purpose in determining

[50] VWS Submission, para. 6, where it is also noted that "any action taken by the VWS to intervene on behalf of the witnesses during the conference call could be viewed by the Defence as interfering with its access to the witnesses."
[51] VWS Submission, para. 7.
[52] *Ibid.*
[53] Milan Lukić's request to reply and reply to Prosecution response to "Milan Lukić's motion to compel disclosure of contact information" and motion for protective measures, filed confidentially on 12 December 2008 ("Defence Reply").
[54] Defence Reply, para. 4.
[55] *Ibid*, referring to the Vice-President's Decision on Milan Lukić's appeal against the Registrar's decision of 18 November 2008, filed on 28 November 2008.
[56] Defence Reply, para. 4.
[57] *Id*, para. 5.

whether the Defence Team should have access to contact information to those containing information useful to the Defence."[58] Rather, in its view, this instead goes:

> against the Honorable President Robinson's own recusal in the matter at first instance. Now, with the entire Chamber having these materials put into a filing for consideration, is to force upon the Trial Chamber exactly the matter the President had previously recused himself from.[59]

In reference to the Prosecution's submission regarding the sworn testimony of Hamdija Vilić concerning phone calls by Milan Lukić, the Defence submits that the Prosecution's previously-instituted contempt proceedings against members of the Defence "were deemed to be without sufficient basis for proceedings."[60]

18. The Defence considers that "the Prosecution has shown no reason why the Defence team should not have the trust of the Chambers and the International Tribunal in properly accessing individuals known to be witnesses to the events of the Indictment of potential use to the Defence."[61] It asserts that there is "no reason not to trust the Defence team in contact of uncalled witnesses" and that if the individuals "should state that they do not wish to speak further with the Defence, it would, of course cease direct communication with the individual."[62]

C. Discussion in relation to the Defence Motion

1. Applicable law and preliminary remarks

19. Pursuant to Article 20(1) of the Statute, the Trial Chamber shall ensure that the trial is fair and expeditious and that the proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses. The rights of the accused are expressed in Article 21 of the Statute, paragraph 2 of which entitles the accused to a fair and public hearing, subject to Article 22. The latter article requires that the Rules provide for the protection of victims and witnesses. Such protection, it is said, shall include but not be limited to "the conduct of in camera proceedings and the protection of the victim's identity." Importantly, Article 21(4)(e) prescribes that the accused shall entitled to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

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[58] Defence Reply, para. 5.
[59] *Id*, para. 6. The Defence refers in this respect to the order of the President of the Tribunal, Judge Patrick Robinson, of 25 November 2008 which directed the appeal of Milan Lukić against the decision of the Acting Commanding Officer of the UNDU, dated 19 November 2008, to the Vice-President of the Tribunal, Judge O-Gon Kwon.
[60] Defence Reply, para. 7, referring to the Decision on Prosecution submission of report pursuant to order to investigate potential contempt of the Tribunal, as amended, Decision on motion for leave to amend Prosecution's list of witnesses, Decision on third Prosecution urgent motion in connection with contempt proceedings, filed confidentially and *ex parte* on 6 October 2008.
[61] Defence Reply, para. 11.
[62] *Id*, para. 10.

20. Pursuant to Rule 69(A), which is situated in Part Five of the Rules entitled "Pre-trial proccedings", the Prosecution may in "exceptional circumstances" apply to a Judge or Trial Chamber to order the non-disclosure of the identity of a victim or a witness "who may be in danger or at risk until such person is brought under the protection of the Tribunal." It is said in subparagraph (C) that, subject to the provisions of 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. Rule 75(A) is located in Part Six of the Rules, which, according to its title, concerns "Proceedings before Trial Chambers". This rule expresses the discretion of a Judge or a Chamber to order "appropriate measures for the privacy and protection of victims and witnesses, provided the measures are consistent with the rights of the accused." According to subparagraph (B), the Chamber may hold in camera proceedings to decide whether to order, for instance, measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related to or associated with a victim or a witness. The subparagraph then lists a number of measures which the Chamber may order to that effect.

21. In view of the open-ended character of Rule 75(A), it appears that non-disclosure of identity, generally speaking as a protective measure, may be considered also during trial proceedings upon a showing of exceptional circumstances.[63] However, the granting of such a measure at the trial stage is extraordinary, including where it is sought for the protection of persons who are not witnesses for a party. In considering such requests, the Chamber must remain guided in the exercise of its discretion by its duty to ensure that the proceedings are conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses. In the Chamber's opinion, the requirements for the granting of non-disclosure of identifying information pursuant to Rule 69 are relevant to a request made during the trial proceedings.

22. The Chamber notes in this respect that the system whereby protective measures are granted by decision of a Chamber exists in order to ensure a proper balancing of the interests of full respect for the rights of the accused and of due protection of victims and witnesses. The relevant provisions of the Statute and the Rules, by referring to victims *and* witnesses, allow for the protection both of persons whom a party has decided to call as a witness and of persons who are not witnesses. Thus, if a party considers that there is a need for the protection of persons who are not, or not any longer, witnesses, then the system allows for applications to be made to this effect. However, it is

[63] In this respect, the Chamber recalls the finding of the *Slobodan Milošević* Trial Chamber, in relation to Rule 69(A), that "[i]t must be right that the Prosecution, to be allowed to redact information it is required to disclose within a strict time frame under the Rules, be required to make a showing of exceptional circumstances with respect to *each witness* for whom – or *each document* for which – it seeks redaction. It is, after all, something only to be granted in 'exceptional circumstances', and the reason for this is that it goes to the heart of an accused's right to a fair trial by enabling him to investigate the case against him, *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on

abundantly clear based on the above provisions and the case-law of the Tribunal that from the point that a case is in the pre-trial stage protective measures may only be employed upon authorisation by a Judge or a Chamber.[64]

2. The Defence request

23. Turning now to the substance of the Defence request, the Chamber notes that the Defence is seeking to obtain the contact information of:

1) eight persons whom the Prosecution previously intended to call as witnesses but ultimately elected not to call, and

2) one person, CW2, who the Prosecution never intended to call as a witness, but whose statements the Prosecution disclosed to the Defence under Rule 68.

24. The Chamber sees the Defence's request as being, effectively, a request for access to confidential material. As is well-established in the jurisprudence of the Tribunal, a party may request access to confidential material from any source. A successful motion for access requires the showing of a legitimate forensic purpose for material relevant to the requesting party's case and that the material sought has been identified or described by its general nature.[65] The Chamber notes that, pursuant to the applicable standard, even if the identity of the persons who are the subject of the Defence Motion had been unknown to the Defence, but they were sufficiently identified, the Defence could have requested access to their confidential information, provided the material sought would be relevant to its case.[66] The Trial Chamber considers that the Defence's forensic purpose in seeking to contact the persons is evident and that any information they may provide to the Defence is likely to be of relevance to the Defence case.

Prosecution motion for provisional protective measures pursuant to Rule 69, filed partly confidential and *ex parte* on 19 February 2002, para. 24 (footnotes omitted).

[64] *Prosecutor v. Radovan Karadžić,* Case No. IT-95-5/18-PT, Decision on Prosecution motion for non-disclosure, 2 Sep 2008 ("First *Karadžić* Decision"), para. 10; *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. 13; *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, Decision on the Defence motion to compel the discovery of identity and location of witnesses, 18 March 1997, para. 18; *Prosecutor v. Radoslav Brđanin and Momir Talić,* Case No. IT-99-36-PT, Decision on motion by Prosecution for protective measures, 3 July 2000, paras 5-21; *Prosecutor v. Lazarević,* Decision on Prosecution's motion for order of non-disclosure to public of materials disclosed pursuant to rule 66(A) and rule 68, 15 March 2005, p. 3. See also *Prosecutor v. Stojan Župljanin,* Case No. IT-99-36/2-PT, Decision on Prosecution's motions for protective measures for victims and witnesses, 30 July 2008, para. 6.

[65] *Prosecutor v. Dario Kordić & Mario Čerkez,* Case No. IT-95-14/2-A, Decision on motion by Hadžihasanović, Alagić, and Kubura for access to confidential supporting material, transcripts and exhibits in the *Kordić & Čerkez* case, 23 January 2003, p. 3; *Prosecutor v Miroslav Kvočka et al.,* Case No. IT-98-30/1-A, Decision on Momčilo Gruban's motion for access to material, 13 January 2003, para. 5; *Prosecutor v. Enver Hadžihasanović et al.*, Case No. IT-01-47-AR73, Decision on appeal from refusal to grant access to confidential material in another case, 23 April 2002 ("*Hadžihasanović* Decision"), p. 3.

[66] *Hadžihasanović* Decision, p. 3.

25. None of the persons who are the subject of the Defence Motion is subject to an order of delayed disclosure of identifying information; however, some of them are subject to other protective measures.[67] In the Trial Chamber's view, a non-disclosure order would allow the Prosecution to refuse to provide the requested contact information to the Defence. But, in the absence of such an order, the principle that there is no property in a witness dictates that the Prosecution may not withhold contact information *unless* it can establish that there are grounds, pursuant to the provisions of the Statute or the Rules, which would allow it to do so. Any other interpretation would, as the Defence argues, allow property in witnesses.

26. Contact information of witnesses, victims and other persons has been treated differently by Chambers. For instance, in *Delalić* the Trial Chamber was seised of a Defence request to compel the Prosecution to disclose the names and locations of the witnesses it intended to call at trial. In balancing its duties under Article 20(1) of the Statute, the Trial Chamber held that pursuant to Rule 69(C) the Defence has a right to know the identity of the witnesses who are to be called by the Prosecution.[68] The Chamber noted that during the investigative stage and pursuant Rule 39(ii), the Prosecution may take special measures for the safety of potential witnesses and informants.

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[67] As far as the Chamber is aware, only VG-55 and VG-59 remain subject to protective measures. On 24 July 2001, the *Vasiljević* Trial Chamber granted pseudonym as well as image distortion during the testimony of VG-55, VG-59 and VG-81, *Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-T, Order on protective measures for witnesses at trial, filed on 24 July 2001, p. 3. These measures continue to have effect in subsequent proceedings in accordance with Rule 75(F)(i). On 11 July 2008, this Chamber granted a Prosecution request to remove the protective measures applying to VG-081, Decision on confidential Prosecution sixth motion for protective measures in relation to witness VG-081, filed on 11 July 2008. With regard to VG-10, the Chamber notes that the "Prosecution's clarification of existing protective measures and sixth motion for protective measures", filed on 27 June 2008, Annex A, lists VG-10 as not being the subject of protective measures. This clarification was submitted following an order of the Chamber that the Prosecution was to file a report "detailing all the protective measures already ordered in these proceedings and, to the best of its ability, indicating whether the continuation of those measures is still justified in light of the changed circumstances", Decision on Prosecution's fourth and fifth motions for protective measures, filed 20 June 2008, p. 7. This Chamber has not granted protective measures for VG-26 and VG-31 and the Chamber is not aware whether protective measures apply to these persons from other proceedings. The Chamber notes that in the Prosecution's witness list, filed on 14 March 2008, it is stated that pseudonyms were used for all witnesses 1) who have protective measures from a previous case, 2) who have been granted protective measures in the instant case, or 3) for whom the Prosecution would be seeking protective measures, Prosecution's list of witnesses pursuant to Rule 65 *ter* (E)(ii), p. 11, fn 1. VG-26 and VG-31 are listed by pseudonym but no explanation is given on what basis this measure has been applied by the Prosecution. On 11 April 2008, the Prosecution requested to remove, *inter alia*, these witnesses from its list, a request which the Chamber granted on 22 April 2008, Decision on Prosecution's motion to amend Rule 65 *ter* witness list and on related submissions, filed 22 April 2008. With regard to VG-60, the Chamber notes that the Prosecution did not include this witness on its witness list of 14 March 2008. The Chamber is not aware that this witness has been granted protective measures in prior proceedings. With regard to Fikret Cocalić, the Chamber recalls that at the status conference on 12 March 2008, the Prosecution indicated that it had, while finalising its Rule 65 *ter* submission due on 14 March 2008, identified several additional witnesses, including Fikret Cocalić, Status conference, 12 March 2008, T. 161. The Prosecution referred to this witness by pseudonym in its 14 March 2008 witness list and disclosed statements relating to this witness in redacted form, following an order by the pre-trial Judge, Order for extension of time, 1 April 2008. However, on 4 April 2008, the Prosecution stated that the witness had informed it that there was no need for protective measures and that the Prosecution would "disclose his statements in full within a few days", Prosecution 4 April 2008 Response, para. 10. By order on 8 July 2008, the witness was removed from the Prosecution's witness list, Decision in relation to Prosecution proposed witnesses, 8 July 2008. There are no protective measures applying to CW2, though this person was subject of extensive confidential and *ex parte* submissions previously noted.

[68] *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Decision on the Defence motion to compel the discovery of identity and location of witnesses, 18 March 1997, paras 15, 17. The Chamber also noted that the term identity "goes beyond the mere provision of the names of these witnesses" and considered that the Defence, in order to identify the witnesses, needs to know further particulars about them, *id*, para. 17.

However, once the Prosecution decides to call witnesses at trial, it may not unilaterally take protective measures. This, the Chamber stressed, was "solely a matter for determination by the Trial Chamber."[69] In the Chamber's view, the term "identity does not *necessarily* include the present addresses of the witnesses"[70] and it therefore rejected the Defence's request in this respect "as unsupported by any Rule or provision of the Statute."[71] But it also concluded that the Defence must have substantial identifying information, which it considered to be the gender, date of birth and the names of the parents of each witness as well as the place of origin of the witness and the place where the witness resided at the time relevant to the charges.[72]

27. In *Lazarević*, and contrary to the *Delalić* decision, the Pre-trial Chamber held that the Prosecution could not "redact identifying information from witness statements or information indicating the current whereabouts of witnesses without seeking the appropriate protective measures from the Trial Chamber".[73] The Prosecution was therefore ordered to disclose to the Defence "the full and unredacted statements of all witnesses, including the names, whereabouts, and other identifying data of the witnesses".[74]

28. In a recent decision in *Župljanin*, the Pre-trial Chamber was seised of a Prosecution motion requesting, *inter alia*, authorisation to redact from materials disclosed pursuant to Rule 66 and Rule 68 information about the whereabouts and the personal identification numbers of "potential witnesses and other persons".[75] The Chamber stressed that 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."[76] The Trial Chamber held that, absent a showing of exceptional circumstances, "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 [...] prejudicial to the preparation of the defence case."[77]

29. Also recently, in *Karadžić*, the Pre-trial Chamber was seised of a Prosecution motion seeking permission for the Prosecution to redact from material to be disclosed to the Accused "any

[69] *Id*, para. 18.
[70] *Id*, para. 20, emphasis added.
[71] *Id*, para. 20.
[72] *Ibid.*
[73] *Prosecutor v. Vladimir Lazarević*, Case No. IT-03-70-PT, Decision on Prosecution's motion for order of non-disclosure to public of materials disclosed pursuant to Rule 66 (A) and Rule 68, 15 March 2005, p. 3.
[74] *Id*, p. 3.
[75] *Prosecutor v. Stojan Župljanin*, Case No. IT-99-36/2-PT, Decision on Prosecution's motion for protective measures for victims and witnesses, 30 July 2008, para. 5.
[76] *Id*, para. 6.
[77] *Id*, para. 8.

information [...] that discloses the current whereabouts of protected witnesses."[78] The Chamber stated that the Prosecution "cannot redact this information from witness statements or information without seeking the appropriate protective measures from the Trial Chamber."[79] The Chamber authorised the Prosecution as "a general protective measure" to "redact from the statements, affidavits, and formal statements of victims, witnesses, or potential witnesses" information disclosing, or which might lead to the disclosure of, the current whereabouts of victims, witnesses or potential witnesses.[80]

30. Based on the above, it appears that whether information should be disclosed to the opposing side concerning the whereabouts about witnesses, potential witnesses and persons, who are not called as witnesses, depends on a case-by-case assessment. A party may always request the opposing party to contact the *witnesses* of that party, potentially with the assistance of the VWS.[81] The Prosecution also alludes to this possibility in its submissions. However, it would be improper for a party to withhold contact information of persons whom it has chosen *not* to call or of other persons, who are not witnesses in the proceedings, without an order by a Chamber granting protective measures to this effect.

3. The Prosecution's request for protective measures

31. In opposition to the Defence Motion, the Prosecution requests that restrictions be placed "on Milan Lukić's contact with the potential witnesses and any other victims the Defence may seek to contact."[82] In effect, the Prosecution is requesting that the accused be restricted from participating in his own defence with regard to the persons who are the subject of the Defence Motion, as well as regarding *any other victim* that the Defence may seek to contact. In the alternative, the Prosecution states that it does not object to Milan Lukić participating in interviews provided he properly identifies himself, the witness knowingly consents, and the conversation is supervised by Defence counsel with the assistance of an interpreter, if necessary.[83]

32. The Prosecution further states that it has "an obligation to take measures to ensure the privacy and safety of the potential witnesses" and that it is "common practice of the Prosecution not to provide contact information for a victim or witness prior to receiving the consent of that

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[78] First *Karadžić* Decision, para. 1.
[79] *Id*, para. 10.
[80] *Id*, para. 16 (c). The Chamber also considered that "[a]t this stage [it was] appropriate to allow the Prosecution to withhold the whereabouts of witnesses and other such information from the Accused, based upon the fact that the Accused may seek to contact the witnesses through the Prosecution, whether or not they have been granted protective measures, *id*, para. 11.
[81] *Prosecutor v. Mrkšić*, Case No. IT-95-13/1-AR.73, Decision on Defence interlocutory appeal on communication with potential witnesses of the ppposite party, 30 July 2003, para. 15.
[82] *Supra* para. 10.
[83] *Supra* para. 10.

individual".[84] The Trial Chamber considers these statements to be somewhat misguided as they give the impression that the Prosecution may take measures unilaterally in respect of anybody whom it considers to be in need of protection. As noted earlier, this is certainly not correct. The Chamber does not agree that the Statute or the Rules allow for such a sweeping common practice, as alluded to by the Prosecution.

33. According to the jurisprudence which has developed under Rule 69, the Chamber, in considering whether exceptional circumstances have been established by an applicant, shall determine:

a) the likelihood of interference resulting from disclosure to the accused. As was also recently held in *Karadžić*, the Prosecution "must establish that there is a likelihood that the particular witness will be interfered with or intimidated once their identity is made known *to the accused* and his defence team, notwithstanding the obligations on the accused and his defence team in relation to disclosure to third parties."[85] It is important to stress that the likelihood of interference must be objective.

b) whether there is "specific evidence of such a risk relating to particular witnesses".[86] In the jurisprudence, this condition has arisen out of a concern that protective measures requests by the Prosecution are not brought mainly in order to "encourage potential witnesses to come forward and testify, thus making it easier to bring prosecutions against other persons in the future", rather than in order to protect individual victims and witnesses in the particular trial.[87]

c) the length of time before the trial at which disclosure to the accused must take place.[88]

With regard to the second condition, the Trial Chamber has no reason to doubt the Prosecution's convictions based on which it is making its request for protective measures. Further analysis of this condition is therefore unnecessary. Furthermore, condition c) is not relevant to the present case. However, the first condition requires attention.

34. The Prosecution's arguments for the protective measures are based on its perception of Milan Lukić and his conduct as an accused before the Tribunal. It further appears that the Prosecution ascribes Milan Lukić's conduct to the Defence itself and that the Prosecution, as a result of this, has very serious doubts concerning the integrity of the Defence and the commitment

[84] *Ibid.*
[85] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on protective measures for witnesses, 30 October 2008 ("Second *Karadžić* Decision"), para. 19, a) (emphasis in the original).
[86] *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-PT, Decision on motion by Prosecution for protective measures, 3 July 2000 ("*Brđanin and Talić* Decision"), para. 28.
[87] Second *Karadžić* Decision, para. 19, b); *Brđanin and Talić* Decision, para. 29.
[88] Second *Karadžić* Decision, para. 19, c), with further references.

of the members of the Defence to their duties of confidentiality. The gravity of such allegations is, mildly put, serious.

35. To constrain an accused's participation in his defence is a far-reaching restriction which could only be undertaken in exceptional circumstances. The same holds true of applications to circumscribe counsel's duties towards their client. In the Chamber's opinion, requests for such restrictive measures must be very well supported in view of the fundamental rights which they seek to restrict. Certainly, it is insufficient to restrict the accused's participation simply because the accused is represented by counsel, something which the Prosecution appears to suggest.[89] The Chamber notes in this respect Article 21 of the Statute according to which it is the *accused* who has a right to adequate time and facilities for the preparation of his defence. Moreover, pursuant to the same provision it is he who has a right to communicate with his counsel with a view to preparing his defence, including to obtaining the attendance of witnesses on his behalf.

36. The Chamber is unable find that Defence counsel are barred from sharing confidential information with their client. Rather to the contrary, and quite clearly, Article 12 of the Code of Professional Conduct *requires* counsel to "promptly comply with all reasonable requests for information" from the client. Also important in this respect is Article 8(C), according to which counsel "shall not advise or assist a client to engage in conduct which counsel knows is criminal or fraudulent, in breach of the Statute, the Rules, this Code or any other "applicable law". It would seem that unless the accused's request is one to which Article 8(C) applies, counsel is required to provide the accused the information he requests.

37. The Chamber notes the Defence's stipulations in this respect and cannot see that the Prosecution has made any submissions which warrant distrust in this respect of the Defence.[90] Absent information which establishes an objective likelihood that disclosure of the contact information will result in the persons under consideration being interfered with by Milan Lukić, the Chamber is, therefore, not satisfied that the Prosecution has met its burden for its request for protective measures. The Chamber will, therefore, order the Prosecution to provide to the Defence the contact information, that is, the information concerning the current whereabouts of VG-10, VG-26, VG-31, VG-55, VG-59, VG-60, VG-81 and Fikret Cocalić. The Chamber will consider the Defence request in relation to CW2 below.

[89] *Supra* para. 10, referring to Prosecution Response, para. 30.
[90] *Supra* para. 15.

4. Defence request with regard to CW2

38. The Chamber considers it necessary to address the situation concerning CW2 separately and in greater detail in order to address some of the Prosecution's submissions, including previously-made *ex parte* submissions, in relation to CW2.

39. CW2 was never a witness in the present proceedings. The Prosecution has not at any point in these proceedings sought protective measures for this person, nor has the Chamber granted any such measures *proprio motu*. CW2 was the subject of an *ex parte* and confidential Prosecution motion for redacted disclosure, filed on 10 September 2008 ("First motion"), whereby the Prosecution requested permission "to disclose to the Defence [of Milan Lukić] a redacted version" of a statement that CW2 gave to the Association Women Victims of War in Bosnia and Herzegovina ("WVW Statement").[91] Prior to filing the motion, the Prosecution disclosed the WVW Statement in redacted form to the Defence.[92] In the First motion, the Prosecution states that:

> [i]n light of the discrepancies between the WVW Statement and the evidence of VG-035, the Prosecution considers that the WVW Statement contains information which arguably affects VG-035's credibility. That information should therefore be disclosed pursuant to Rule 68.[93]

The redactions carried out by the Prosecution concerned CW2's close relationship with VG-035, a Prosecution witness who testified concerning counts 18 and 19 which charge Milan Lukić with the murder of Hajira Korić in June 1992. The Chamber notes that VG-035 is the only witness called by the Prosecution to prove these allegations. The Defence put information from the redacted WVW statement to VG-035 during its cross-examination on 15 September 2008, thus without knowing who the Rule 68 information emanated from.[94]

40. The Prosecution's reasons for the redactions related to the "Prosecution urgent motion for an order directing the Prosecution to investigate potential contempt of the Tribunal with confidential an *ex parte* annexes", filed on 13 August 2008. This motion was "brought on the basis of an allegation of bribery in the present proceedings in connection with defence witnesses of Milan Lukić."[95] Specifically, the Prosecution stated that it:

> would not be as concerned about the disclosure of this information [that is, the information redacted in the WVW statement] if the situation was not such that the integrity of the defence team of Milan Lukić, as currently constituted, is in question [which calls into question] the

[91] Prosecution's motion for redacted disclosure, filed confidentially and *ex parte* on 10 September 2008, para. 14.
[92] First motion for redacted disclosure, para. 3, where the Prosecution states that it "has made these redactions in order to protect VG-035 as she is a witness who has been granted protective measures in these proceedings and is also psychologically vulnerable." The Chamber notes "Milan Lukić's submission pursuant to order of 21 November 2008 regarding disclosure", filed confidentially on 27 November 2008, whereby the Defence informed the Chamber that the Prosecution disclosed the WVW Statement to the Defence on 9 September 2008 and that the name and whereabouts of CW2 had been redacted.
[93] First Motion, para. 8.
[94] Hearing, 15 September 2008, T. 1704-1705.
[95] First motion, para. 1.

> Prosecution's ability to trust the team, as currently constituted, with sensitive witness information.[96]

41. CW2 was also the subject of second motion for redacted disclosure, filed confidentially and *ex parte* on 3 October 2008 ("Second motion"), whereby the Prosecution sought the same type of redactions for a statement given by CW2 to the Prosecutor's Office of Bosnia and Herzegovina ("POBiH statement").[97] The Prosecution incorporated by reference its arguments in the First motion.[98] In the Second motion, the Prosecution states that it disclosed the POBiH Statement in redacted form to the Defence on 3 October 2008.[99] The POBiH Statement was attached to the Second motion in BCS only and that the Prosecution on 7 October 2008 filed a notice stating that "redacted and unredacted versions of this witness statement will be provided in the English language as soon as possible."[100] As far as the Trial Chamber is aware, this has not been done by the Prosecution.

42. On 6 October 2008, the Chamber issued a decision wherein it found that it was not satisfied that there were sufficient grounds to proceed against any of the suspects investigated by the Prosecution for alleged contempt.[101] The Chamber therefore declined to direct the Prosecution to prosecute the submitted allegations of contempt. Following this decision, on 8 October 2008, the Prosecution submitted that "in light of this Chamber's confidential and *ex parte* Decision of 6 October 2008, the Prosecution withdraws its motions for redacted disclosure."[102] The Prosecution further stated that:

> As is consistent with the practice before this Tribunal and in the present case, the Prosecution will continue to redact those portions of the statements that reveal the current location and other contact details of the witnesses and any relatives mentioned in their statements. Should the Defence wish to contact these witnesses or their relatives, the Prosecution will provide their contact information to the [VWS] for an assessment of their security situation."[103]

43. Turning, first, to the redactions carried out by the Prosecution to the WVW Statement and the POBiH Statement, the Chamber considers that by the First and Second motions the Prosecution was seeking *permission* for redactions it had already made, rather than *authorisation* to redact

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[96] First motion, para. 12.
[97] Prosecution's second motion for redacted disclosure, filed confidentially and *ex parte* on 3 October 2008.
[98] *Id*, para. 2.
[99] *Ibid.* In "Milan Lukić's submission pursuant to order of 21 November 2008 regarding disclosure", filed confidentially on 27 November 2008, the Defence informed the Chamber that the Prosecution disclosed the POBiH Statement to the Defence on 3 October 2008 and that the name and whereabouts of CW2 had been redacted.
[100] Notice regarding Prosecution's second motion for redacted disclosure, filed confidentially and *ex parte* on 7 October 2008, para. 2.
[101] Decision on Prosecution submission of report pursuant to order to investigate potential contempt of the Tribunal, as amended, decision on motion for leave to amend the Prosecution's list of witnesses, decision on third Prosecution urgent motion in connection with contempt proceedings, filed confidentially and *ex parte*, on 6 October 2008, pp. 3-4. The *ex parte* status of this filing was lifted by the Decision on Prosecution motion for leave to amend witness list (Hamdija Vilić), filed confidentially on 6 November 2008.
[102] Submission in response to decisions of 6 October 2008 on Prosecution motions for redacted disclosure, para. 6.
[103] *Ibid.*

pursuant to Rule 68(iv). It is useful to recall the provisions of this rule, according to which the Prosecution:

> shall apply to the Chamber sitting *in camera* to be relieved from an obligation under paragraph (i) to disclose information in the possession of the Prosecutor, if its disclosure may prejudice further or ongoing investigations, or for any other reason may be contrary to the public interest or affect the security interests of any State, and when making such application, the Prosecutor shall provide the Trial Chamber (but only the Trial Chamber) with the information that is sought to be kept confidential.

This is a very clear procedure and the need for it is evident in light of the importance placed on proper compliance by the Prosecution with its disclosure obligations under the Rule. The Chamber does not exclude that there may be situations where, for instance, immediate redactions have to be carried out and permission for them can only be sought after the fact. However, the Chamber is not aware of any reason which required the Prosecution to bypass the procedure set out in Rule 68(vi). The arguments of the Prosecution in support of its redactions – that the integrity of the Defence was in question, which called into question the Prosecution's ability to trust it "with sensitive witness information" – are not enough for carrying out unilateral, unauthorised redactions to information, which the Prosecution itself has designated for disclosure under Rule 68. Thus, the fact that the Prosecution filed a request pursuant to Rule 77 of the Rules for the institution of contempt proceedings against possible members of the Defence cannot – as the Prosecution seems to think – serve as a reason for such redactions. The Chamber therefore holds that the Prosecution acted in error when it unilaterally redacted the WVW Statement and the POBiH Statement. It will therefore order the disclosure in unredacted form of these statements to the Defence.

44. The Chamber notes that CW2 was on the witness list filed by the Defence on 2 December 2008, but not on the Defence's final witness list of 5 January 2008.[104] Furthermore, the information provided by CW2 in the WVW Statement in relation to the killing of Hajira Korić is clearly such that Rule 68 applies to it. For these reasons, the Chamber considers it necessary that CW2 testifies. The Trial Chamber will therefore order that CW2 be called pursuant to Rule 98 as a witness of the Trial Chamber. To this end, the Chamber will order the Registrar to take any and all necessary measures to enable CW2 to testify.

45. As a final matter in this respect, the Chamber will consider the Prosecution's statement that it will, "consistent with the practice before this Tribunal and in the present case [...] continue to redact those portions of the statements that reveal the current location and other contact details of the witnesses and any relatives mentioned in their statements."[105] As noted earlier, measures for the protection of victims or witnesses are to be carried out solely upon order of a Chamber unless a

[104] Milan Lukić updated witness list pursuant to order of the Trial Chamber, 2 December 2008, Annex A, p. 12; Milan Lukić updated 65*ter* witness list pursuant to order of the Trial Chamber, 5 January 2009.
[105] *Id*, para. 6.

specific rule, such as Rule 39, would permit a party to take such measures. The Chamber cannot, therefore, accept that there is a "practice before this Tribunal" to the effect that the Prosecution unilaterally redacts portions of witness statements or statements of other persons. The Chamber notes that an exception may be made for situations where the Prosecution, in carrying out its obligations under Rule 66, withholds "confidential victim or witness information for those who have already been granted delayed disclosure or for whom the Prosecution intends to apply for delayed disclosure".[106] But as a statement of principle, the Prosecution's statement is certainly incorrect.

D. In relation to the Prosecution Motion

1. Prosecution submissions

46. The Prosecution requests an order pursuant to Rule 54 compelling the Defence to produce the contact information of twelve Defence witnesses: MLD2, MLD13, MLD16, MLD17, MLD19, MLD21, MLD22, MLD23 and Miodrag Mitrasinović, as well as four other witnesses ("four other witnesses").[107] The Prosecution states that it seeks to "interview Defence witnesses in respect of whom the Prosecution considers that the witness summaries are inadequate due to the very minimal information contained therein."[108] The Prosecution submits that it has requested the relevant information from the Defence on several occasions: in writing on 21 January 2009,[109] by letter and e-mail on 4 February 2009,[110] and by e-mail on 9 February 2009.[111] The Prosecution alleges that the Defence has not provided a response to any of the Prosecution requests for contact information.[112] The Prosecution also refers to the testimony of MLD17 and to its questions that "on the 21st of January, the OTP asked for an interview with you" and "Was there any reason why you would not have an interview with the Prosecution?"[113] The Prosecution submits that the witness responded that she had received "no information at all".[114]

47. The Prosecution notes that it is amenable to the interviews it seeks being scheduled in the manner described in the VWS Submission.[115] Pursuant to the VWS suggestion, the Defence would

[106] First *Karadžić* Decision, para. 11.
[107] Prosecution Motion, paras 2 and 17. The Chamber notes that the Prosecution does not include MLD17 in para. 17 under the heading "Relief sought".
[108] Prosecution Motion, para. 11.
[109] *Id*, para. 2 and Confidential Annex A.
[110] *Id*, para. 5 and Confidential Annex B.
[111] *Id*, para. 6 and Confidentail Annex C.
[112] *Id*, para 8.
[113] Hearing, 4 February 2009, T. 4727.
[114] Prosecution Motion, para. 4.
[115] *Supra*, paras 9-13.

provide the contact information to VWS so that they may inquire of the witnesses whether they are agreeable to their contact information being passed to the Prosecution.[116]

48. The Prosecution states that this Trial Chamber has confirmed that "the jurisprudence of the Tribunal is that there is no property in a witness"[117] and submits that the Prosecution's request is reasonable and necessary for the purpose of its investigation in this case.[118] The Prosecution further states that the Prosecution has provided "ample opportunity to the Defence to facilitate these requests" and that there is "no reason the Defence would be unable to provide the Prosecution with the contact information for the twelve remaining witnesses from its original request."[119]

2. Defence submissions

49. On 18 February 2009, the Trial Chamber issued an order seeking to expedite the time period of filing of a response by the Defence until 10 a.m. on 23 February 2009. On 23 February 2009, the Defence filed a confidential motion seeking an extension of the time period for the response until 24 February 2009.[120] The Chamber hereby grants the extension sought therein. The Defence ultimately responded late in the evening on 23 February 2009.[121]

50. The Defence submits that it did reply to the Prosecution's requests for contact information in a letter dated 11 February 2009 ("Letter").[122] The Defence highlights five points in the Letter, which they seek to rely on in asking the Chamber to deny the Prosecution Motion. First, the Defence submit that they see "no formal precedent within the rules for the request".[123] Secondly, the Defence points out that it was not afforded a similar ability to interview Prosecution witnesses.[124]

51. The remaining three submissions of the Defence relate to its fear that any interviews carried out by the Prosecution may a) violate the rights of the interviewee, b) result in protective measures being compromised and discourage witnesses from attending, and c) that contact may be used to intimidate defence witnesses and prevent them coming to testify.[125]

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[116] *Id*, para. 12.
[117] *Id*, para. 10, citing this Chamber's statement, Hearing, 8 Oct 2008, T. 2673.
[118] *Id*, para. 13.
[119] *Id*, para. 16.
[120] Milan Lukić's motion to enlarge time to file response, 23 February 2009.
[121] Milan Lukić's response to Prosecution urgent motion to compel production of contact information with confidential annexes A, B and C, 23 February 2009 ("Defence Response").
[122] Defence Response, para. 3 and see "Exhibit 'A'".
[123] *Id*, para. 4.
[124] *Ibid.*
[125] *Ibid.*

52. The Defence gives two examples of interviews carried out by the Prosecution in support of these three submissions, first of MLD25, and secondly, of a person in the *Milutinović* case.[126] The Defence submits that these interviews highlight the manner in which the Prosecution carries out interviews, in particular "so as to discourage witnesses from testifying on behalf of the Defence."[127] In addition, the Defence submits that these interviews demonstrate repeated violations by the Prosecution of the right of the witnesses to remain silent, and their right "to seek legal advise in confidence."[128] The Defence also submits that witnesses who have come and testified for the Defence have had their protective measures compromised on several occasions.[129] In support of this contention, the Defence attaches documents detailing how MLD10's identity has purportedly been revealed in the media and how her reputation and integrity has been attacked as a result of her appearance at the ICTY.[130]

E. Discussion

53. A number of the witnesses that are the subject of the Prosecution Motion have already testified: MLD17 (on 4 February 2009), MLD19 (on 25 February 2009), MLD21 (on 25 February 2009), MLD22 (on 25 and 26 February 2009), MLD23 (on 26 February 2009) and Miodrag Mitrasinović (on 26 February 2009). The Chamber also notes that MLD16 ultimately did not testify.[131] In view of the Prosecution's purpose for bringing the motion, the Chamber considers that the motion is moot in respect of these witnesses. The Chamber will therefore only consider the Prosecution Motion in respect of MLD2, MLD13 and the four other witnesses (collectively, "the Six Remaining Witnesses").

54. None of the Six Remaining Witnesses has been granted delayed disclosure of identifying information. As noted earlier, such a measure would have allowed the Defence to refuse to provide the requested contact information to the Prosecution.[132] As also noted above, there is no property in a witness and, moreover, there is an equal right of both sides to request to contact witnesses with a view to interviewing them.[133] Furthermore, the Trial Chamber has made it clear above that the requested party may only withhold the information sought if a Chamber has granted protective measures to this effect upon a showing of exceptional circumstances.

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[126] *Id*, para. 5 refering to *Prosecutor v. Milutinović et al.*, Case IT-05-87-T, Sreten Lukić's submission pursuant to Trial Chamber direction of 13 August 2007, in support of his re-filed motion for an order barring contact with defense witnesses", 15 August 2007, pp. 2-8.
[127] Defence Response, para 5.
[128] *Ibid.*
[129] *Id*, para. 6.
[130] *Ibid.*
[131] Hearing, 3 February 2009, T. 4684 onwards (esp. T. 4688).
[132] *Supra*, para. 25.
[133] *Supra*, para. 30.

55. The Chamber considers the Prosecution's request to obtain the contact information of the Six Remaining Witnesses for the purpose of requesting interviews to be reasonable and that it may assist the Prosecution in its preparation for cross-examination of those witnesses.

56. In opposing the Prosecution's request, the Defence makes serious allegations against the Prosecution. The Chamber is of the view that it is insufficient for a party to refer to the filing of a party in another case of which this Chamber has no knowledge.[134] Furthermore, the Chamber notes that the material included in the Defence Response in support of its allegations against the Prosecution concerning MLD10 was not filed in a working language of the Tribunal. The Chamber has not therefore taken this material into consideration. Nevertheless, and in any event, Chamber is not satisfied that the Defence raised any issue or substantiated any allegation in a manner sufficient to establish that protective measures are warranted for the witnesses.

57. The Chamber concludes that the Defence has failed to establish the existence of exceptional circumstances warranting the granting of protective measures, generally speaking, and specifically that there would be an objective likelihood of interference with the Six Remaining Witnesses which would result from disclosure of their contact information to the Prosecution. The Chamber will therefore order the Defence to provide this information to the Prosecution in order to enable the Prosecution to contact the witnesses with a view to ascertaining whether they would agree to an interview with the Prosecution.

[134] *Supra*, fn. 125.

F. Disposition

58. For the foregoing reasons, in consideration of the arguments of the parties and pursuant to Rules 54, 68, 75, 98, the Trial Chamber:

GRANTS the Defence Motion;

ORDERS the Prosecution immediately to disclose to the Defence of Milan Lukić the contact information sought in relation to VG-10, VG-26, VG-31, VG-55, VG-59, VG-60, VG-81 and Fikret Cocalić;

CALLS CW2 as a witness of the Trial Chamber on Thursday 9 April 2009;

ORDERS that CW2:

1) shall be referred to by this pseudonym at all times during the testimony or whenever referred to during the proceedings or in documents, including the transcript of the proceedings, and

2) shall be screened from the public and granted image and voice distortion in all audio-visual recordings and transmission of the testimony;

ORDERS the Registrar to take any necessary measures to obtain the attendance of CW2 before the Trial Chamber on Thursday 9 April 200;

ORDERS the Prosecution immediately to disclose to the Defence of Milan Lukić the WVW Statement and the POBiH Statement in unredacted form;

GRANTS the Prosecution motion; and

ORDERS the Defence of Milan Lukić immediately to disclose to the Prosecution the contact information sought in relation to the Six Remaining Witnesses.

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

Judge Patrick Robinson
Presiding

Dated this thirtieth day of March 2009
At The Hague
The Netherlands

[Seal of the Tribunal]