

IT-09-92-1
D28864-028858
24 June 2011

28864
SMS



**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-09-92-I
Date: 24 June 2011
Original: English

BEFORE TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Bakone Justice Moloto
Judge Christoph Flügge

Registrar: Mr John Hocking

Decision of: 24 June 2011

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

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

Office of the Prosecutor

Mr Dermot Groome
Mr Peter McCloskey

The Accused

Mr Aleksandar Aleksić

PROCEDURAL HISTORY AND SUBMISSIONS BY THE PARTIES

1. On 3 June 2011, the Prosecution filed its Motion for Protective Measures for Victims and Witnesses and Documentary Evidence (“Motion”). The Prosecution seeks orders restricting public disclosure by the Defence of information and material it has been provided by the Prosecution.¹ According to the Prosecution, public disclosure of such information and material may compromise the security of victims and witnesses, be contrary to conditions pertaining to usage and publication (for example, Rule 70 restrictions), or compromise or impair Tribunal investigations and proceedings.²

2. The Prosecution further seeks orders for privacy and protection of victims and witnesses, in particular restricting disclosure of information to the Defence about the current whereabouts of victims and witnesses.³ The Prosecution argues that it is in the interests of justice that confidentiality be maintained in relation to the current whereabouts of victims and witnesses in order to limit risks to their security and in order to respect their right to confidentiality with respect to private information.⁴

3. On 6 June 2011, the Chamber decided to shorten the deadline to respond to the Motion to 10 June 2011 and informed the Defence accordingly through an informal communication. On 10 June 2011, the Defence filed a request for extension of time to file a response to the Motion (“Request”).⁵ The Defence requested the Chamber to accept the “limited role” of the Duty Counsel and grant a two-week extension for filing a response counting from the day when a permanent counsel is assigned.⁶ In the alternative, the Defence requested a two-week extension from the filing of the Request.⁷ On 15 June 2011, the Chamber granted the Request in part, and decided that any response to the Motion should be filed by 17 June 2011. The Chamber informed the Defence accordingly through an informal communication.

4. On 17 June 2011, the Defence filed its response to the Motion (“Response”),⁸ requesting that the Motion be denied in its entirety.⁹ However, the Defence’s arguments are

¹ Motion, paras 1, 5.

² Motion, para. 2.

³ Motion, paras 1, 4-5.

⁴ Motion, para. 4.

⁵ Duty Counsel Request for Extension of Time to File a Response to Prosecution’s Motion for Protective Measures for Victims and Witnesses and Documentary Evidence, 10 June 2011.

⁶ Request, paras 5-7, p. 4.

⁷ Request, p. 4.

⁸ Duty Counsel Response to Prosecution’s Motion for Protective Measures for Victims and Witnesses and Documentary Evidence, 17 June 2011.

⁹ Response, p. 5.

limited to the second part of the Motion, namely the requests for orders for privacy and protection of victims and witnesses, in particular with regard to information about their current whereabouts.¹⁰ In this respect, the Defence submits that the Prosecution needs to show exceptional circumstances for a variation of its disclosure obligations.¹¹

APPLICABLE LAW

5. Article 20 of the Statute of the Tribunal (“Statute”) provides, in relevant parts:

The Trial Chamber shall ensure that a trial is fair and expeditious and that proceedings are conducted [...] with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

6. Rule 53 (C) of the Rules of Procedure and Evidence (“Rules”) provides, in relevant parts:

(A) In exceptional circumstances, a Judge or a Trial Chamber may, in the interests of justice, order the non-disclosure to the public of any documents or information until further order.

[...]

(C) A Judge or Trial Chamber may, in consultation with the Prosecutor, also order that there be no disclosure of an indictment, or part thereof, or of all or any part of any particular document or information, if satisfied that the making of such an order is required to give effect to a provision of the Rules, to protect confidential information obtained by the Prosecutor, or is otherwise in the interests of justice.

7. Rule 66 of the Rules provides, in relevant parts:

Subject to the provisions of Rules 53 and 69, the Prosecutor shall make available to the defence in a language which the accused understands

(i) within thirty days of the initial appearance of the accused, copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused [...]

8. Rule 68 of the Rules provides, in relevant parts:

Subject to the provisions of Rule 70,

¹⁰ Response, paras 2-13.

¹¹ Response, paras 10, 12-13.

(i) the Prosecutor shall, as soon as practicable, disclose to the Defence any material which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence [...]

9. Rule 75 of the Rules provides, in relevant parts:

A Judge or a Chamber may, *proprio motu* or at the request of either party, or of the victim or witness concerned, or of the Victims and Witnesses Section, order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused.

DISCUSSION

10. The Chamber will initially deal with the Defence’s Request, which it decided to grant in part. The Deputy Registrar’s decision appointing the Duty Counsel sets out that he should “represent the Accused at his initial appearance, and in such other matters as may be necessary until a permanent counsel is assigned”.¹² Considering this and the subject matter of the Motion, the Chamber found that it was within the competencies of the Duty Counsel to respond to the Motion. The Chamber further found that it was appropriate to allow the Defence two weeks from the date of the Motion to respond.

11. The Motion has two parts: the first concerns disclosure to the public and the second concerns disclosure to the Defence. The Defence has not provided any arguments against granting the first part of the Motion, regarding the restrictions on public disclosure of material and information provided by the Prosecution to the Defence. The Chamber considers that the Prosecution might later request specific protective measures and should the Chamber decide to grant such requests, making the material public now would deprive those decisions of any effect. The Chamber therefore finds that it is in the interests of justice at this stage of the proceedings to restrict the disclosure to the public of the material provided by the Prosecution to the Defence. One important exception to such a restriction would be when public disclosure is directly and specifically necessary to allow the Defence to prepare for and participate in the proceedings and present its defence.

12. With regard to the second part of the Motion, namely the disclosure to the Defence of information contained in statements about the current whereabouts of victims and witnesses, the Chamber considers that the legal provision regulating the Prosecution’s

obligations is Rule 66, rather than Rule 68 of the Rules. Any restriction to disclosure could therefore be sought under Rule 53 of the Rules. The Prosecution argues that the restriction it is seeking is in the interests of justice “in order to limit risks to the security of victims and witnesses and in order to respect the rights of victims and witnesses to confidentiality in respect of private information”.¹³ The Defence argues that Ratko Mladić’s (“Accused”) “right to a fair trial and ability to prepare his defence would be significantly impeded” if the request for such a restriction would be granted.¹⁴ The Defence relied on a decision in the *Milošević* case.¹⁵ The Chamber finds that this decision is not on point as it concerns the redaction of *identifying information* of witnesses, rather than information about the current whereabouts of victims and witnesses whose identities are known to the Defence.¹⁶

13. The Prosecution pointed to a decision in the *Karadžić* case, in which the Chamber seized of that case granted the Prosecution’s request to redact information about the current whereabouts of witnesses.¹⁷ The *Karadžić* Chamber held that 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”.¹⁸

14. Considering the importance of protection and privacy for victims and witnesses and, in particular, that the information proposed to be redacted by the Prosecution has no or very limited implications for the ability of the Defence to effectively prepare its defence, the Chamber finds that it is in the interests of justice to restrict disclosure as requested by the Prosecution.

¹² Decision by Deputy Registrar, 1 June 2011.

¹³ Motion, para. 4.

¹⁴ Response, para. 11.

¹⁵ Response, paras 7-9. See *Prosecutor v. Slobodan Milošević*, Case No. IT-54-T, Decision on Prosecution Motion for Provisional Protective Measures Pursuant to Rule 69, 19 February 2002 (“*Milošević* Decision”).

¹⁶ See *Milošević* Decision, para. 25.

¹⁷ Motion, para. 4, note 4. See *Prosecutor v. Radovan Karadžić*, Case no. IT-95-5/18-PT, Decision on Prosecution Motion for Non-Disclosure, 2 September 2008 (“*Karadžić* Decision”), paras 11, 16.

¹⁸ *Karadžić* Decision, para. 11.

DISPOSITION

15. For the foregoing reasons, pursuant to Article 20 of the Statute and Rules 53 and 75 of the Rules, the Chamber **GRANTS** the Motion and **ORDERS** as follows:

- a) The Prosecution may redact from statements of witnesses and potential witnesses any information which discloses the current whereabouts of the maker of any such document or his or her family, and any information contained within such documents which discloses the current whereabouts of other individuals named in them who have made witness statements which the Prosecution has already disclosed or which it intends to disclose;
- b) The Defence shall not in any way, directly or indirectly, disclose to the public any of the material provided to it by the Prosecution, except:
 - i) as directly and specifically necessary to allow it to prepare for and participate in these proceedings and present a defence, or
 - ii) when such material becomes public in the course of public and open session proceedings in this case or when it is disclosed to the public by the Prosecution;
- c) If the Defence finds it necessary to disclose material for the purpose set out in paragraph 15 b) i), above, it shall inform each person among the public to whom such material is disclosed, that he or she shall not copy, reproduce, or publicise such material, in whole or in part, and shall not disclose it to any other person. If provided with the original or any copy of such material, such person shall return it to the Defence when the material is no longer necessary for the purpose set out in paragraph 15 b) i), above. The Defence should further maintain a list of persons to whom the material is disclosed, recording the name of the person, a description of the disclosed material, and the dates of disclosure and return of the material;
- d) At the conclusion of the proceedings of this case, the Defence shall return to the Registry all confidential, disclosed material and copies thereof which have not become part of the public record;
- e) Should a member of the Defence team withdraw or otherwise leave the Defence, all of the material disclosed by the Prosecution, together with copies of such material, held or possessed by this member should be handed over to the person serving as Lead Counsel for the Defence at that time.

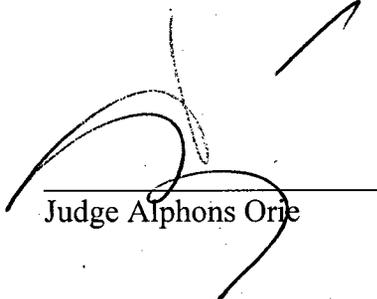
16. For the purpose of this decision, the “public” means all persons, governments, media (as defined in paragraph 17, below), organizations, and other entities, other than the

judges and staff of the Tribunal Chambers and Registry, the Prosecution and the Defence (as defined in paragraph 18, below).

17. For the purpose of this decision, the “media” means all video, audio, electronic, and print media personnel, including journalists, reporters, authors, television and radio personnel, their agents and representatives.

18. For the purpose of this Decision, the “Defence” means the Accused, his Defence Counsel and legal assistance and staff, as well as such other persons assigned by or listed with the Registry as part of his defence team. In this respect, the Registry is instructed to maintain a list identifying each person who is part of, or who represents, the Defence.

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



Judge Alphons Orie

Dated this 24th day of June 2011
At The Hague
The Netherlands

[Seal of the Tribunal]