

4-02-82-7
D 13362 - D 13353
30 March 2007

13362
YB.

UNITED
NATIONS



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of
Former Yugoslavia since 1991

Case No. IT-04-82-PT
Date: 30 March 2007
Original: English

IN TRIAL CHAMBER II

Before: Judge Kevin Parker, Presiding
Judge Christine Van Den Wyngaert
Judge Krister Thelin

Registrar: Mr. Hans Holthuis

Decision of: 30 March 2007

PROSECUTOR

v.

**LJUBE BOŠKOSKI
JOHAN TARČULOVSKI**

PARTLY CONFIDENTIAL

**DECISION ON PROSECUTION'S MOTION FOR
PROTECTIVE MEASURES**

The Office of the Prosecutor:

Mr. Dan Saxon
Ms. Joanne Motoike
Mr. Matthias Neuner

Counsel for the Accused:

Ms. Edina Rešidović and Mr. Guénaél Mettraux for Ljube Boškosi
Mr. Antonio Apostolski for Johan Tarčulovski

I. INTRODUCTION

1. This Trial Chamber (“Chamber”) of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (“Tribunal”) is seized of a *confidential* “Prosecution’s Motion for Protective Measures”, filed on 12 March 2007 (“Motion”). The Prosecution requests that all nine prospective witnesses mentioned in its Motion be referred to by a pseudonym in the course of the trial. For four of these prospective witnesses, the Prosecution also seeks to have their testimony given with both image and voice distortion. For three of the prospective witnesses, the Prosecution seeks to have their testimony given with image distortion. For the remaining two prospective witnesses, the Prosecution seeks to have the testimony given in closed session. For all of the prospective witnesses, the Prosecution further requests (a) the redaction of all identifying information from the public records of the Tribunal and, (b) the non-disclosure to the public of any identifying records. The Defence for Ljube Boškoski (“Boškoski Defence”) filed a response on 20 March 2007, objecting to the protective measures sought by the Prosecutor only in respect of one of the prospective witnesses (“Boškoski Defence Response”).¹ The Defence for Johan Tarčulosvski (“Tarčulosvski Defence”) filed a response on 29 March 2007, objecting to the protective measures sought in respect of three of the prospective witnesses (“Tarčulosvski Defence Response”).² In its submission, the Tarčulosvski Defence contends that it was unable to retrieve an electronic copy of the Motion on the filing date, and subsequently was unable to file its response within the deadline prescribed by the Rules of Procedure and Evidence of the Tribunal (“Rules”). The Chamber is satisfied that good cause has been shown pursuant to Rule 127 to accept the late submission. On 27 March 2007, the Prosecution filed leave to reply to the Boškoski Defence Response and submitted its reply (“Reply”).³ The Chamber grants leave to reply, and takes note of the content of this Reply.

II. LAW

2. The Motion is governed by Articles 20, 21 and 22 of the Statute of the Tribunal (“Statute”) and Rules 54, 75 and 79 of the Rules.

3. Article 20(1) of the Statute provides that proceedings are conducted “with full respect for the rights of the accused and due regard for the protection of victims and witnesses”, and Article 20(4) of the Statute provides that “the hearings shall be public unless the Trial Chamber decides to

¹ *Confidential* Boškoski Defence Response to Prosecution Motion for Protective Measures, 20 March 2007.

² *Confidential* Johan Tarčulosvski Response to Prosecution Motion for Protective Measures, 29 March 2007.

close the proceedings in accordance with its rules of procedure and evidence”. Article 21(2) of the Statute provides that “the accused shall be entitled to a fair and public hearing, subject to Article 22”. Article 22 of the Statute states that protective measures shall include, but shall not be limited to, the conduct of *in camera* proceedings and the protection of the victim’s identity. The Rules of the Tribunal echo these provisions. Rule 75 states that a Chamber may order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused. In particular, Rule 75 (B)(i) provides that a Trial Chamber may hold in camera proceeding to determine whether to order 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 witness by such means as (a) expunging names and identifying information from the Tribunal’s public records, (b) non-disclosure to the public of any records identifying the victim, (c) giving testimony through image or voice altering devices or closed circuit television, and (d) assignment of a pseudonym. Rule 79 of the Rules on closed session proceedings states that a Trial Chamber may order that the press and the public be excluded from all or part of the proceedings for reasons of *inter alia* “(ii) safety, security or non-disclosure of the identity of a victim or witness as provided in Rule 75.”

4. The Chamber recalls that the burden rests on the party seeking protective measures to justify in each case why the measures requested should be granted.⁴ Not only must the testimony of the witness be important to the Prosecution’s case but the applicant must show that, should it become publicly known that the witness has testified, there is a real risk to his or her security or that of his or her family, rather than a mere general expression of fear by the witness.⁵ The Chamber must therefore be satisfied, in view of the specific reasons provided, that the fear expressed has an objective foundation.

5. With regards to closed session, the more extreme the protection sought, the more onerous will be the obligation upon the applicant to establish the risk asserted.⁶ It is so because the determination of protective measures requires the Chamber to consider competing interests, namely

³ Confidential Prosecution’s Reply to Bošković’s Defence Response to “Prosecution Motion for Protective Measures”, 27 March 2007.

⁴ *Prosecutor v. Pavle Strugar, Miodrag Jokić and others*, “Order on Prosecution’s motions for protective measures”, 16 January 2002, page 5; *Prosecutor v. Limaj et al*, Decision on Prosecution’s Motion for Protective Measures at Trial, 22 November 2004, para. 6; *Prosecutor v. Milutinović et al*, Decision on Prosecution’s Sixth Motion for Protective Measures, 1 June 2006.

⁵ *Prosecutor v. Duško Tadić*, “Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses”, 10 August 1995 (paras 62-66). See also, *The Prosecutor v. Tihomir Blaškić*, “Decision on the application of the Prosecutor dated 17 October 1996 Requesting Protective Measures for Victims and Witnesses”, 5 November 1996; *Prosecutor v. Slobodan Milošević*, Decision on Prosecution’s Motion for Trial Related Protective measures (Bosnia), 30 July 2002.

⁶ *Prosecutor v. Slobodan Milošević*, Decision on Prosecution’s Motion for Trial Related Protective measures (Bosnia), 30 July 2002, para 5.

on the one hand, the right of the Accused to a fair and public trial and, on the other hand, the rights of victims to protection and privacy. The Chamber will therefore examine closely the circumstances upon which a party relies to justify closed session under Rule 79 of the Rules. In particular, the Chamber will be concerned to ensure that there is shown to be a real risk to the witness or his or her family from the prospect of the witness' public testimony, and that such risk is sufficiently founded. Moreover, it will need to be shown that less restrictive measures cannot adequately deal with the witness' legitimate concerns or that there exists some other exceptional circumstance.⁷

III. DISCUSSION

6. For the purpose of this decision, the Chamber will refer to the prospective witnesses who are the subject of the Motion, with the pseudonyms proposed in the Motion.

7. With respect to prospective witness M-017, the Prosecution requests that the witness' testimony be given under pseudonym (pseudonym "M-017") and with image and voice distortion.⁸ In support of this submission there is offered a *confidential* written declaration of an OTP investigator.⁹ In the declaration, the OTP investigator states that when interviewing prospective witness M-017, the witness stated that he or she feared for his or her security should he or she come to testify in the present case. The Boškoski Defence does not object to the granting of protective measures to this prospective witness. Upon evaluation of the factual circumstances relied on by the Prosecution in support of the protective measures at trial for this prospective witness, the Chamber is persuaded that there is a real risk to the security of the witness. The testimony of this prospective witness will therefore be given under pseudonym M-017, and with image and voice distortion.

8. With respect to prospective witness M-037, the Prosecution requests that the witness' testimony be given under pseudonym (pseudonym "M-037") and with image and voice distortion.¹⁰ A *confidential* written declaration of an OTP investigator who interviewed this prospective witness and heard his or her security concerns, is offered in an Annex attached to the Motion.¹¹ The Boškoski Defence does not object to the protective measures requested. The Chamber notes that the prospective witness has personally expressed serious and grave concerns for his or her own safety and that of his or her family, based particularly upon his or her personal experience. Additionally, upon review of the material submitted in support the Motion, the Chamber is persuaded that there is an objective basis demonstrating a real likelihood that the witness and the family of the witness

⁷ *Prosecutor v. Slobodan Milošević*, Decision on Prosecution's Motion for Trial Related Protective measures (Bosnia), 30 July 2002, para 6.

⁸ Motion, para 11(b); *Confidential* Annex A to the Motion.

⁹ *Confidential* Annex B.

¹⁰ Motion, para 11(b); *Confidential* Annex A to the Motion.

concerned may be in danger. The testimony of this prospective witness will therefore be given under pseudonym M-037, and with image and voice distortion.

9. With respect to prospective witness M-039, the Prosecution requests that the witness' testimony be given under pseudonym (pseudonym "M-039") and with image distortion.¹² In support of its submission, the Prosecution offers a *confidential* written declaration of an OTP investigator who interviewed this prospective witness and heard his or her fear of reprisal should he or she testify before this Tribunal.¹³ The Boškoski Defence does not object to the protective measures requested for this witness. The Chamber considers that, in view of the highly sensitive nature of the anticipated testimony of witness M-039, there is a real risk to the security of the witness concerned. The testimony of this prospective witness will be therefore given under pseudonym M-039, and with image and voice distortion.

10. With respect to prospective witness M-052, the Prosecution requests that the witness's testimony be given under pseudonym (pseudonym "M-052") and in closed session.¹⁴ Offered in support of the protective measures requested is a *confidential* written declaration of an OTP investigator.¹⁵ In the declaration, the OTP investigator states that when interviewing prospective witness M-052, the witness stated that, in view of his or her anticipated testimony in the present case, he or she had been personally threatened. The Boškoski Defence objects to the granting of protective measures to this prospective witness and submits, *inter alia*, that a "legitimate and objectively-established security concern" has not been shown.¹⁶ Having examined closely the circumstances upon which the Prosecution justifies the protective measures requested, and in view of the highly sensitive nature of the anticipated testimony, the Chamber considers that there is a real risk to the security of the witness should the testimony be given publicly before this Tribunal. The Chamber finds that the protective measures requested by the Prosecution are, therefore, appropriate and necessary to safeguard the privacy and protection of the witness concerned, and further finds it to be consistent with the rights of the Accused in this case. The testimony of this prospective witness will be therefore given under pseudonym M-052, and in closed session.

11. With respect to prospective witness M-053, the Prosecution requests that the witness' testimony be given under pseudonym (pseudonym "M-053") and with image distortion.¹⁷ In support

¹¹ Motion, para 11(b); *Confidential* Annex A to the Motion.

¹² Motion, para 11(b); *Confidential* Annex A to the Motion.

¹³ *Confidential* Annex B.

¹⁴ Motion, para 11(b); *Confidential* Annex A to the Motion.

¹⁵ *Confidential* Annex B.

¹⁶ Boškoski Defence Response, paras 19-22; Annex A and B to the Boškoski Defence Response.

¹⁷ Motion, para 11(b); *Confidential* Annex A to the Motion.

of this submission there is offered a *confidential* written declaration of an OTP investigator.¹⁸ The written declaration indicates that the witness has been threatened in view of his or her anticipated testimony in the present case. The Boškoski Defence does not object to the granting of protective measures to this prospective witness. It is the opinion of the Chamber that the Prosecution has shown the presence of security concerns underlying the protective measures requested, calling for the use of protective measures at trial for this prospective witness. The testimony of this prospective witness will be therefore given under pseudonym M-053, and with image distortion.

12. With respect to prospective witness M-062, the Prosecution requests that the witness's testimony be given under pseudonym (pseudonym "M-062") and in closed session.¹⁹ A *confidential* written declaration of an OTP investigator who interviewed this prospective witness and heard his or her security concerns, is offered in annex to the Motion.²⁰ The Boškoski Defence does not object to the protective measures requested. The Chamber considers that, in view of the highly sensitive nature of the anticipated testimony, there is a real risk to the security of the witness and the family of the witness should the testimony be given publicly before this Tribunal. Further, it is the view of the Chamber that no less restrictive measure can adequately deal with the witness' legitimate concerns since the content of the testimony would lead to the witness' identification.

13. With respect to prospective witness M-084, the Prosecution requests that the witness' testimony be given under pseudonym (pseudonym "M-084") and with image distortion.²¹ Having examined carefully the *confidential* written declaration of an OTP investigator, which is offered in support of the Motion, the Chamber notes that this witness has personally expressed serious and grave concerns for his or her safety and that of his or her family to the OTP investigator.²² Additionally, upon evaluation of the factual circumstances relied on by the Prosecution in support of the protective measures at trial for this prospective witness, the Chamber is persuaded that there is an objective basis demonstrating a real likelihood that the witness and the family of the witness concerned may be in danger. The testimony of this prospective witness will therefore be given under pseudonym M-084, and with image distortion.

14. With respect to prospective witness M-088, the Prosecution requests that the witness' testimony be given under pseudonym (pseudonym "M-088") and with image and voice distortion.²³ The reasons and circumstances underlying the protective measures requested are outlined in a *confidential* written declaration of an OTP investigator, attached in Annex B to the Motion. The

¹⁸ *Confidential* Annex B.

¹⁹ Motion, para 11(b); *Confidential* Annex A to the Motion.

²⁰ *Confidential* Annex B.

²¹ Motion, para 11(b); *Confidential* Annex A to the Motion.

²² *Confidential* Annex B.

Boškoski Defence does not object to the protective measures requested for this witness. The Chamber considers that, in view of the highly sensitive nature of the anticipated testimony of witness M-088, there is a real risk to the security of the witness concerned. The testimony of this prospective witness will be therefore given under pseudonym M-088, and with image and voice distortion.

15. With respect to prospective witness M-092, the Prosecution requests that the witness' testimony be given under pseudonym (pseudonym "M-092") and with image and voice distortion.²⁴ Offered in support of the protective measures requested is a *confidential* written declaration of an OTP investigator.²⁵ The Boškoski Defence does not object to the granting of protective measures to this prospective witness. Upon evaluation of the factual circumstances relied on by the Prosecution in support of the protective measures at trial for this prospective witness, the Chamber is persuaded that there is a real risk to the security of the witness. The testimony of this prospective witness will therefore be given under pseudonym M-017, and with image and voice distortion.

16. The Chamber is also persuaded that all identifying information or material relating to the nine prospective witnesses subject of the Motion shall not be disclosed to the public and shall be redacted from the public records of the Tribunal by the competent organs or sections. The Chamber finds that these measures requested by the Prosecution are appropriate and necessary to safeguard the privacy and protection of the prospective witnesses and the integrity of the evidence and the proceedings, and further finds them to be consistent with the rights of the accused in this case. The Chamber points out that the Defence has an underlying obligation to safeguard this type of identifying information or material of protected witnesses and that any breach of this obligation will be regarded as contempt of the Tribunal pursuant to Rule 77(A)(ii) of the Rules.

IV. DISPOSITION

17. Based on the foregoing, pursuant to Articles 20, 21 and 22 of the Statute and Rules 54, 75 and 79 of the Rules, the Chamber **GRANTS THE MOTION** and **ORDERS** as follows:

1. All nine prospective witnesses subject of the Motion shall testify with the pseudonyms listed in *Confidential* Annex I attached to this decision. These pseudonyms shall be used whenever referring to the witnesses in question in this trial and related proceedings before the Tribunal and in discussions among parties to the trial.

²³ Motion, para 11(b); *Confidential* Annex A to the Motion.

²⁴ Motion, para 11(b); *Confidential* Annex A to the Motion.

²⁵ *Confidential* Annex B.

2. Witness M-017, witness M-037, witness M-088, and witness M-092 shall testify with the protective measures of pseudonym, image and voice distortion; witness M-039, witness M-053, and witness M-084 shall testify with the protective measures of pseudonym and image distortion and witness M-052 and M-062 shall testify with a pseudonym in closed session. The specific protective measures granted for each witness are indicated in *Confidential Annex I*.
3. The name, address, whereabouts of, and identifying information concerning each of the witnesses identified in *Confidential Annex I* of this decision shall not be disclosed to the public and shall not be included in any public records of the Tribunal.
4. To the extent that the name, address, whereabouts of, or other identifying data of the witnesses identified in *Confidential Annex I* is contained in existing public records of the Tribunal, that information shall be expunged from those documents.
5. All hearings to consider the issue of protective measures for the witnesses identified in *Confidential Annex I* shall be held in closed session and edited records and transcripts of the session(s) shall be released to the public and to the media after review by the Prosecution, in consultation with the Victims and Witnesses Section.
6. The public and the media may not photograph, video-record or sketch or in any manner record or reproduce images of the witnesses identified in *Confidential Annex I* while, they are in the precincts of the Tribunal.

For the purposes of this decision:

“The Defence” means and includes the accused Ljube Boškoski and Johan Tarčulosvski (“Accused”), their Defence Counsel and all those approved by the Registry to assist with the defence of the Accused.

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

“The media”, as mentioned above, means and includes all video, audio, electronic and print media personnel, including journalists, reporters, authors, television and radio personnel, as well as their agents and representatives.

18. Nothing herein shall preclude any party or person from seeking such other or additional protective measure or measures as may be appropriate concerning a specific witness or prospective witness, or other evidence.

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

Dated this 30th day of March 2007
At The Hague
The Netherlands



Judge Kevin Parker

Presiding Judge

[Seal of the Tribunal]