



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

Case No. IT-04-82-A
Date: 14 May 2010
Original: English

BEFORE A JUDGE OF TRIAL CHAMBER II

Before: Judge Guy Delvoie

Registrar: Mr. John Hocking

Order of: 14 May 2010

PROSECUTOR

v.

**LJUBE BOŠKOSKI
JOHAN TARČULOVSKI**

PUBLIC

**ORDER ISSUING A PUBLIC REDACTED VERSION OF THE
“DECISION ON BOŠKOSKI MOTION FOR URGENT ORDERS
REGARDING DISCLOSURE OF CONFIDENTIAL
MATERIAL” OF 22 DECEMBER 2009**

The Office of the Prosecutor:

Mr. Paul Rogers

The Former Yugoslav Republic of Macedonia:

via the Embassy of the Former Yugoslavia Republic
of Macedonia to The Netherlands, The Hague

Counsel for Ljube Boškosi:

Ms. Edina Rešidović
Mr. Guénaél Mettraux

The United States of America:

via the Embassy of the United States of America to
The Netherlands, The Hague

Counsel for Johan Tarčulovski:

Mr. Alan M. Dershowitz
Mr. Nathan Z. Dershowitz
Mr. Antonio Apostolski
Mr. Jordan Apostolski

I, GUY DELVOIE, Judge 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”);

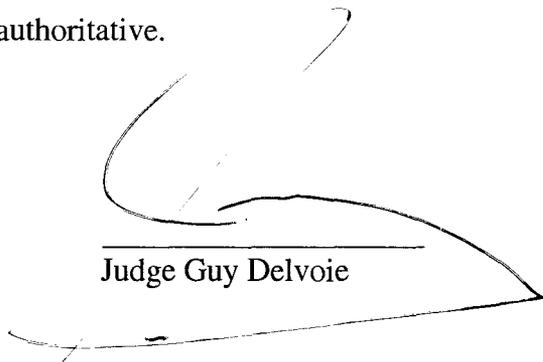
NOTING the “Decision on Boškoski Motion for Urgent Orders Regarding Disclosure of Confidential Material” issued confidentially by me in my capacity as then Duty Judge on 22 December 2009 (“Decision”);

CONSIDERING that some of the information contained in the Decision is to remain confidential;

HEREBY ISSUE a public redacted version of the Decision.

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

Dated this fourteenth day of May 2010,
At The Hague,
The Netherlands.



Judge Guy Delvoie

[Seal of the Tribunal]

**UNITED
NATIONS**



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

Case No. IT-04-82-A
Date: 22 December 2009
Original: English

BEFORE THE DUTY JUDGE

Before: Judge Guy Delvoie, Duty Judge
Registrar: Mr. John Hocking
Decision of: 22 December 2009

PROSECUTOR

v.

**LJUBE BOŠKOSKI
JOHAN TARČULOVSKI**

PUBLIC REDACTED VERSION

**DECISION ON BOŠKOSKI MOTION FOR URGENT ORDERS
REGARDING DISCLOSURE OF CONFIDENTIAL MATERIAL**

The Office of the Prosecutor:

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Mr. Alan M. Dershowitz
Mr. Nathan Z. Dershowitz
Mr. Antonio Apostolski
Mr. Jordan Apostolski

1. I, **Guy DELVOIE**, Judge 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”), acting in my current capacity as Duty Judge in accordance with Rule 28 of the Rules of Procedure and Evidence (“Rules”), am seised of the “Boškoski Motion for Urgent Orders Regarding Disclosure of Confidential Material with *Ex Parte* Annexes A through J”, filed confidentially and partly *ex parte* by Ljube Boškoski (“Boškoski”) on 7 December 2009 (“Motion”).

A. Background

2. On 22 April 2005, the Prosecution filed before Trial Chamber II hearing the case of *Prosecutor v. Ljube Boškoski and Johan Tarčulovski* (“Trial Chamber”) a motion seeking protective measures for material that would be disclosed to the Defence pursuant to its obligations under Rules 66 and 68 of the Rules.¹

3. On 28 April 2005, an Interim Decision was delivered by the Pre-Trial Judge ordering the Prosecution to comply with its disclosure obligations by 1 May 2005, while also ordering that the Defence teams and their staff may not disclose any of the material to the public.² The Prosecution subsequently filed a Notice of Compliance on 3 May 2005 informing the Trial Chamber that it had disclosed the material to the Defence in compliance with the Interim Decision (“May 2005 disclosure”).³ The Notice of Compliance also included non-disclosure agreements signed personally by Boškoski and Johan Tarčulovski (“Tarčulovski”).

4. On 20 June 2005, the Pre-Trial Judge rendered a decision granting the Prosecution’s Protective Measures Motion in part and ordering that the Defence shall not in any way, disclose to the public any of the material which was provided by the Prosecution except that which may be reasonably necessary for the preparation and presentation of a defence case.⁴ The Pre-Trial Judge also considered that there was no need for every member of a Defence team to sign a non-disclosure agreement in light of the obligations of counsel under the Code of Professional

¹ *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-PT, Urgent Prosecution’s Motion for Protective Measures for Victims and Witnesses with Confidential and *Ex Parte* Annex A, 22 April 2005 (“Protective Measures Motion”).

² *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-PT, Interim Decision on Prosecution’s Motion for Protective Measures for Victims and Witnesses, 28 April 2005 (“Interim Decision”), pp. 2-3.

³ *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-PT, Prosecution’s Notice of Compliance with Disclosure Obligations Pursuant to Rule 66(A)(i) with Confidential Attachment 1, 3 May 2005.

⁴ *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-PT, Decision on Prosecution’s Motion for Protective Measures for Victims and Witnesses, 20 June 2005, para. 4, p. 6, (“First Decision on Protective Measures”).

Conduct for Defence Counsel Appearing before the Tribunal, Rule 77 of the Rules and other protective measures ordered in the decision.⁵

5. On 17 August 2005, the Pre-Trial Judge granted in part a motion filed by the Prosecution on 7 July 2005, requesting further protective measures for the material disclosed by the Prosecution to the Defence.⁶ The Pre-Trial Judge noted that those measures previously granted remain in force, while ordering that any member of the public, including the media and relatives and associates of Boškoski and Tarčulovski, is prohibited from disclosing and/or publishing any material or information subject to protective measures aside from material which may become public during open session proceedings.⁷

6. On 23 November 2009, Boškoski informed his counsel that [REDACTED] had aired a portion of [REDACTED] ("Video").⁸ Excerpts of this Video have been made publicly available on the website of [REDACTED].⁹ It came to the attention of Boškoski's counsel that portions of the same Video was also posted on the website of [REDACTED].¹⁰ This Video was included in the May 2005 disclosure by the Prosecution to the Defence as [REDACTED], but was never used or tendered as an exhibit in the proceedings at the Tribunal.¹¹ Following the receipt of this information counsel for Boškoski, on 23 and 24 November 2009, immediately informed the Registry and the Prosecution of the publication of this Video in the media.¹² On 6 December 2009, the Defence was informed of further distribution of this material to the public.¹³

7. On 30 November 2009, the Registry sent letters to both [REDACTED] and [REDACTED] requesting removal of the Video from their websites.¹⁴ On 4 December 2009, the

⁵ First Decision on Protective Measures, p. 4.

⁶ *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-PT, Prosecution's Motion Seeking Further Protective Measures for Victims and Witnesses with Confidential Annexes A & B, 7 July 2005.

⁷ *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-PT, Decision on "Prosecution's Motion Seeking Further Protective Measures for Victims and Witnesses with Confidential Annexes A & B", 17 August 2005, pp. 4-5 ("Second Decision on Protective Measures").

⁸ Motion, para. 8.

⁹ [REDACTED]. See also Prosecution Response to *Boškoski* Confidential Motion for Urgent Orders Regarding Disclosure of Confidential Material, 17 December 2009 ("Response"), para. 2; Letter from the Lead Counsel for Boškoski, Ms. Edina Residović, to the Registrar of the Tribunal, 23 November 2009 ("Boškoski Counsel's Letter to the Registrar"), included in Annex I of the Registry Submission Pursuant to Rule 33(B), 16 December 2009 (Signed 15 December 2009) ("Registry Submission").

¹⁰ [REDACTED]. See also Response, para. 2; Boškoski Counsel's Letter to the Registrar, included in Annex I of the Registry Submission.

¹¹ Motion, para. 8; Response, para. 2; Boškoski Counsel's Letter to the Registrar, included in Annex I of the Registry Submission.

¹² Motion, para. 9.

¹³ Motion, para. 11.

¹⁴ Registrar's Letter to [REDACTED] and Registrar's Letter to [REDACTED], both dated 30 November 2009, included in Annex III of the Registry Submission.

Registry informed the Appeals Chamber of the action taken by way of an internal memorandum.¹⁵ [REDACTED].¹⁶ On 15 December 2009, pursuant to Rule 33(B) of the Rules, the Registry filed before the Appeals Chamber a submission reporting these developments.¹⁷

8. On 7 December 2009, Boškoski filed the instant Motion for urgent orders with respect to the disclosure of the Video before the Appeals Chamber. On 17 December 2009, the Prosecution confidentially filed its Response, partly opposing the Motion.

B. Submissions of the parties

9. Boškoski submits that as the aired Video forms part of the May 2005 disclosure, it is covered by protective measures on the confidentiality of the material granted in the Interim Decision and the First and Second Decisions on Protective Measures (collectively, “Protective Measures Decisions”).¹⁸ He also contends that the publication of this confidential material coincides with a media campaign directed against him, which has been ongoing throughout the appeal proceedings.¹⁹ While Boškoski is not aware of the origin of the disclosure of the confidential material, it is submitted that these recent events have created a risk of interference with the appeal proceedings as well as a threat to the well-being of Boškoski and his family.²⁰ While Boškoski does not assert that all of the surrounding events are seamlessly related, he points to [REDACTED] as indications of a grave scenario.²¹

10. Boškoski therefore requests the Appeals Chamber to make a number of orders with a view to cure the improper disclosure of confidential material while ensuring the safety of Boškoski and his family.²² More specifically, he requests the Appeals Chamber to:

- (i) remind all parties and those with access to confidential documents covered by the Protective Measures Decisions, of their obligation to refrain from communicating any of these documents or their content to the public, and that such disclosure might amount to contempt of court pursuant to Rule 77 of the Rules;

¹⁵ Internal Memorandum of the Deputy Registrar to Judges Patrick Robinson, Mehmet Güney, Liu Danqun, Andréia Vaz and Theodor Meron, 4 December 2009 (“Internal Memorandum of the Deputy Registrar”), included in Appendix I of the Registry Submission.

¹⁶ [REDACTED].

¹⁷ Registry Submission.

¹⁸ Motion, para. 8. *See* Interim Decision; First Decision on Protective Measures; Second Decision on Protective Measures.

¹⁹ Motion, para. 12.

²⁰ Motion, para. 12.

²¹ Motion, paras 8, 10, 12.

²² Motion, para. 15.

(ii) order the above mentioned two media outlets which have broadcasted the Video to immediately remove it from their websites and from any other record accessible to the public, immediately return to the Registry the original copy of the Video which they received and destroy all copies made of it which are in their possession;

(iii) remind media outlets that any use of the Video and other material covered by the Protective Measures Decisions might expose them to contempt proceedings pursuant to Rule 77 of the Rules;

(iv) assign a person or entity to investigate the circumstances in which the Video was disclosed to the two media outlets, and remind the Macedonian authorities of their obligation to provide all necessary measures to the person or entity who will investigate the matter; and

(v) request the authorities of the Former Yugoslav Republic of Macedonia ("FYROM") to take all necessary measures to protect Boškoki and his family and guarantee their physical well-being.

11. In its Response, the Prosecution confirms that the Video – protected material – remained publicly available on both [REDACTED] and [REDACTED] websites as of 17 December 2009.²³ The Prosecution agrees that if the Appeals Chamber is satisfied that the protected material has been broadcast and that the two media outlets have failed to voluntarily remove the material from the public domain, it should be addressed by an order of the Appeals Chamber.²⁴

12. The Prosecution, however, submits that such an order should be "limited and specific".²⁵ While it generally agrees with the contents of the requested order (ii) above,²⁶ it submits that the parties to these proceedings are already subject to orders prohibiting the publication of confidential material,²⁷ and therefore a reminder to the parties in this regard would serve no useful purpose.²⁸ The Prosecution also contends that a general reminder to media outlets regarding the publication of protected material and the associated consequence of contempt of

²³ Response, paras 2, 6.

²⁴ Response, para. 3.

²⁵ Response, para. 7.

²⁶ Response, para. 7. The Appeals Chamber notes that the Prosecution suggests that the Video should be returned not only to the Registry but also to the Office of the Prosecutor.

²⁷ See Protective Measures Decisions.

²⁸ Response, para. 8.

the Tribunal would be too broad and imprecise, while submitting that such an order limited to the two alleged broadcasters and the Video in question would be appropriate.²⁹

13. The Prosecution further states that it opposes the immediate issuance of any order or reminder to the FYROM authorities directing them to institute “all necessary measures” for the protection of Boškoski and his family, as premature and unjustified.³⁰ In this regard, the Prosecution contends that the jurisdiction of the Tribunal to issue an order requiring “all necessary measures” for the security of an accused remains unsettled, and that there is no precedent in which binding orders related to protective measures for those who are not victims or witnesses were directed to a sovereign State.³¹ The Prosecution further submits that even if such orders could be issued by this Tribunal, Boškoski has failed to comply with the requirements under Article 29 of the Statute of the Tribunal (“Statute”) with regard to an application for State assistance. According to the Prosecution, such requirements include: that requests for State assistance must be specific, relevant, necessary and achievable; and that orders to a State should be used only when cooperative processes have been exhausted.³²

C. Preliminary Issue

14. At the outset, I note that while the Motion was filed within normal Registry hours, the Appeals Chamber is currently unavailable. I am satisfied as to the urgency of this application and will deal with this matter pursuant to Rule 28(D)(ii) of the Rules.

D. Discussion

15. Pursuant to Article 20(1) of the Statute and Rules 54, 75 and 107 of the Rules, the Appeals Chamber may issue such orders as are necessary to ensure the cessation of the publication of information which is in violation of an order of a Chamber.³³ Furthermore, pursuant to Rules 77 and 107 of the Rules, when the Appeals Chamber has reason to believe that

²⁹ Response, para. 9.

³⁰ Response, para. 11.

³¹ Response, paras 11-15.

³² Response, paras 11, 16-22. In this regard, the Prosecution notes that Boškoski has failed to show that FYROM authorities have responded inadequately to the perceived safety threats. Further, the Prosecution highlights the fact that Boškoski does not assert that all reported incidents are related to the proceedings of the Tribunal or the disclosure of the confidential material.

³³ See *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Order for the Immediate Cessation of Violations of Protective Measures for Witnesses, 2 December 2004, pp. 2-3; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Order for the Immediate Cessation of Violations of Protective Measures for Witnesses, 18 June 2002, p. 3; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, Order for the Immediate Cessation of Violations of Protective Measures for Witnesses, 1 December 2000, p. 1.

a person may be in contempt of the Tribunal by disclosing information in violation of an order of a Chamber, it may direct the Registrar to appoint an *amicus curiae* to investigate the matter.

16. I recall that the Second Decision on Protective Measures affirmed the safeguards put in place by the First Decision on Protective Measures, while additionally ordering that “[a]ny member of the public (including e.g. the media as well as relatives and associates of the accused)³⁴ is prohibited from disclosing and/or publishing any material, or information contained therein, which is subject to a protective measures order in this case, except as such material may become public in the course of public and open session proceedings in this case”.³⁵ Both the First and Second Protective Measures Decisions stated that “any breach of these decisions shall be dealt with in accordance with Rule 77” of the Rules.³⁶

17. The supporting documentation in the Motion and the Registry Submission, as well as the Prosecution’s submission in its Response, show that the confidential Video subject to the protective measures granted in the Protective Measures Decisions was indeed disclosed by an unknown source and subsequently published by [REDACTED] and [REDACTED]. I also note that the Registry has sent letters to both organisations requesting removal of the Video from their websites and stating that distribution or publication of the confidential material to the public is a violation of orders of the Tribunal.³⁷ As of today, 22 December 2009, at 8:30 hours, the confidential material in question has not been removed from the public domain.³⁸

18. In view of the duty to respect protective measures imposed by the Tribunal, I consider that the disclosure by any means of the material protected as confidential pursuant to orders of the Trial Chamber shall cease immediately. Furthermore, given that the disclosure of this

³⁴ Definition set out in the First Decision on Protective Measures, para. 1, p. 5: “the public’ means and includes all persons, governments, organisations, entities, clients, associations, groups and media, other than the judges and staff of the Tribunal Chambers and Registry, the Prosecution, and the Defence, as defined above. ‘The public’ specifically includes, without limitation, family, friends and associated of each accused, the media, the accused in other cases or proceedings before the Tribunal and/ or national courts, and defence counsel in other cases or proceedings before the Tribunal and/ or national courts;”; “the media’ means all video, audio, electronic and print media personnel, including journalists, reporters, authors, television and radio personnel, their agents and representatives;” “material’ means all information including statements, documents, videos, photographs and any other data sources whatsoever whether in hard copy or electronic format.”

³⁵ Second Decision on Protective Measures, pp 4-5.

³⁶ First Decision on Protective Measures, p. 7; Second Decision on Protective Measures, p. 5.

³⁷ Registrar’s Letter to [REDACTED] and Registrar’s Letter to [REDACTED], both dated 30 November 2009, included in Annex III of the Registry Submission. I note that the Registry, by way of informal communication on 22 December 2009, has confirmed that no action has been taken by the respective media outlets regarding the request for removal of the Video.

³⁸ [REDACTED] (visited at 8:30 on 22 December 2009).

[REDACTED] (visited at 8:30 on 22 December 2009).

confidential Video has been widely attracting attention of the media,³⁹ I also consider that the parties and members of the public should be reminded of the prohibition of disclosure of confidential material, including the Video.

19. However, I consider that Boškoski has failed to demonstrate any failure on the part of the authorities of the FYROM in ensuring the security and well-being of Boškoski and his family.⁴⁰ Furthermore, he has not substantiated the reason why measures additional to that which the FYROM has already provided to protect him and his family as citizens of the FYROM are necessary.⁴¹ Therefore, I am not persuaded that any issuance of a request to the authorities of the FYROM with a view to ensure the safety of Boškoski and his family is necessary at this stage.⁴²

20. [REDACTED],⁴³ [REDACTED].⁴⁴ [REDACTED].

E. Disposition

21. For the foregoing reasons, I **GRANT** the Motion in part, and

ORDER [REDACTED] and [REDACTED] to immediately remove the Video in question from their websites and from any other record accessible to the public over which they have control, to cease and abstain from any further publication of the Video, to return the original copy of the Video which they received to the Registry of the Tribunal, and to destroy all copies made of said Video in their possession;

REMINDE the parties and any member of the public (including the media), of their obligation not to disclose any confidential material, including those subject to protective measures as ordered in the Protective Measures Decisions, to the public, and that those responsible for disclosure of information in breach of the Tribunal's order may be held in contempt of the Tribunal pursuant to Rule 77 of the Rules;

³⁹ Motion, para. 8 and Annexes B through F.

⁴⁰ In particular, Boškoski does not show how his counsel's letter to Nikola Gruevski, the Prime Minister of the FYROM, of 17 August 2009 expressing their concern for the safety of Boškoski and his family was insufficiently addressed, Motion, para. 7.

⁴¹ [REDACTED]. [REDACTED].

⁴² In this regard, see *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-AR108 bis, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, para. 31, stating that:

[i]t is [...] to be regarded as sound policy for the Prosecutor, as well as defence counsel, first to seek, through cooperative means, the assistance of States, and only if they decline to lend support, then to request a Judge or a Trial Chamber to have recourse to the mandatory action provided for in Article 29 [of the Statute].

See also *Prosecutor v. Milan Milutinović*, Case No. IT-05-87-AR108bis.2, Decision on Request of the United States of America for Review, 12 May 2006, para. 32.

INSTRUCT the Registrar to send copies of this decision to the relevant authorities of the Former Yugoslav Republic of Macedonia and the United States of America without delay;

REQUEST the relevant authorities of the Former Yugoslav Republic of Macedonia to serve this decision without delay on [REDACTED],⁴⁵ and to provide, without delay, a written report confirming such service or describing the efforts made to do so;

REQUEST the relevant authorities of the United States of America to serve this decision without delay on [REDACTED],⁴⁶ and to provide, without delay, a written report confirming such service or describing the efforts made to do so; and

DISMISS the Motion in all other respects.

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

Dated this 22nd day of December 2009
At The Hague,
The Netherlands

Judge Guy Delvoie
Duty Judge

[Seal of the Tribunal]

⁴³ [REDACTED].

⁴⁴ [REDACTED]. [REDACTED].

⁴⁵ [REDACTED].

⁴⁶ [REDACTED].