



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-95-5/18-PT
Date: 2 September 2008
Original: English

IN THE TRIAL CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge Iain Bonomy, Pre-Trial Judge
Judge Michèle Picard

Registrar: Mr. Hans Holthuis

Decision of: 2 September 2008

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON PROSECUTION MOTION FOR NON-DISCLOSURE

Office of the Prosecutor

Mr. Serge Brammertz
Mr. Alan Tieger

The Accused

Mr. Radovan Karadžić

THIS TRIAL CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“Tribunal”) is seised of the “Prosecution’s Motion for Protective Measures for Victims and Witnesses and Documentary Evidence,” filed 5 August 2008 (“Motion”), and hereby renders its decision thereon.

Submissions of parties

1. In the Motion, the Prosecution, pursuant to Articles 20 and 22 of the Statute of the Tribunal and Rules 53, 54, 69, 70, 73, and 75 of the Rules of Procedure and Evidence of the Tribunal, requests various measures related to the restriction of disclosure to and by the Accused in the above-captioned proceeding, such as, *inter alia*, prohibiting the Accused from disclosing to the public any of the material provided to him by the Prosecution, except for that which is reasonably necessary to allow him to prepare for and participate in the proceedings and present a defence; returning all such materials to the Registry at the conclusion of the proceedings; and permitting the Prosecution to redact from the material any information contained within such documents that discloses the current whereabouts of protected witnesses.
2. The Accused has not responded to the Motion within the time limit prescribed under the Rules of Procedure and Evidence of the Tribunal.

Applicable law

3. The Chamber notes that Article 20(4) of the Statute of the Tribunal requires that hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence. Article 20(1) requires the Chamber to ensure that proceedings are conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.
4. Article 21(2) provides that the accused is entitled to a fair and public hearing of the charges against him, subject to Article 22, which requires the Tribunal to provide in its Rules for the protection of victims and witnesses, including the conduct of *in camera* proceedings and the protection of the victim or witness’s identity.
5. Article 21(4)(b) requires that the accused have adequate time and facilities for the preparation of his defence; and, Rule 66(A)(i) of the Rules of Procedure and Evidence of the Tribunal requires the Prosecution to disclose to the accused, within thirty days of the initial

appearance, copies of the supporting material that accompanied the indictment when confirmation was sought. However, this disclosure requirement is expressly subject to Rule 53—which provides that, “in exceptional circumstances” and where the interests of justice require, non-disclosure to the public may be ordered with respect to any document or information—and to Rule 69—which provides that “in exceptional circumstances” non-disclosure of the identity of a victim or witness who may be in danger or at risk may be ordered.

6. Applications under Rule 53(A) go to concerns regarding the safety of victims and witnesses in proceedings before the Tribunal, and the correct balance must be achieved between the interests of the accused and the protection of victims and witnesses. While the balance dictates in favour of an accused’s right to the identity of witnesses upon whom the Prosecution intends to rely (subject to protective measures granted), it dictates against making public supporting material where such disclosure might lead to witness identification and therefore endanger such victims or witnesses. The reason for this distinction is primarily because the former goes to the ability of the accused to prepare his defence, while the latter does not.¹

7. Any protective measures ordered for victims or witnesses in prior proceedings before the Tribunal continue to have effect in the above-captioned proceedings by operation of Rule 75(F).

Discussion

8. The Prosecution makes no argument specifically related to this case for the protective measures requested in the Motion, measures aimed at both the Accused and the public. The Prosecution does not list the names or pseudonyms of potential witnesses whose information may be included in the material to be disclosed to the Accused pursuant to Rule 66(A)(i). The Chamber infers, however, from the Motion that there is identifying information of victims or witnesses who may have been granted protective measures in prior proceedings that would very well continue through the operation of Rule 75(F).

9. Nevertheless, the Chamber notes that it is necessary for the Prosecution to withhold from the public any confidential material disclosed pursuant to Rules 66(A)(i) that may identify a witness for whom protective measures have previously been granted or for whom the Prosecution intends to apply for protective measures in the future.²

¹ See *Prosecution v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Provisional Protective Measures, 19 February 2002 (partly confidential and *ex parte*), para. 32.

² See *Prosecutor v. Župljanin*, Case No. IT-99-36/2-PT, Decision on Prosecution’s Motion for Protective Measures for Victims and Witnesses, 30 July 2008 (partly confidential and *ex parte*), paras. 9–10; *Prosecutor v. Čermak and*

10. However, the Prosecution has given no reasons for withholding the identities of victims and witnesses from the Accused and cannot redact this information from witness statements or information without seeking the appropriate protective measures from the Trial Chamber.³ The Prosecution is therefore required to comply with its obligation under Rule 66(A)(i) to supply to the Accused statements in unredacted form, including identifying information of witnesses. An exception to this is 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, seeing as this is a protective measure that continues in subsequent proceedings via Rule 75(F).⁴

11. In addition, the Chamber notes that Chambers have taken different approaches to the provision of information of the whereabouts of witnesses to the Accused.⁵ At this stage, the Chamber finds it 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.

12. The Chamber will order the Prosecution to disclose both a public/redacted version of material and a confidential/unredacted version to the Accused, so that he knows exactly what information is public and what information is confidential.

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

14. Material subject to Rule 70 restrictions need not be disclosed until the Prosecution has received permission from the Rule 70 provider for such disclosure; and, the Chamber will order the Prosecution to inform the Chamber if any of the Rule 66(A)(i) material is covered by Rule 70 restrictions.

15. The Chamber notes that the Accused has thus far elected to represent himself in these proceedings. The disclosure is therefore to be made to Accused himself, and *the Accused therefore*

Markač, Case No. IT-03-73-PT, Decision and Order on Prosecution's Motion for Protective Measures for Victims and Witnesses, 1 April 2004, pp. 2–3.

³ See *Prosecutor v. 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 (confidential), pp. 2–3.

⁴ See *Prosecutor v. Brđanin*, Case No. IT-99-36-A, Decision on Mićo Stanišić's Motion for Access to All Confidential Materials in the *Brđanin* Case, 24 January 2007, para. 17.

⁵ Compare *Prosecutor v. 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 (confidential), p. 3, with *Prosecutor v. Župljanin*, Case No. IT-99-36/2-PT, Decision on Prosecution's Motion for Protective Measures for Victims and Witnesses, 30 July 2008 (partly confidential and *ex parte*), p. 6.

may not share the confidential/unredacted version of the supporting material with the public, except as specified in paragraph 16(f) below.

Disposition

16. Accordingly, the Trial Chamber, pursuant to Articles 20, 21, and 22 of the Statute of the Tribunal and Rules 53, 54, 66, 69, and 70 of the Rules of Procedure and Evidence of the Tribunal, hereby GRANTS the Motion, in part, and ORDERS as follows:

- a. The Prosecution shall, no later than Monday, 15 September 2008, disclose to the Accused both a confidential/unredacted and public/redacted version of the supporting material that accompanied the indictment when confirmation was sought (including the names of the victims, witnesses, or potential witnesses) and all prior statements obtained by the Prosecution from the Accused.
- b. The Prosecution may, however, withhold from the Accused, at the present time, identifying information for victims, witnesses, or potential witnesses who have been granted delayed disclosure in prior proceedings, until 30 days prior to the anticipated commencement of the trial.
- c. As a general protective measure for the purpose of disclosure to the Accused, the Prosecution may redact from the statements, affidavits, and formal statements of victims, witnesses, or potential witnesses:
 - i. any information that discloses, or might lead to the disclosure of, the current whereabouts of the maker of any such document and/or his or her family;
 - ii. any information contained within such documents that discloses, or might lead to the disclosure of, the current whereabouts of individuals named within them who have made statements that the Prosecution has already disclosed or that it intends to disclose; and
 - iii. the personal identification number or passport number of victims, witnesses, or potential witnesses.
- d. If the Accused is aware or becomes aware of the current whereabouts of a victim, witness, or potential witness identified by the Prosecution, this information shall not be disclosed to the public (including the media), except to the limited extent reasonably necessary for the preparation and presentation of the case (as discussed

- below), and the Accused shall not approach a victim, witness, or potential witness identified by the Prosecution without prior written notice to the Prosecution, in such time and circumstances as will allow the Prosecution to take steps as may be necessary and appropriate to protect the security and privacy of the victim, witness, or potential witness. When contacting a victim, witness, or potential witness identified by the Prosecution, the Accused must identify himself.
- e. To the extent reasonably necessary to allow the Accused to prepare for and participate in these proceedings and present a defence, the Accused may seek to obtain from the Prosecution the current whereabouts of a victim, witness, or potential witness.
 - f. The Accused shall not disclose to the public any confidential portions of the supporting material described in the foregoing paragraphs (including but not limited to the names, identifying information, and whereabouts of any victim, witness, or potential witness), except to the limited extent that such disclosure is directly and specifically necessary for the preparation and presentation of the case. If the Accused finds it directly and specifically necessary to make disclosures pursuant to this limited purpose, he shall inform each person among the public to whom non-public material or information is shown or disclosed, that such person is not to copy, reproduce, or publicise such material or information, and is not to show, disclose, or convey it to any other person. If provided with the original or any copy or duplicate of such material or information, such person shall return it to the Accused when continued possession of the material or information is no longer necessary for the preparation and presentation of the case.
 - g. The Accused shall not disclose to the public his knowledge with regard to the identities and whereabouts of the victims, witnesses, or potential witnesses mentioned in the supporting material or any other confidential or non-public material disclosed by the Prosecution.
 - h. The Accused shall not disclose to the public any evidence or any written statement of a witness or potential witness, or the substance, in whole or part, of any such non-public evidence, statement, or prior testimony disclosed to the Accused.


- i. The Accused shall maintain all confidential materials pertaining to protected victims, witnesses, or potential witnesses on a confidential basis and shall destroy them or return them to the Registry following the close of the proceedings.
- j. Except as provided for by subsection (f) above, any person, including the Accused, who knowingly and wilfully discloses the identifying information of any protected victim, witness, or potential witness, or any other information sufficient to identify these individuals, shall be in violation of this Order, and may be subject to prosecution for contempt of the Tribunal pursuant to Rule 77 of the Rules.**

17. The Prosecution shall, no later than Monday, 15 September 2008, inform the Chamber and the Accused if any of the Rule 66(A)(i) material is covered by Rule 70 restrictions.

18. For the purposes of this decision, the “public” means all persons, including corporations; governments and organs/departments thereof; organisations; entities; associations; groups; the Accused’s family members, friends, and associates; accused and defence counsel in other proceedings before the Tribunal; and the media. However, for purposes of this decision, the “public” does not mean Judges of the Tribunal; staff of the Registry and the Office of the Prosecutor; or the Accused himself.

19. Beyond that specified in the orders in the disposition above, all other requests for relief made by the Prosecution in the Motion are hereby DENIED.

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



Judge Patrick Robinson
Presiding

Dated this second day of September 2008
At The Hague
The Netherlands

[Seal of the Tribunal]