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SCSL-2004-15-PT

(6228 - 6266)

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THE SPECIAL COURT FOR SIERRA LEONE

BEFORE:

Judge Benjamin Itoe
Judge Bankole Thompson
Judge Pierre Boutet

Registrar: Mr. Robin Vincent

Date filed: 14th May 2003

The Prosecutor

-v-

Issa Hassan Sesay

Case No: SCSL – 2003 – 15 – PT

Defence Response to the Prosecution Renewed Motion for Protective Measures

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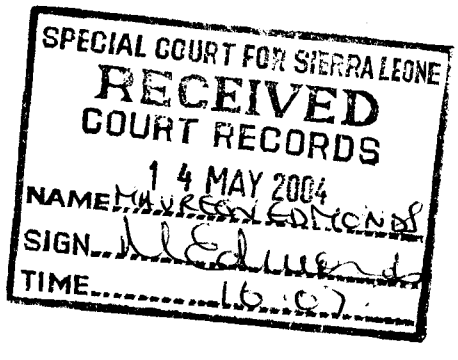
Office of the Prosecutor

Luc Cote
Robert Petit



Defence Counsel

Tim Clayson
Wayne Jordash
Serry Kamal
Sareta Ashraph

INTRODUCTION

1. On the 2nd April 2004 the Prosecution were ordered to file a renewed Motion ("The Motion") for Protective Measures dated 2nd April 2004. The order was discussed within the accused's Pre – trial conference on the 28th April 2004. The defence understood that the purpose of the proposed "consolidated" Motion was to clarify the Prosecution's position in relation to the present Special Measures and thereafter to provide the Trial Chamber and the accused with details of those required at trial. At the Pre – trial conference the defence for Sesay also requested, following protracted argument concerning the non-disclosure of the identity of the Prosecution's expert witnesses, that the Prosecution include within the "consolidated" Motion details of the reasons, particular to an expert, which formed the basis of non – disclosure. The Prosecution did not object to this request or in any way express their dissent to this invitation.

SUBMISSIONS

2. The Prosecution, in their renewed application, have failed to provide a proper evidential basis for the Special Measures currently in place or the wide ranging and unprecedented nature of their requests for protection during the trial. The Prosecution's Motion is predicated upon the statements of Mr Kamara (Annex C) Mr White (Annex D) Mr Lahun (Annex E) Mr Vahidy (Annex F) and Ms Michels (Annex G). The statements suggest at their highest (i) that "some specific threats" have been made against some witnesses (penultimate paragraph of Mr Vahidy's statement) (ii)) potential witnesses in general have expressed various concerns about testifying before the Special Court" including "fear of reprisals" (paragraph 6 and 9 of Mr Lahun's statement) (iii) some witnesses were reported to be planning in a non – specific way to prevent the Prosecution of accused persons, particularly CDF members" (paragraph 5 of Mr Kamara's statement) and (iv) two witnesses have "already had their lives, and their families physically threatened through attempts carried out by some of the defendants who are either indicted or under investigation by the Office of the Prosecutor" (paragraph 3 of Mr White's statement) and (v) the "current security situation in Sierra Leone and the neighbouring countries remain fragile" (ultimate paragraph of Mr White's statement).

3. As was noted by the ICTY, when considering (and rejecting) the Prosecution's application to obtain protective measures for *every* witness in the case of Bradnin & Talic[1] the requirements of Rule 69(A) dictate that in

[1] See Prosecutor v. Brdanin & Talic, IT – 99 – 36, Decision on Motion by Prosecution for Protective Measures, 3 July 2000.

such an application the Prosecution must show "exceptional circumstances"[2] in relation to every witness[3]. It was rightly (and "frankly"[4]) conceded by the Prosecution in that case that it was "difficult to argue that *every* witness must be vulnerable"[5]. This was despite the fact that the Prosecution relied upon the compelling assertion that "Bosnia and Herzegovina continues to be a dangerous place, where each ethnic or political group is viewed as the enemy of another and where....much of the war (was) being still fought".[6] The defence contrast this asserted state of affairs with that as described by the Prosecution witnesses in Annex C – G (see above).

4. The defence would also draw the Trial Chambers specific attention to the remark of Mr Vahidy, who states in the penultimate paragraph of his statement that, "The number of witnesses who need protection is increasing significantly as a consequence of current events and some specific threats made against witnesses". The defence note that, in contradistinction to the Prosecution stance, Mr Vahidy (a professional best placed to make this assessment) regards only some (albeit an increasing number) of the witnesses in need of protection. The Prosecution stance can therefore best be characterised identically to that of the Prosecution in Brdanin "The action of the Prosecution in redacting the name and identifying features in every statement, although no doubt administratively convenient, (is) both unauthorised and unjustified on the basis which the Prosecution has now put forward.[7]..... It asks the accused to accept that there are very good reasons why the identity is not being provided. This does not even begin to discharge the onus which the prosecution bears under Rule 69(A)"[8]

5. It must also be noted that this onus is not considered to be discharged (or dischargeable) simply by reliance on witness fears that they may be in danger or at risk. There must be an objective basis for the fears expressed. As stated in paragraph 26,[9] "Something more than that must be demonstrated to warrant

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[2] See Rule 69(A) of the Rules of Procedure and Evidence of the Special Court

[3] See Bradnin (ante) para 10.
[4] See Bradnin (ante) para 10
[5] See Bradnin para 10
[6] See Bradnin (para 8)
[7] See Bradnin (para 13).
[8] See Bradnin (para 17). The Trial Chamber also stated in paragraph 20 (and the defence invite the Honourable Chamber to adopt this position) that "Rule 69(A) requires the prosecution first to establish exceptional circumstances. This is in accordance with the balance carefully expressed in Article 20.1 (Article 17 of the statute of the Special Court essentially mirrors this provision) that proceedings are conducted (....) with full respects for the rights of the accused and due regard for the protection of victims and witnesses. As the Prosecution rightly concedes, the rights of the accused are made the first consideration, and the need to protect victims and witnesses is a secondary one".
[9] See Bradnin (ante para 26).

an interference with the rights of the accused which these redactions represent".[10]

6. The Trial Chamber in Bradnin was equally instructive in its observation in paragraph 38 when it noted "that the pre – trial investigation process in which any defence team is involved is a difficult one, and that (unless very few witnesses have been made the subject of protection orders) a period somewhat longer than thirty days before the trial is likely to be necessary in most cases if the accused is to be properly ready for trial". It must be noted that this observation was made in the context of an indictment spanning only four years and therefore the difficulties facing the defence in that case were likely to be considerably less. How much more difficult is the task of the defence in this case facing a time span of 6 years and 266 witnesses whose identities remain hidden?

7. The Prosecution's assertion, relying upon Prosecutor v Muyunyi and others (ICTR – 2000 – 55 – I, 25 April 2001) in paragraph 18 of the Motion (that "protective measures can be ordered on the basis of a current security situation even where the existence of threats or fears as regards specific witnesses has not been demonstrated) is correct but should be examined more closely. In that case the Trial Chamber was convinced by evidence which contained "serious and *detailed* allegations of violence and threats against witnesses" and demonstrated the "level of threat in several regions of Rwanda due to attacks by infiltrators". On the basis of this the Trial Chamber were convinced that "a volatile security situation exists in Rwanda and neighbouring countries, which could endanger the lives of the witnesses who may be called to testify at trial".

8. The defence note that the Prosecution themselves do not assert that the security situation in Sierra Leone can be characterised in this way. Mr Kamara (Inspector General of the Sierra Leone Police) describes the situation as "precarious" whilst failing to refer to any specific incidents;[11] Mr Lahun (despite having "travelled to various regions in the country") makes no mention of any concerns relating to the security situation (simply limiting his comments to describing witnesses who have expressed fears and suggesting they are well founded given that many "live in remote areas without any police presence or other semblance of security"[12]) and Mr White only refers to the current security situation in Sierra Leone as "remain(ing) fragile".[13]

9. In short the Prosecution application, based as it is on the evidence aforementioned, is fundamentally flawed. It lacks the details of specific

[10] These remarks and the submissions hereinbefore it equally apply to the Prosecution request for the orders contained at 35 (e) (g)
[11] See paragraph 3 of his statement.
[12] See paragraph 9 of his statement
[13] See penultimate paragraph of his statement and paragraph 17 of the Motion.

objective threat and danger to its witnesses which would satisfy the criteria of exceptionality envisaged by Rule 69(A).

10. The defence also observe the contradictory nature of the Prosecution's broad brush application. On the one hand they seek to rely upon the "fragile" security situation in Sierra Leone and the lack of police presence in some areas yet they still refuse to identify those witnesses who either are outside the country or inside Sierra Leone where there is security. It is this lack of detail in particular which offends the accused's rights and prevents the Trial Chamber from adjudicating upon this issue.

11. In this regard the defence submit that the Prosecution have failed to even attempt to justify their insistence that the identities of their own expert witnesses remain undisclosed.[14] The Prosecution tactic is a familiar one. It is a disappointing tactic designed to protect their case and not their witnesses. It involves, in this and other instances, the tacit agreement in open court to comply with a defence request (in this instance to detail the security threats to their expert witnesses) and thereafter the failure to even address the issue. The Prosecution have simply ignored the request, to assist the Trial Chamber to adjudicate upon this issue, by providing details of the alleged security concerns in relation to these witnesses. The Prosecutions "undertaking" to disclose the identities of their expert witness when they choose; applying the criteria they select is a gross usurpation of the Trial Chambers discretion. The defence would respectfully invite the Trial Chamber to order the Prosecution to disclose the identities of their expert witnesses forthwith.

12. The defence submit that the aforementioned critique is applicable to the following orders sought by the Prosecution; 35(a) – (o). The defence however hereby indicates its objections to the orders contained within 35(e), (g), (i), (k), (l), (n) and (o) for the reasons below.

13. It is submitted that the effects (singularly or cumulatively) of the orders sought in paragraphs 35(e), (g) (h) and (i) is to effectively deny the public the opportunity to properly engage with the trial. They amount to a request for full anonymity for all witnesses which is unprecedented, dangerous and unfair to both the accused and the public. The public will not be able to see the witnesses or even in the main hear their voices devoid of distortion. The proposals risk turning the trials into simply a discourse between lawyer, Judge and accused with the consequential result that the public gain little and the historical record even less. This Court is about the public and for the public. The process of reconciliation envisaged by the mandate of the court is at grave risk. The defence submit, "The benefits of a public hearing are well known.

[14] See Paragraphs 33 and 34.

The principle advantage of press and public access is that it helps to ensure that the trial is fair... In addition the International Tribunal has an educational function and the publication of its activities helps to achieve this goal."[15]

14. This view was also expressed most forcefully by the Trial Chamber in Bradnin (paragraph 35) and the defence adopts its sentiments in their entirety, "The attitude displayed by the prosecution in the present case appears to be part of an unfortunately increasing trend in proceedings before the Tribunal for matters to be dealt with behind closed doors... The trend is a dangerous one for the public perception of the Tribunal and it should be stopped".

15. The defence accept that "the stated preference for public hearings must be balanced with other mandated interests such as the duty to protect (..) witnesses".[16] However "the judges need to verify on a case by case basis whether the rights of the accused were justified by *real fear* for the safety of the witnesses".[17] (emphasis added). In the respects aforementioned the Prosecution fail to demonstrate such real fears.

SCREENS

16. The defence submit that the orders sought by the Prosecution seek to deny the public the right to observe the demeanour of the witnesses. The effect of this order is equivalent to an order that the public have right to hear the proceedings but no more. It is the equivalent to banning them from the court but allowing them to listen through the key hole of the door. It is draconian and unnecessary *except* (and only exceptionally) if and when the Prosecution show in relation to a particular witness that they have a legitimate, well grounded objective fear for their safety. The lack of support for this unprecedented proposal is highlighted by the Prosecution attempt to characterise this as "standard practice"[18] (which it most definitely is not) and their reliance on Muvunyi, Musabyimana and Kamhanda which do not in any way support their proposition.

VOICE DISTORTION

17. The defence accept that it may be difficult for witnesses to give evidence in public. That is implicit in any trial concerning serious allegations sexual or otherwise. Nevertheless this has never been in any International or National jurisdiction a reason to deny the accused a public trial nor to deny the public the right to observe and hear the witness. The prosecution do not rely upon any jurisprudence for their request because none supports this proposal.

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[15] See Prosecutor v Tadic, IT – 94 – 1 para. 32
[16] See Blasic, IT – 95 – 14: Decision of Trial Chamber I on the Prosecutor's requests of 5 and 11 July 1997 for Protection of Witnesses.; para 10.
[17] See Blasic (ante) para. 10.
[18] See para. 20 of the Motion

CLOSED CIRCUIT TELEVISION

18. The defence accept that some child witnesses may require the assistance of closed circuit television. It should not be granted however without a detailed assessment on a case by case basis balancing the rights of the accused with the need to protect the witness. It should not be granted on a blanket basis simply because they are, according to the Prosecution, are "child witnesses". The age, experience and likely testimony of a witness must be taken into account when deciding this issue. The defence can do no more than reiterate the comments of the Trial Chamber in the Prosecutor v Tadic, IT- 94 -1, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995 which rejected the application in relation to victims of sexual assaults, "the Trial Chamber believes that adequate protection can be provided to certain of these witnesses without resort to closed circuit television, which involves removing the witness from the court room. Alternative methods such as the installation of temporary screens in the courtroom, positioned so that the witness cannot see the accused but the accused may view the witness via the courtroom monitors may also be suitable..... and will give the Trial Chamber the benefit of observing directly the demeanour of the witness"(para. 51). The defence observe that in the absence of further information the balancing act conducted by that chamber can not be conducted in this case and the present proposal should be rejected in its entirety.

CATEGORY C WITNESSES - INSIDERS

19. The defence object strongly to any suggestion that these witnesses should be afforded any protective measure whatsoever. These witnesses have been offered immunity from Prosecution if they give evidence against the accused. This is plain on the face of their witness statements and interviews. These witnesses are prima facie impartial and have axes to grind; they have extensive criminal backgrounds on their own admission. It is submitted that granting the order requested would prejudice the case of the defence beyond a reasonable degree. The public have a right to know and to observe these witnesses. The credibility of their evidence ought to be judged in a public forum. In the event that they are not expected to give their evidence in public their evidence remains tainted by the "behind the doors" deals which have been struck with these accused. Justice should be seen to be done and all should observe it.

ORDERS SOUGHT CONTAINED IN PARAGRAPH 35 k, l , and n

20. The defence object to these proposals and refer the Chamber to the reasoning by the Trial Chamber in Bradnin (see footnote 1) in paragraphs 39 – 44 and 45 – 49 which is adopted in its entirety.

ORDER 35 (O)

21. The defence object to the proposal that the defence ought to apply for permission to the Trial chamber. Once again the Prosecution's request is focused on protecting their case rather than the safety of their witness. It is the defence contention that the defence, upon the disclosure of the witness identity, ought to be able to be trusted to contact the witness. It is in the interests of justice to allow the defence access to those witnesses to ensure that the process remains untainted by bias.

PRAYER

22. The defence submit that the orders sought in paragraphs 35 (a) (e) (g) (h) (i) (k) (l) (m) (n) and (o) should not be granted.

Tim Clayson

Wayne Jordash

Serry Kamal

Sareta Ashraph

Dated the 14th day of May 2004

LIST OF AUTHORITIES

1. BRDANIN AND TALIC IT 99-36- 3rd July 2000.
2. BLASKIC. IT -95 -15 5th and 11th July 1997.

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IN THE TRIAL CHAMBER

Before:
Judge Claude Jorda, Presiding
Judge Fouad Riad
Judge Mohamed Shahabuddeen

Registry:
Mr. Jean-Jacques Heintz, Deputy Registrar

Decision of:
10 July 1997

THE PROSECUTOR

v.

TIHOMIR BLASKIC

DECISION OF TRIAL CHAMBER I ON THE PROSECUTOR'S REQUESTS OF 5 AND 11 JULY 1997 FOR PROTECTION OF WITNESSES

The Office of the Prosecutor:

Mr. Mark Harmon
Mr. Andrew Cayley
Mr. Gregory Kehoe

Counsel for the Accused:

Mr. Anto Nobilo
Mr. Russell Hayman

1. On 5 June 1997, the Prosecution submitted to the Trial Chamber a motion "for protective measures" (hereinafter "the motion of 5 June 1997"). On 11 June 1997, the Prosecutor filed a second motion, "special request for hearing date" (hereinafter "the motion of 11 June 1997"). Defence counsel for General Blaskic (hereinafter "the Defence"), in its opposition of 13 June 1997 (hereinafter "the response"), responded to those motions. The Prosecutor replied to the opposition in a brief filed on 16 June 1997 (hereinafter "the reply). The Trial Chamber heard the parties during a hearing on 23 June 1997.

The Trial Chamber will first analyse the claims of the parties and then discuss all the disputed points of fact and law.

I. ANALYSIS OF THE CLAIMS AND ARGUMENTS OF THE PARTIES

2. In her request of 5 June 1997, the Prosecutor requested that the Judges of this Trial Chamber take

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measures to ensure the protection of two witnesses who are "employees of a humanitarian organisation". The measures cover six points:

1) the two witnesses will testify in closed session, but counsel for the humanitarian organisation will be permitted in the courtroom to assist, if so required, the two witnesses and the Trial Chamber regarding questions of confidentiality (hereinafter "measure 1");

2) the witnesses' names and other identifying information, including their association past or present with the humanitarian organisation will not appear in any record of the Tribunal open to the public, including the transcripts of hearings (hereinafter "measure 2");

3) the motions of 5 and 11 June 1997, and any measure relating to these applications which identify the witnesses and the humanitarian organisation with which they are affiliated will be placed under seal and will not be mentioned in any index listing the sealed documents or proceedings (hereinafter "measure 3");

4) the accused, the Defence, the Prosecution and their representatives may not disclose to anyone (specifically to those who were - or will be- indicted by the Tribunal and to their counsel) the names, addresses and other identifying information of those witnesses, including their affiliation past or present with the humanitarian organisation (hereinafter "measure 4");

5) the two witnesses will not be required to disclose their employment or current domicile or the identity of the persons who are - or who were - affiliated with the humanitarian organisation and who reside in or are nationals of the countries of the former Yugoslavia (hereinafter "measure 5");

6) the words "members of a humanitarian organisation" will be used whenever reference is made to those witness in a decision rendered pursuant to Sub-rule 79(B) of the Rules of Procedure and Evidence (hereinafter "the Rules") or in any other decision or public judgement rendered in this case, and no information identifying them will appear in those documents "hereinafter "measure 6");

The Prosecutor emphasised that the objective of these provisions was to ensure the safety of all the staff of that organisation who might be placed into serious danger by the disclosure of the identify of the said witnesses.

3. In her motion of 11 June 1997, the Prosecution recalled that the decision of 6 June 1997 in respect of protection of witnesses[1] - which *inter alia* requested that the accused and his counsel not disclose to the public or the media the names or any identifying information about the witnesses from the former Yugoslavia - did not apply to the two witnesses who were "members of a humanitarian organisation" since they no longer resided on the territory of the former Yugoslavia.

Furthermore, the Prosecutor emphasised the fact that those witnesses had disclosed information to her on a confidential basis and that for this reason - pursuant to Sub-rule 70(B) of the Rules - she could disclose it to the Defence only after having received the consent of the person or organ concerned.

4. In its response of 13 June 1997, the Defence agreed to measures 1, 2, 3 and 6 which the Prosecution had proposed.

In addition, the Defence challenged the application of Sub-rule 70(B) to the statements of the two witness who are "members of a humanitarian organisation" which had been taken by the Office of the Prosecutor. In fact, it considered that the Prosecutor had not provided proof that the said statements had been provided to her on a confidential basis.

The Defence also strongly objected to the application of protective measures 4 and 5 which it

considered to be overly restrictive of the accused's rights.

Lastly, it stressed that the humanitarian organisation had "affirmatively prevented" one of its employees from testifying for it. It added that the Trial Chamber should therefore order the organisation "to refrain from instructing its employees to cooperate with one side and not the other".

5. In her reply, the Prosecutor asserted that the statements of the two witnesses had been communicated to her on a confidential basis pursuant to Sub-rule 70(B) of the Rules.

She also recalled that protective measures 4 and 5 not only fully complied with the rights of the accused, as secured by Article 21 of the Statute, but were also indispensable for the protection of the said witnesses.

Lastly, the Prosecutor noted that the Defence had not satisfied the procedures necessary for the concerned humanitarian organisation to authorise the examination of one of its employees.

6. During the arguments at the hearing at which two individuals were heard - one as a witness - after having emphasised that the safety of the two witnesses was truly in jeopardy, the Prosecutor submitted to the Trial Chamber a modified version of measure 4:

"I. As a general principle, the parties are prohibited from disclosing to anyone, including other witnesses and potential witnesses, the fact that:

A) the witnesses from the humanitarian organisation provided information to the Prosecutor;

B) the witnesses from the humanitarian organisation testified in closed session; and that

C) the Prosecutor intends to call or has called such witnesses to testify.

II. If the Defence determines that it is necessary to disclose the identify of a witness from the humanitarian organisation during the trial and during the course of its examination of a different witness, the following measures should apply:

A) that portion of the examination concerning the witness from the humanitarian organisation shall occur in closed session;

B) the questions shall be phrased so as to not disclose that the witnesses from the humanitarian organisation were employees of that humanitarian organisation;

C) the questions shall be phrased so as not to disclose that the witnesses from the humanitarian organisation testified at the trial or provided information to the Prosecutor;

D) counsel for the humanitarian organisation will promptly be provided with a transcript of the closed session referred to in paragraph A above.

III. If the Defence determines that it is necessary to disclose the identity of a witness from the humanitarian organisation out of court to a witness or potential witness, the following measures should apply:

A) the Defence may apply to the Trial Chamber *ex parte* (with no notice to or participation of the Prosecutor), for permission to question a potential witness about a witness from the humanitarian organisation. Counsel for the humanitarian organisation shall be notified that such an application is being made and shall be entitled to appear in respect to the application;

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B) in assessing the Defence application, the Trial Chamber shall consider the following:

i) whether the Defence has exhausted all other means of obtaining the information;

ii) whether the need to disclose the identity of the witness or witnesses from the humanitarian organisation relates to facts at issue and not to collateral issues.

In respect to the application described in III B) above, the burden shall be on the Defence to demonstrate that it is necessary to identify the witnesses from the humanitarian organisation."

The Defence objected to this measure and considered that it did not respect the rights of the accused and was impossible to implement. It also challenged the legality of Rule 70 of the Rules, considering that it did not place the parties on an equal footing because it could be invoked only by the Prosecution.

II. DISCUSSION

7. After having analysed the applicability of Rule 70 of the Rules to the statements of the two witnesses who are "employees of a humanitarian organisation", the Trial Chamber will consider protective measures 1, 2, 3 and 6 described in paragraph 2 of this decision. It will then review whether the provisions of 4 and 5 are compatible with rights of the accused specifically provided in Article 21 of the Statute. Lastly, the Trial Chamber will deal with the Defence motion to require that the organisation authorise one of its employees to testify on its behalf.

A. Rule 70 of the Rules: matters not subject to disclosure

8. As regards the application of Rule 70 of the Rules to this case, the Trial Chamber considers that at the hearing of 23 June 1997, the Prosecution provided the proof that the information which the two witnesses had supplied to it were confidential at the time it was provided. It notes, moreover, that, pursuant to Sub-rule 70(B) of the Rules, the information was used solely for the purpose of generating new evidence.

Furthermore, the Trial Chamber notes that, according to the provisions of Sub-rule 70(B) of the Rules, the use of that information as evidence is subject to the prior consent of the entity providing it - that is, in the present case, the humanitarian organisation of which the two witnesses are employees.

In view of the objectives of Rule 70 of the Rules, the Trial Chamber must also take into account the nature and functions of the humanitarian organisation as well as the harm to all its operations which might be caused by the information's being disclosed. In this respect, it considers that in light of the humanitarian organisation's current and future mission, it is fully entitled to seek the application of the provisions of Rule 70 of the Rules.

The Judges also recall that the consent of the organisation was conditional on the Trial Chamber's ordering six protective measures which - as the Prosecutor noted in her motion of 5 June 1997 - must be examined in light of Article 22 of the Statute and Rules 54, 75 and 79 of the Rules.

The Trial Chamber must therefore analyse those measures and determine to what extent they are compatible with the rights of the accused.

B. The Protective Measures

1. General Principles

9. The Trial Chamber first recalls - as it did previously in its decision of 6 June 1997 - that it is extremely concerned that the witnesses who may be called to testify before it during the trial should be protected[2]. It stresses the fact that, in this respect, the Statute affirms the principle, and the Rules establish how this is to be organised. Article 20(1) of the Statute states that there must be "due regard for the protection of victims and witnesses", and Article 22 of the Statute invites the Judges to include this protection in their Rules. Sub-rule 75(A) of the Rules therefore provides that a Judge or Trial Chamber may "order appropriate measures for the privacy and protection of victims and witnesses", specifically, "expunging names and identifying information from the Chamber's public records" and "non-disclosure to the public of any records identifying the victim". Sub-rule 75(B)(ii) authorises the holding of *in camera* proceedings. Lastly, Sub-rule 79(A)(ii) of the Rules states that the press and the public may be "excluded from all or part of the proceedings" for various reasons, including, the need to avoid the disclosure of a victim's or witness' identity.

The Trial Chamber must also ensure that the rights of the accused enjoy "full respect" (Article 20(1) of the Statute). It must therefore guarantee that the protective measures are compatible with the right of the accused to a "fair and public hearing" (Article 21(2) of the Statute) and, more particularly, his right "to examine, or have examined, the witnesses against him" (Article 21(4) of the Statute).

The Judges also recall their sovereign power to evaluate the measures they deem most appropriate to ensure the protection[3] and emphasise - as did Trial Chamber II in the case *The Prosecutor v. Tadic*[4] - that the list of measures provided for in Rule 75 of the Rules is not exhaustive.

2. Protective measures 1, 2, 3, 6

10. The Trial Chamber emphasises that although protective measures 1, 2, 3 and 6 in no manner infringe on the accused's right "to examine, or have examined, the witnesses against him" (Article 21 (4)(e) of the Rules), they do limit his right to a public trial, as provided in Article 20(4) of the Statute[5] and Rule 78 of the Rules[6].

The Trial Chamber does, however, recall that the Judges of Trial Chamber II - in the case *The Prosecutor v. Tadic*[7] - stated that the "preference for public hearings must be balanced with other mandated interests such as the duty to protect [...] witnesses"[8] and that the Judges needed to verify on a case by case basis whether the restrictions which the protection imposed on the rights of the accused were justified by real fear for the safety of the witnesses.

In this respect, the Judges consider that the Prosecutor sufficiently demonstrated - in her motion of 5 June 1997 and at the hearing of 23 June 1997 - that the safety of the two witnesses who are "employees of a humanitarian organisation" and its staff would be seriously threatened should their identity be disclosed to the public and the media. Furthermore, the Trial Chamber notes that the danger that much greater because some of the employees of that organisation are currently posted on the territory of the former Yugoslavia.

It also notes that the Defence did not challenge the application of measures 1, 2, 3 and 6 which the Prosecutor proposed.

11. The Trial Chamber therefore orders that the testimony of the two witnesses who are employees of a humanitarian organisation be heard *in camera*; that their names, addresses and other identifying information, including their association past or present with the humanitarian organisation, not appear in any of the Tribunal's records open to the public and that they be placed under seal; that the motions of 5 and 11 June 1997 which identify those witnesses, as well as the humanitarian organisation with which they are affiliated, be placed under seal; that the words "witnesses who are employees of a humanitarian organisation" be used whenever reference is made to those witnesses in the Tribunal's public records, and that no indication which would identify them appear in those

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documents.

3. Protective measures 4 and 5

12. In respect of the new version of protective measure 4 which the Prosecution presented at the hearing of 23 June 1997 and which was mentioned in paragraph 6 of this Decision, the Judges would first point out that Trial Chamber II[9] - basing itself on Articles 20 and 22 of the Statute as well as Sub-rules 69(C), 75(A) and (B)(iii) of the Rules and on a detailed analysis of national and international case-law, more specifically in the cases *R. v. Taylor* (Court of Appeals, Criminal Division 22, July 1994) and *Kostovski* (ECHR 20 December 1989) - had ordered that the names and addresses of four Defence witnesses not be disclosed and that their voices and images be distorted (anonymity). Five reasons justified such provisions: 1) the real fear for the safety of the witnesses and their families; 2) the importance of the testimonies for the Prosecution; 3) the lack of any serious indication that the said witnesses lacked credibility; 4) the ineffectiveness or lack of a witness protection programme; 5) the absolute necessity for the said measure. If a less restrictive measure can ensure the requested protection, it should be applied. The International Tribunal must be satisfied that the accused will not suffer any excessive prejudice which can be avoided, although some imbalance is inevitable.

In this respect, the Trial Chamber notes that protective measure 4 differs from the one considered in the case *The Prosecutor v. Tadic* insofar as it is less restrictive about the rights of the accused. In fact, although measure 4 limits the accused's right to "examine or have examined, the witnesses against him" (Article 21(4)(e) of the Statute) - by authorising the disclosure of the identity of the two witnesses only under limited conditions - the Defence knows the identity of the said witnesses.

Indeed, as the Prosecution underscored, the Defence will have "possession of [their] statements" and "the witnesses will testify in person at trial without voice or image distortion and will be subject to a face to face cross-examination."

Furthermore, the Trial Chamber notes - as the Prosecutor demonstrated in her motion of 5 June 1997 and at the hearing on 23 June 1997 - that, as regards witnesses whose safety must be particularly guaranteed, it is clear that any disclosure of their identity might be extremely prejudicial to them.

The Trial Chamber also considers that, given the positions the witnesses held at the time of the facts and circumstances about which they are being called on to testify, they are likely to provide significant clarification in respect of the charges against the accused.

The Judges also emphasise the fact that the Tribunal does not have a victims and witnesses protection programme and is therefore not in a position to guarantee their safety once they have left the confines of the Tribunal[10].

The Trial Chamber thus considers that, in view of these exceptional circumstances, it is perfectly justified that the accused, the Defence, the Prosecution and their representatives, be permitted to disclose the identity of the witnesses from the humanitarian organisation only in accordance with the stringent conditions provided in the modified version of measure 4.

Nonetheless, the Trial Chamber wishes to emphasise that, according to Rule 89(D), it "may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial".

13. As regards measure 5, the Trial Chamber first wishes to reiterate its concern for ensuring the safety of all the staff of the humanitarian organisation with which the two witnesses are affiliated and, first and foremost, of those currently posted on the territory of the former Yugoslavia.

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The Trial Chamber also considers that the accused has not sufficiently demonstrated that the knowledge he might have about the domicile and current employment of these witnesses as well as the identity of the staff employed in that humanitarian organisation was indispensable for preparing his defence.

It therefore states that the said witnesses are authorised not to disclose their employment or current domicile or identity of the staff who are currently - or were formerly - employed by the humanitarian organisation and who are residents or nationals of the countries of the former Yugoslavia.

C. Equal access to the witnesses from the humanitarian organisation

The Trial Chamber takes note of the fact that, as a Prosecution witness stated at the hearing of 23 June 1997, each of the parties has equal access to the information in the possession of the said humanitarian organisation. It recalls, however, that, in order to obtain the information, both the Prosecutor and the Defence must comply with the procedures in force in that organisation.

As concerns the Defence assertion that Rule 70 of the Rules would not be applicable, the Trial Chamber recalls that the Rules were established by the Judges as part of the mission entrusted to them in Article 15 of the Statute. In this respect, the Rules were drafted in accordance with the letter and spirit of the Statute. The provisions of the Rules must, therefore, be interpreted within their general context and not within the context of one specific provision.

In fact, the provisions of the Rules seek to ensure a general balance between the protection of the rights of the accused, those of the victims and those of the Prosecution.

In that regard, insofar as necessary, the Trial Chamber should apply the provisions of Rule 70 of the Rules in respect of the Defence in the same manner as it does in respect of the Prosecution.

III. DISPOSITION

FOR THE FOREGOING REASONS,

Trial Chamber I,

RULING *inter partes* and unanimously,

TAKES NOTE of the agreement between the parties in respect of protective measures 1, 2, 3 and 6;

As regards the modified version of measure 4,

ORDERS the parties not to disclose to anyone, including the other witnesses or potential witnesses the fact that: a) the witnesses from the humanitarian organisation supplied information to the Prosecutor; b) the witnesses from the humanitarian organisation testified *in camera*; and that c) the Prosecutor intends to call or called those witnesses to appear;

ORDERS that, should the Defence deem that it is necessary to disclose the identity of a witness from the humanitarian organisation during the trial or during the examination of a different witness, the following measures shall be applied: a) that portion of the examination relating to the witness from the humanitarian organisation shall take place *in camera*; b) the questions shall be phrased so as not to disclose the fact that the witnesses from the humanitarian organisation were its employees; c) the questions shall be phrased so as not to disclose the fact that the witnesses from the humanitarian organisation testified during the trial or provided information to the Prosecutor; d) counsel for the humanitarian organisation shall receive promptly the transcript of the *in camera* session mentioned in paragraph (a) above;

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ORDERS that, should the Defence deem it necessary to disclose the identity of a witness from the humanitarian organisation to a witness outside the courtroom, or to a potential witness, the following measures shall be applied: a) the Defence may request the Trial Chamber *ex parte* (without so informing the Prosecutor and without her participation), for permission to examine a potential witness about a witness from the humanitarian organisation (counsel for the humanitarian organisation shall be informed of such a request and shall be permitted to appear to give an opinion about the said request); b) when it reviews the Defence request - which must demonstrate the need to identify the witnesses from the humanitarian organisation - the Trial Chamber must consider: i) whether the Defence has exhausted all its other methods for obtaining the said information; ii) whether the need to disclose the identity of the witness or witnesses from the humanitarian organisation relates to the facts under review and not to corollary facts;

As regards measure 5,

ORDERS that the two witnesses not be required to disclose their employment, current domicile or the identity of the persons who are - or were - employees of the humanitarian organisation and who are residents or nationals of the countries of the former Yugoslavia;

TAKES NOTE of the fact that each of the parties has equal access to the information in the possession of the humanitarian organisation, so long as the procedures in force in that organisation are respected.

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

Done this tenth day of July 1997
At The Hague
The Netherlands

(signed)

_____
Claude Jorda,
Presiding Judge, Trial Chamber I

(SEAL OF THE TRIBUNAL)

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1. Decision of Trial Chamber I on the Prosecutor's requests of 12 and 14 May 1997 for protection of witnesses, *The Prosecutor v. Blaskic,* 6 June 1997.
2. Decision of Trial Chamber I on the requests of the Prosecutor dated 12 and 14 May 1997 for the protection of witnesses, *The Prosecutor v. Blaskic*, 6 June 1997, p. 6, para. 10.
3. Article 22 of the Statute and Rule 75 of the Rules.
4. Decision on the Prosecutor's motion requesting protective measures for victims and witnesses, *The Prosecutor v. Tadic,* 10 August 1995.
5. Article 20(4) of the Statute states that "the hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence".
6. Rule 78 of the Rules reads: "All proceedings before a Trial Chamber, other than deliberations of the Chamber, shall be held in public, unless otherwise provided".
7. Decision on the Prosecutor's motion requesting protective measures for victims and witnesses *op. cit, 4.*
8. *ibid.,* p. 14, para. 33.
9. Decision on the Prosecutor's motion requesting protective measures for victims and witnesses *op. cit, 4.*
10. Decision on the Prosecutor's motion requesting protective measures for victims and witnesses *op. cit, 4.*

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IN TRIAL CHAMBER II

Before:
Judge David Hunt, Presiding
Judge Florence Ndepele Mwachande Mumba
Judge Fausto Pocar

Registrar:
Mrs Dorothee de Sampayo Garrido-Nijgh

Decision of:
3 July 2000

PROSECUTOR

v

Radoslav BRDANIN & Momir TALIC

DECISION ON MOTION BY PROSECUTION FOR PROTECTIVE MEASURES

The Office of the Prosecutor:

Ms Joanna Korner
Mr Michael Keegan
Ms Ann Sutherland

Counsel for Accused:

Mr John Ackerman for Radoslav Brdanin
Maître Xavier de Roux and Maître Michel Pitron for Momir Talic

1 The application

1. On 10 January 2000, the Prosecutor filed a motion seeking orders directed to the two accused (Radoslav Brdanin and Momir Talic) and their legal teams – collectively described as the "Brdanin and Talic Defence" – in the following terms:

> (1) The Brdanin and Talic Defence shall not disclose to the media any confidential or non-public materials provided by the Prosecutor.
>
> (2) Save as is directly and specifically necessary for the preparation and presentation of this case, the Brdanin and Talic Defence shall not disclose to the public:
>
> > (a) the names, identifying information or whereabouts of any witness or potential witness identified to them by the Prosecutor;

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(b) any evidence (including documentary, physical or other 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;

(3) If the Brdanin and Talic Defence find it directly and specifically necessary to disclose such information for the preparation and presentation of this case, they shall inform each person among the public to whom non-public material or information (such as witness statements, prior testimony, or videos, or the contents thereof), is shown or disclosed, that such a person is not to copy, reproduce or publicise such statement or evidence, and is not to show or disclose it to any other person . If provided with the original or any copy or duplicate of such material, such person shall return it to the Brdanin and Talic Defence when such material is no longer necessary for the preparation and presentation of this case;

(4) With regard to (3) above, the Brdanin and Talic Defence shall maintain a log indicating the name, address and position of each person or entity receiving such information and the date of disclosure. If there is a perceived violation of the orders described herein, the Prosecutor shall notify the Trial Chamber which may either review the alleged violations or may refer the matter to a designee, such as a duty Judge. If the Trial Chamber refers the matter to a duty Judge, the duty Judge shall review the disclosure log, make factual determinations, and report back to the Trial Chamber with a recommendation as to whatever action seems appropriate .

(5) If a member of the Brdanin and Talic Defence team withdraws from the case, all material in his or her possession shall be returned to the lead defence counsel. The Brdanin and Talic Defence shall return to the Registry, at the conclusion of the proceedings in this case, all disclosed materials and copies thereof, which have not become part of the public record.

(6) The Prosecutor may make limited redactions to witness statements or prior testimony concerning the identity and whereabouts of vulnerable victims or witnesses. The identities of such persons shall be disclosed to the Brdanin and Talic Defence within a reasonable period before commencement of trial, unless otherwise ordered.(1)

Paragraph 2 of the Motion defines, in wide terms, the expressions "the Prosecutor ", "Brdanin and Talic Defence", "the public" and "the media".(2) The Motion was filed on a confidential basis.

2. The orders sought numbered (1), (2) and (3) were not opposed. The others were opposed.

2 The Statute and the Rules

3. There are three provisions of the Tribunal's Statute which are relevant to this application. Article 20 ("Commencement and conduct of trial proceedings") provides , so far as is here relevant:

1. The Trial Chambers shall ensure that a trial is fair and expeditious and that 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.

[...]

4. The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence.

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Article 21.2 ("Rights of the accused") provides:

> 2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute.

Article 22 ("Protection of victims and witnesses") provides:

> The International Tribunal shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include , but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity.

4. There are also a number of the Rules of Procedure and Evidence ("Rules") which are relevant to the application. Rule 66(A)(i) ("Disclosure by the Prosecutor") is in the following terms:

> 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; [...]

Rule 53(A) ("Non-disclosure") provides:

> 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.

Rule 69 ("Protection of Victims and Witnesses") provides:

> (A) In exceptional circumstances, the Prosecutor may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal.
>
> (B) In the determination of protective measures for victims and witnesses, the Trial Chamber may consult the Victims and Witnesses Section.
>
> (C) Subject to 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) ("Measures for the Protection of Victims and Witnesses") provides:

> 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 witnesses, provided that the measures are consistent with the rights of the accused.

3 The redactions made by the prosecution

5. On 11 January, the prosecution purported to comply with its obligation under Rule 66(A)(i) by serving on counsel for the two accused copies of the supporting material which had accompanied the indictment when confirmation was sought. *Every* statement served had been redacted to remove the name and any other material which would identify either the persons who had made the statements or their whereabouts , notwithstanding the references in par (6) of the orders presently sought to

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"limited redactions" and "vulnerable victims or witnesses". The documents were accompanied by a letter which requested counsel to respect the protective measures sought in the Motion until such time as the Trial Chamber had ruled upon it. (3)

6. It was conceded by the prosecution that this redaction had been effected without having first obtained an order pursuant to Rule 69, but it was said that the redaction had been carried out in advance of such an order "for safety's sake".(4) The first issue to be determined in the Motion is, therefore, whether pursuant to Rule 69(A) the prosecution is entitled to the redaction of the name and identifying features of *every* person who has made a statement until "a reasonable period before [the] commencement of [the] trial", as sought by the Motion.(5)

7. In relation to the power to provide appropriate protection for victims and witnesses in the Statute and Rules, it was held by the Trial Chamber in the *Prosecutor v Tadic*(6) that:

> [...] in the fulfilling of its affirmative obligation to provide such protection, [the Tribunal] has to interpret the provisions within the context of its own unique legal framework in determining where the balance lies between the accused's right to a fair and public trial, the right of the public to access of information and the protection of victims and witnesses. How the balance is struck *will depend on the facts of each case.* (7)

The balance between the right of the accused to a fair and public trial and the protection of victims and witnesses within its unique legal framework had also been referred to in earlier decisions in the same case.(8)

8. The prosecution, however, relies not only upon the facts of this particular case but also upon "the facts and circumstances concerning Tribunal cases generally" to justify the redaction of all identification of *every* person who had made the relevant statements and their whereabouts. It says that Bosnia and Herzegovina continues to be a dangerous place, where each ethnic or political group is viewed as the enemy of another, and where –

> [...] much of the war is still being fought, with indictees [sic] or suspects and their supporters (as well as supporters of those detained in The Hague) still at large and where witnesses against them are considered "the enemy".(9)

The Motion proceeds:

> 10. In the past two years, there have been increasing instances involving interference with and intimidation of Tribunal witnesses, including breaches and violations of witness protection orders (including non-disclosure orders) and other security measures . The situations range from witnesses having their lives threatened, to repeated instances of witness statements that have been disclosed to accused and their counsel being published in the media or otherwise made public (despite the existence of non-disclosure orders), to numerous threatening telephone calls, to loss of jobs or job opportunities, to witnesses' general fear and apprehension that they or their families will be harmed or harassed or otherwise suffer if they testify or co-operate with the Tribunal.
>
> 11. In light of these past breaches of confidentiality and other serious problems , and their effect on victims and witnesses, the Prosecutor has grave concerns that the safety of witnesses, their willingness to testify and the integrity of these proceedings will be substantially jeopardised if witnesses' identities, whereabouts and statements are prematurely disclosed in circumstances where they cannot be protected . The Prosecutor submits that the requested protective measures greatly assist in minimising these concerns.

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9. The prosecution submits that the future of this and all other Tribunal cases depends upon the ability and willingness of witnesses to give evidence. Absent evidence, there will be no trials, or no trials which accomplish justice. It says :(10)

> If witnesses will not come forward or if witnesses refuse or are otherwise unwilling to testify, there is little evidence to present. Threats, harassment, violence, bribery and other intimidation, interference and obstruction of justice are serious problems, for both the individual witnesses and the Tribunal's ability to accomplish its mission.

10. It was frankly conceded by the prosecution that the basic argument underlying its submissions was that the requirements of Rule 69(A) – that "exceptional circumstances " must be shown before protective measures will be ordered by the Trial Chamber – are satisfied in relation to *every* witness in *every* case "at this stage" (that is, at the time for service on the accused of the supporting material which accompanied the indictment when confirmation was sought).(11) It was also frankly conceded by the prosecution that it is difficult to argue that *every* witness must be vulnerable.(12)

11. In the opinion of the Trial Chamber, the prevailing circumstances within the former Yugoslavia *cannot by themselves* amount to exceptional circumstances . This Tribunal has always been concerned solely with the former Yugoslavia, and Rule 69(A) was adopted by the judges against a background of ethnic and political enmities which existed in the former Yugoslavia at that time. The Tribunal was able to frame its Rules to fit the task at hand; the judges who framed them feared even at that time that many victims and witnesses of atrocities would be deterred from testifying about those crimes or would be concerned about the possible negative consequences which their testimony could have for themselves or their relatives.(13) Accordingly, the use by those judges of the adjective "exceptional" in Rule 69(A) was not an accidental one. To be exceptional, the circumstances must therefore go beyond what has been, since before the Tribunal was established, the rule – or the prevailing (or normal) circumstances – in the former Yugoslavia. As was made clear by the Second *Tadic* Protective Measures Decision, the circumstances of each case must be examined.

12. The prosecution submits that the Second *Tadic* Protective Measures Decision should no longer be followed, as it was the Tribunal's first case, and that there had been numerous documented instances of interference since that time.(14) Even if the situation *has* changed since the Second *Tadic* Protective Measures Decision – and the Trial Chamber is not satisfied that there has been any *significant* change – the wording of Rule 69(A) has nevertheless remained the same, and the phrase "exceptional circumstances" in its ordinary usage does not permit any interpretation which equates it with what is now said to be the rule in the former Yugoslavia.

13. The action of the prosecution in redacting the name and identifying features in *every* statement, although no doubt administratively convenient, was both unauthorised and unjustified on the basis which the prosecution has now put forward .

4 An alternative procedure?

14. During the course of the oral hearing of the Motion, on 24 March 2000, there was discussion as to whether a procedure could be devised which would avoid the need for a witness-by-witness application by the prosecution to the Trial Chamber for protective measures before complying with its obligation under Rule 66(A)(i) to serve copies of its supporting material upon the accused.

15. The prosecution proposed a procedure whereby –

> (i) it would take it upon itself to redact the identity of every witness who has asked for his or her identity not to be revealed and who, in its judgment, is a vulnerable witness,

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(ii) the accused could make a "reasonable" request to it for the identity of particular victims and witnesses to be revealed, giving reasons why their identity was required at an earlier stage than (say) thirty days before the commencement of the trial, and

(iii) if that request were refused, the accused could then seek relief from the Trial Chamber.(15)

Should the accused require the name of a witness because there are, for example, features directly implicating the accused, the name would be supplied unless there is a very good reason why the prosecution wished to withhold it.(16)

16. Such a proposal, however, has two basic defects. First, it continues to assume that *every* witness (or at least those who ask for their identity not to be disclosed) is in fact "in danger or at risk" (as Rule 69(A) describes them), or "vulnerable" (as the Motion describes them). As already decided, that is not so . Secondly, the proposal completely reverses the appropriate onus. Rule 69(A) places the onus upon the prosecution to demonstrate the exceptional circumstances justifying an order for non-disclosure, whereas this proposal places the onus upon the accused to justify disclosure.

17. There is another problem. The prosecution asserted that, as it has a responsibility to ensure that the accused is given a fair trial, it should be trusted in effect to perform the role which the Rules give to the Trial Chamber in determining which victims and witnesses are vulnerable.(17) It asks the accused "to accept that there are very good reasons why the identity is not being provided".(18) This does not even begin to discharge the onus which the prosecution bears under Rule 69(A). One of the supporting documents served on the accused in the present case consists of the transcript of evidence which a proposed witness gave in open session in another case before the Tribunal, with all material identifying the witness redacted. As it would be a simple thing for the accused to find the relevant transcript and thus to identify the witness in question, there could be no exceptional circumstances warranting a redaction of that witness's name. This example suggests a perhaps less than dispassionate approach by the prosecution to its task.(19)

18. The proposal was opposed by both accused, and the Trial Chamber accepts that its implementation would be contrary to both the Statute and the Rules.

5 A conflict between the Rules?

19. The prosecution claims that there is a conflict which needs to be resolved between the obligation placed upon it by Rule 66(A)(i) to disclose the supporting material to the accused within thirty days of his initial appearance and the protection afforded to victims and witnesses provided by Rule 69 (A).(20)

20. The Trial Chamber does not accept that there is any such conflict. As already decided, Rule 69 (A) does *not* provide the blanket protection asserted by the prosecution. Before protective measures will be granted, Rule 69(A) requires the prosecution first to establish exceptional circumstances. This is in accordance with the balance carefully expressed in Article 20.1: that "proceedings are conducted [...] with full respect for the rights of the accused and due regard for the protection of victims and witnesses". As the prosecution correctly concedes, the rights of the accused are made the first consideration, and the need to protect victims and witnesses is a secondary one.(21) The reference to "proceedings" in Article 20 is not limited to the actual trial; it includes every phase of the litigation which affects the determination of the matter in issue.(22)

21. If the prosecution is able to demonstrate exceptional circumstances justifying the non-disclosure of the identity of any particular victims or witnesses at this early stage of the proceedings, then its obligations of disclosure under Rule 66 (A)(i) will be complied with if it produces copies of the statements with the names and other identifying features of only *those* witnesses redacted.

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6 Rule 69(A)

22. It is necessary initially to say one thing about Rule 69(A) if only for the purpose of putting it on one side. The Rule expresses the power to make a non-disclosure order in relation to a victim or witness who may be in danger or at risk "until such person is brought under the protection of the Tribunal". This rather curious wording appears to assume that the Tribunal has a witness protection program or scheme which will render the non-disclosure order no longer necessary once it comes into operation. In fact, the Tribunal does not have any such program or scheme.(23) The Rule has always been interpreted as including the power to make non-disclosure orders which continue throughout the proceedings and thereafter. If necessary, such a power is justified by Rule 53(A), which permits a non-disclosure order (so far as the public is concerned) to be made in relation to any document or information until further order – but, again, only "[i]n exceptional circumstances". So far as the accused is concerned, Rule 69(C) requires the identity of the victim or witness to be disclosed to him "in sufficient time prior to the trial to allow adequate time for preparation of the defence".(24)

23. There is therefore clear power to make what may be described as the usual non -disclosure orders in relation to particular victims and witnesses once exceptional circumstances have been shown. That, however, is not what is sought by the prosecution in the present motion. In substance, the present motion seeks only to justify the prosecution's right to make the blanket redactions already made. In that endeavour , the prosecution has been unsuccessful, and it will be necessary to file a fresh motion in which it seeks to justify a non-disclosure order in relation to particular victims and witnesses.(25) As some of the issues which will arise in relation to such a fresh motion have been debated in relation to the present motion, it is appropriate to express the views of the Trial Chamber in relation to those issues at this stage.

24. The first issue concerns the likelihood that prosecution witnesses will be interfered with or intimidated once their identity is made known to the accused and his counsel , but not to the public. The prosecution says, and the Trial Chamber accepts, that the greater the length of time between the disclosure of the identity of a witness and the time when the witness is to give evidence, the greater the potential for interference with that witness.(26) Paragraph 10 of the Motion makes the general allegation that there has been an increasing number of instances in which there have been breaches and violations of witness protection orders, thus justifying grave concerns that such instances will increase further if the identity of the witnesses is disclosed earlier than is necessary.

25. The prosecution subsequently gave four examples of these instances.(27) In the first, counsel for an accused was charged (with his client) with contempt arising from alleged interference with a prospective witness for that client. The charge of contempt has been dismissed upon the basis that the Trial Chamber was not satisfied beyond reasonable doubt that the interference had occurred.(28) In the second example, counsel in one case named in open session a person as having been a witness in an associated case who had been granted protective measures in that other case. When charged with contempt, Counsel claimed that he had drawn the inference that that person had given evidence in the associated case from the fact that it was known that he had been in The Hague at the time. The prosecution did not assert that this knowledge had been gained as a result of a breach by anyone bound by the protective measures order in the associated case.(29) In the third example, a witness list was published in a newspaper in Sarajevo. In the fourth example, a witness statement was published in a newspaper in Croatia . The prosecution asserted that:(30)

> As a result of these actions, Prosecution witnesses who had previously agreed to appear before the Tribunal refused to testify.

The reference to "these actions" appears to be limited to the third and fourth examples .

26. It is, however, important to recall the terms of the rule under which the prosecution seeks a non-

disclosure order. Rule 69(A) applies only to "the non-disclosure of the identity of a victim or witness who may be in danger or at risk". Any fears expressed by potential witnesses themselves that they may be in danger or at risk are *not in themselves* sufficient to establish any real *likelihood* that they may be in danger or at risk. Something more than that must be demonstrated to warrant an interference with the rights of the accused which these redactions represent. Most judges can identify cases in which it is obvious that witnesses have been interfered with, but it is by no means so obvious that this has resulted from breaches by defence team members of witness protection orders. The examples of violations in the four cases following (in a temporal sense only) the disclosure of the identity of the witnesses to the defence are accompanied by the prosecution's assertion that they show "a history of violations in virtually every case that has been brought before this Tribunal".(31) This piece of hyperbole does not assist.

27. Counsel for the accused have, with some justification, complained that their integrity has been impugned by these assertions. Such an intention has been denied by the prosecution, which has attempted to explain the relevance of its assertions in this way:(32)

> It is submitted that if, before an order is to be made, the Prosecutor is required to demonstrate that there are grounds for believing that a particular defence counsel would behave improperly and/or until interference with witnesses or improper disclosure of confidential material has taken place, then the purpose of the order (which does no more than comply with the statutory obligation to protect victims and witnesses), has been negated.

This was expanded at the oral hearing:(33)

> We're suggesting that the interference may and has in the past come from persons who have a vested interest in, whether actively sought by the accused or no, helping them. And one of the foolish ways which they see help being given is by interference with witnesses.

These explanations do not entirely eradicate the suggestion by the prosecution that there is a presumption that impropriety will occur, particularly when the terms of Order (4) are considered.(34)

28. The Trial Chamber accepts that, once the defence commences (quite properly) to investigate the background of the witnesses whose identity has been disclosed to them, there is a risk that those to whom the defence has spoken may reveal to others the identity of those witnesses, with the consequential risk that the witnesses will be interfered with. But it does not accept that, absent specific evidence of such a risk relating to particular witnesses, the likelihood that the interference will eventuate in this way is sufficiently great as to justify the extraordinary measures which the prosecution seeks in this case in relation to every witness.

29. A second issue which arose relates to the extent to which the power to make protective orders can be used not only to protect individual victims and witnesses in the particular case but also to assist the task of the prosecution to bring other cases against other persons in the future. This issue arises from the prosecution's assertion quoted earlier:(35)

> If witnesses will not come forward or if witnesses refuse or are otherwise unwilling to testify, there is little evidence to present. Threats, harassment, violence, bribery and other intimidation, interference and obstruction of justice are serious problems, for both the individual witnesses and the Tribunal's ability to accomplish its mission.

That is a statement which could easily be misunderstood. In the view of the Trial Chamber, when the required balancing exercise is undertaken before protective measures are ordered, a clear distinction must be drawn between measures to protect individual victims and witnesses in the particular trial

and measures which simply make it easier for the prosecution to present its other cases against other persons.

30. Whilst the Tribunal must make it clear to prospective victims and witnesses in other cases that it will exercise its powers to protect them from, *inter alia* , interference or intimidation where it is possible to do so, the rights of the accused in the case in which the order is sought remain the first consideration . It is not easy to see how those rights can properly be reduced to any significant extent because of a fear that the prosecution may have difficulties in finding witnesses who are willing to testify in other cases.

31. The Trial Chamber accepts that the need to carry out *any* balancing exercise which limits the rights of the accused necessarily results in a less than perfect trial. On the other hand, it also accepts that such a result does not necessarily mean that the trial will not be a fair one. Those propositions were stated by the majority of the Trial Chamber in the First *Tadic* Protective Measures Decision , (36) and they have never been disputed . The question here is whether the extent to which it is necessary to deny the rights of the accused in order to assist the prosecution to have indeterminate victims and witnesses testify on its behalf in future cases tilts the balance too far. The right to a fair trial holds so prominent a place in a democratic society that it cannot be sacrificed to expediency. (37)

32. That said, however, the Trial Chamber accepts that, where the likelihood that a particular victim or witness may be in danger or at risk has *in fact* been established, it would be reasonable, for the reasons already given, to order non -disclosure of the identity of *that* victim or witness until such time that there is still left, in the words of Rule 69(C), "adequate time for preparation of the defence" before the trial. Counsel for Brdanin in the end realistically accepted that the real issue was "when". (38) Counsel for Talic did not accept the right of the prosecution to have *any* documents redacted, (39) although his co-counsel emphasised the requirement of Rule 69(A) that redaction be allowed only in exceptional circumstances.(40)

33. A third issue which arose relates to the *length* of that time before the trial at which the identity of the victims and witnesses must be disclosed to the accused. The prosecution accepts that, although the greater the length of time between the disclosure and the time when the witness is to give evidence, the greater the potential for interference with that witness, the time to be allowed for preparation must be time before the trial commences rather than before the witness gives evidence . (41)

34. The prosecution has also very realistically conceded that what is a reasonable time will depend upon the particular category in which the witness in question falls .(42) For example, where (as in the present matter) the case against the accused does not suggest that either of the accused personally did the acts in question, the witnesses who are to prove the basic facts for which the accused is said to be responsible (either as a superior or by way of aiding and abetting) do not themselves directly implicate the accused , and knowledge of their identity would do little to assist the defence in its preparation for the trial.(43) The witnesses whose identity is of much greater importance to the accused in the preparation of the defence are those who directly implicate the accused as having superior authority or as aiding and abetting.(44) The distinction is a valid one, but the problem is that it is in relation to the witnesses who fall into the second category that the prosecution has the greater concerns and whom it seeks to keep anonymous until the last moment.

35. All three of these issues will be relevant to the determination of the fresh motion which the prosecution must now file in which it seeks to justify a non-disclosure order in relation to particular witnesses.

36. The prosecution has suggested that a disclosure of its witnesses' identity thirty days before the trial would be sufficient to allow the accused to be ready for trial . The prosecution asserts that the

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name of the witness is –

> [...] normally only relevant to issues of credit and is, therefore, generally only a small part of any case preparation that the Defence may undertake.(45)

The prosecution asked rhetorically:(46)

> [E]ven if [the defence] have the name of a witness, how would this assist them preparing the defence of either of the two accused?

These statements are quite unrealistic when applied to those witnesses who fall within the category of giving evidence which directly implicates the accused. There can be no assumption by counsel for the accused that these witnesses will be telling the truth.(47) There are well documented cases where, upon a careful investigation, witnesses called by the prosecution have turned out not to have been where they say they were,(48) or have subsequently retracted their evidence.(49) The Appeals Chamber has placed a firm obligation upon those representing an accused person to make proper inquiries as to what evidence is available in that person's defence.(50) Some of the prosecution witnesses are likely to be of such importance that it will be necessary for at least the final stage of the investigation into those witnesses to be done by counsel who is to appear for the accused at the trial. That is obvious to anyone with experience of criminal trials. The earlier stages can be conducted by the investigator(s) retained for the accused in the field. Many more than one person may well need to be spoken to before appropriate information becomes available.

37. One difficulty which is said by both accused to have arisen in the present case results from the fact that the indictment was sealed, and has remained sealed except in relation to these two accused. Persons whom the defence teams wish to interview have declined to co-operate for fear that they are also named in that indictment , or perhaps in another sealed indictment. This difficulty was said to arise in relation to prospective witnesses for the *defence* whom the defence teams wish to interview, which is hardly relevant to the present issue, which concerns *prosecution* witnesses.(51) However , the Trial Chamber recognises that such a difficulty may well arise also in relation to those from whom the defence teams seek information in relation to the prosecution witnesses.

38. The Trial Chamber does not believe that it is possible to lay down in advance any particular period which would be applicable to all cases. Everything will depend upon the number of witnesses to be investigated, and the circumstances under which that investigation will have to take place. Some accused may have better resources of their own than others, depending upon their position prior to their arrest. That period can only be determined after the protective measures are in place. However, from evidence given in other cases,(52) the Trial Chamber accepts that the pre-trial investigation process in which any defence team is involved is a difficult one, and that (unless very few witnesses have been made the subject of protection orders) a period somewhat longer than thirty days before the trial is likely to be necessary in most cases if the accused is to be properly ready for trial.

7 Return of documents

39. Order (5), if made, would oblige counsel for the accused to return all statements of witnesses to the Registry "at the conclusion of the proceedings". It is said that, as the statements were provided to the accused only to enable him to prepare for the trial, they should be returned to the Registry – thus ensuring that what may be described as the non-public information which the statements contain can never be disclosed to the public.(53) The prosecution would not have access to the documents when they are returned.(54)

40. It was argued on behalf of Talic that the documents became the property of the accused as soon as they are provided to him, and that he should be entitled to keep them "so that he could use them

properly in the future".(55) The prosecution replied that property in the documents does not pass to the accused .(56) The Trial Chamber does not find it necessary to determine this issue, as it accepts the alternative submission made on behalf of Brdanin, that the "work product" of counsel (being the notations inevitably made by counsel on those documents during the preparation and the course of the trial) does become the property of the accused and that it is of a confidential nature.(57) It is unnecessary to determine whether that confidentiality stems from the legal professional privilege which arises (at least in the common law systems) between attorney and client; it is sufficient to say that the "work product" is confidential, and that the accused should not ordinarily be required to divulge it. The issue therefore becomes whether the risk of disclosure is of such a nature that the documents ought nevertheless be returned .

41. When pressed as to how realistic the risk was that the non-public material in these statements would be disseminated if the documents were kept by counsel after the case has been concluded (when the protective measures still operate), the prosecution first referred to the refusal by one defence counsel in another case to return his papers at the conclusion of the trial, and then suggested that:(58)

> One keeps papers in one's office, people wander in and out of the office, or one leaves papers somewhere, and unless they're returned and accounted for, [...] there's always that risk. That's the difficulty.

If there is a deliberate refusal by counsel to return the documents when ordered to do so, he or she would be subject to punishment for contempt. Such a refusal does not lead inevitably to a deliberate disclosure of the documents; however, even punishment for contempt would not cure the damage should there be a deliberate disclosure. But what realistically is the likelihood of a repeat of an event such as this? And what realistically is the likelihood that counsel who has kept the statements *after the conclusion of the case* would leave them in a situation where there would be an unintentional disclosure to somebody who has wandered into his or her office? All but one of the documented disclosures to which the prosecution has referred in the Motion occurred either during the pre-trial phase or during the trial itself. The exception occurred when counsel in one completed case provided an unredacted statement of a witness to counsel in an associated case who had at that time received from the prosecution only a redacted statement of that witness .(59)

42. The Trial Chamber does not accept that the risk is of such significance as to warrant the concern which the prosecution has expressed. There is in any event some difficulty in determining the exact time when the proceedings have concluded , which the prosecution has proposed as the time for the statements to be returned . It was agreed at the oral hearing that, if such documents were to be returned to the Registry at the conclusion of the trial, they would for practical reasons be destroyed, rather then stored.(60) Whether an appeal is to be lodged would be known fairly quickly, and counsel could perhaps be permitted to keep the statements until the time for filing an appeal has expired and, if an appeal is filed, until the appeal is disposed of. But what if, at some later stage, an application is made for a review pursuant to Rule 119 ? Counsel retained for the accused in that procedure would have lost a very valuable resource if the work product on the statements has been destroyed. This would be unfair to the accused. It was suggested by the prosecution that the answer would be for defence counsel to keep his or her work product separately from the statements supplied. The Trial Chamber regards that submission as quite impractical.

43. The Trial Chamber does not accept that the likely risk of either deliberate or unintentional disclosure after the conclusion of the case is of such significance as to justify the unwieldy and possibly unfair consequences of an order that the documents be returned in every case. The fact that orders for the return of statements have been made in similarly general terms in other cases does not impress the Trial Chamber,(61) as the present case appears to be the first in which objection has been taken to orders of the nature sought in this case, and the first in which there has been any examination of what is involved in those orders.

44. The Trial Chamber is prepared to make an order in the terms of the first part of Order (5) – that, if a member of the Brdanin and Talic Defence team withdraws from the case, all the material in his or her possession shall be returned to the lead defence counsel. Such an order is justified as that member of the team no longer has any need for the documents. But the Trial Chamber is not prepared at this stage to make any further order in relation to the return of documents. It accepts that such orders may be warranted in a particular case. Counsel for Brdanin suggested that an order may be warranted where a document was "akin to a national security document",(62) but the Trial Chamber would not limit the occasions when an order may be appropriate to that class of case. Such orders are better considered at the end of the trial, when the risk involved may more easily be identified. The risk has not been identified in the present case at this stage. The order is therefore otherwise refused, without prejudice to any further application at a later stage.

8 Maintaining a log

45. The accused have not objected to Order (3), which obliges their Defence team (as defined) to inform each person among the public to whom they find it directly and specifically necessary to disclose confidential or non-public materials that such person is not to copy, reproduce or publicise the information disclosed, is not to show or disclose that information to any other person, and is to return the original or any copy of such material provided to that person. Order (4), if made , would oblige counsel to maintain a log indicating the names, addresses and position of each person or entity receiving any of the non-public information in the materials provided by the prosecution. The prosecution points out that similar statutory requirements exist in relation to statements, photographs and medical reports in sexual cases in the United Kingdom.(63) Such a regime was said to be necessary in Tribunal cases as the "only way of tracing these things".(64) An expanded explanation was given in these terms:(65)

> [...] if there is a leak of confidential material, and the Trial Chamber has to conduct an investigation, the only way they can properly do so is by a log being kept. And that's the reason that we are asking for that [...]

The procedure laid down by Order (4) is that, if a "perceived violation" of the non-disclosure order occurs, the Trial Chamber, or a designee [sic] such as a duty judge, may review the disclosure log so that "appropriate" action may be taken. The prosecution asserts that the log will not be disclosed to it..(66)

46. The accused Talic objects to such an order upon the basis that it infringes the confidentiality of his defence team's investigations,(67) in that (a) it will permit both the prosecution and the Tribunal to know those whom his defence team is meeting in order to organise his defence,(68) and (b) it will permit the prosecution to prosecute those persons "secretly".(69) The prosecution denies that legal professional privilege applies to that information . Again, it is unnecessary for the Trial Chamber to determine whether the confidentiality as to the identity of persons to whom the defence team have spoken in the preparation of the case for the accused stems from legal professional privilege, as it is sufficient to say that such information *is* confidential, and the accused should not ordinarily be requested to divulge it.

47. It is significant, in the view of the Trial Chamber, that the review of this log is contemplated only in the event of a "perceived violation" of the non-disclosure order. As that order is binding only upon the Brdanin and Talic Defence (which term is limited by its definition to the accused themselves, their counsel and all staff assigned to them by the Tribunal), Order (4) appears to be intended specifically to provide the basis for "appropriate" action against only those persons responsible for maintaining the log. The "appropriate" action could well include prosecution for contempt of the Tribunal.

48. If, however, any member of the defence team is to be prosecuted for contempt , it is perhaps

disingenuous of the prosecution to assert that the log will not be disclosed to it, as it would be the prosecution to which the Trial Chamber would necessarily have to turn for assistance in proceedings for contempt pursuant to Rule 77. Again, if any member of the defence team is to be prosecuted for contempt , he or she is entitled to the same presumption of innocence and right to silence which any other accused person has. The obligation to keep the log upon which such a prosecution is to be based would require that accused person to provide evidence against him or herself, contrary to Article 21 of the Tribunal's Statute. Such a procedure could be justified only where the situation were so grave that substantial damage was being caused by improper disclosures.(70) The Trial Chamber is not satisfied that such a situation exists here.

49. A requirement that such a log be kept so that any improper disclosure could be traced to a person to whom the defence team has quite properly disclosed the identity of the witness (in its investigation into the background of that witness) would not give rise to these problems, but the non-disclosure order is not binding upon those other persons, and the Tribunal is powerless to take any action against them if such a disclosure by them does occur. The Trial Chamber does not accept that it is appropriate to require such a log to be maintained by the defence team for the purpose contemplated by Order (4). The order is refused.

9 Confidential filings

50. An issue was also raised by the Trial Chamber itself as to the action of the prosecution in filing its Motion on a confidential basis. At the time when the Motion was filed, a Scheduling Order was made which, *inter alia*, lifted its confidentiality.(71) An informal request was made by the prosecution to rescind that order,(72) but the order was merely stayed until further order, so that both the confidentiality of this document and the right of a party without leave to file a document on a confidential basis simply by labelling it "Confidential" could be argued at the oral hearing.(73) The Registrar was also invited to make representations pursuant to Rule 33(B) upon the second of those issues, as well as upon the issue as to whether there should be a requirement that any party wishing to file a document on a confidential basis (other than one seeking protective orders for specific persons) must first, on an *ex parte* basis and before filing it, seek leave from the Pre-Trial Judge to do so on such a basis .(74) A submission of the Registrar was filed.(75)

51. The purported basis for filing the Motion as a confidential document was the fear that, if the material contained in par 10 of the Motion – which is quoted in par 8 of this Decision – could be read by anyone, including those who are potential witnesses and those who have an interest in preventing such witnesses from giving evidence, it could well lead to those witnesses refusing to co-operate,(76) and to the possibility of interference with witnesses being planted in the minds of those who have a vested interest in ensuring that evidence which implicates these two accused is not given. (77)

52. The Trial Chamber repeats what it said earlier,(78) that the issue is the likelihood that prosecution witnesses may be interfered with or intimidated, and that any fears expressed (or held) by potential witnesses themselves that they may be approached are not in themselves sufficient to establish the likelihood that they may be interfered with or intimidated. The Trial Chamber regards the suggestion that those already minded to prevent evidence being given against these two accused would, by reading a publicly filed document such as this Motion, be incited to interfere with or intimidate witnesses as merely fanciful.(79) The reality is that there have already been serious allegations made publicly that witnesses in other cases have been interfered with. In one case, the allegations were upheld in proceedings for contempt against the counsel concerned.(80) In another case, the allegations against other counsel and the accused for whom he appeared were dismissed. (81) Both judgments are public documents, and may be read by anyone. The second was given only recently, but no-one has suggested that there has been an upsurge of interference with witnesses in the period since the first of those judgments was given. Nor could they.

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53. There was no justification for filing the Motion on a confidential basis. Article 20.4 of the Tribunal's Statute provides:

> The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence.

Pursuant to that Article, Rule 79 provides that a Trial Chamber may exclude the press and the public from the proceedings only for one of three specified reasons (one being the safety, security or non-disclosure of the identity of a victim or witness as provided by Rule 75). Both these provisions make it clear that the proceedings must be in public unless good cause is shown to the contrary.(82)

54. The prosecution has submitted that these provisions relate only to hearings, and not to the filing of motions. That is strictly true, but they indicate a intention that *everything* to do with proceedings before the Tribunal should be done in public unless good cause is shown to the contrary. As a matter of general policy , this must be so. A necessary consequence of the filing of this Motion on a confidential basis has been that the oral argument upon the Motion – which dealt with matters of great importance – took place in closed session, although it was subsequently conceded by the prosecution that nothing said during that oral hearing other than the references to par 10 of the Motion was confidential in nature.(83) If par 10 of the Motion did not justify it being filed on a confidential basis, then the public has been denied its right of access to a hearing, a right which both the prosecution and the Tribunal should have been anxious to enforce.

55. The prosecution also asked rhetorically:(84)

> [W]hat interest can the public have in [...] unnecessarily knowing that there's an application for protection of witnesses and/or that there have been successful attempts in the past?

The answer is that there is a public interest in the workings of courts generally (including this Tribunal) – not just in the hearings, but in everything to do with their working – which should only be excluded if good cause is shown to the contrary . The attitude displayed by the prosecution in the present case appears to be part of an unfortunately increasing trend in proceedings before the Tribunal for matters to be dealt with behind closed doors. When the prosecution seeks to have anything dealt with confidentially, the accused does not usually object because it is in his interest that the less that is made public concerning his case the better.(85) This trend is a dangerous one for the public perception of the Tribunal, and it should be stopped.

56. The stay on the order lifting the confidentiality of the Motion is removed, and the filings by the parties in relation to the Motion, and the transcript and video-recording of the oral hearing on the Motion, will also be made public.

57. The remaining issues concerning confidentiality were the right of a party without leave to file a document on a confidential basis simply by labelling it "Confidential ", and whether there should be a requirement that any party wishing to file a document on a confidential basis (other than one seeking protective orders for specific persons) must first, on an *ex parte* basis and before filing it, seek leave from the Pre-Trial Judge to do so on such a basis.

58. The parties made no specific submissions in relation to these issues, although the prosecution did identify some convenient categories into which its "confidential " filings fall, to which reference will be made later.

59. The Registrar has identified as being relevant to this issue Article 12.1 of the Directive for the Registry–Judicial Department–Court Management and Support Services ("Directive"),(86) which provides :

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> Documents which are confidential in whole or in part, or which include words or phrases which should not be disclosed to the public, are filed and classified in accordance with the procedure described in Article 11 herein. These documents remain a part of the relevant case file, but they are placed in a distinct folder which is not accessible to the public.

The classification of documents described in Article 11 of the Directive makes no reference to the classification of documents as confidential. The Registrar has submitted that, as it is her view that "her Office is not in a position to make decisions that affect the judicial rights of the parties",(87) and "in accordance with the current practice of the Registry", the parties *do* have the right to file a document without leave on a confidential basis simply by labelling it "Confidential".(88) Such a practice, she says(89) –

> [...] is the most appropriate mechanism for satisfying the dual objectives of maintaining the security of each party's documents, and maintaining a transparent and impartial filing system.

60. The Trial Chamber respectfully takes issues with a number of these assertions . First, Article 12 makes it clear that the documents to which it relates are those which are *in fact* confidential, not those which are merely claimed to be so, and to documents which "should" not be disclosed to the public. On the face of it, the Article *does* require the Registry staff to make a determination . Secondly, it is by no means the universal practice of the Registry to leave it to the parties to nominate whether they wish to have the documents filed on a confidential basis, and decisions *are* made by Registry staff on occasions as to whether a document should be filed on a confidential basis.(90) Thirdly, the Directive cannot be interpreted according to the ability of the Registrar to provide staff who are able to apply it. And, lastly, the argument that, by making a determination as to whether a document should be filed on a confidential basis , the Registry staff will no longer be seen as impartial is illogical. The Trial Chamber does not accept the Registrar's conclusion that the parties have the right to file a document without leave on a confidential basis simply by labelling it "Confidential".

61. In relation to the suggested requirement that a party seeking to file a document on a confidential basis must first obtain leave to do so, the Registrar asserts that it would be contrary to the Directive, which can only be amended by the Registrar after consultation with the judges and the Prosecutor. (91) As the parties require documents to be filed on a continuous basis throughout the day, and in some cases after hours, she also asserts that any requirement of leave could potentially result in delays because of the unavailability of the Pre-Trial Judge or the Trial Chamber.(92)

62. Once again, the Trial Chamber respectfully takes issue with these assertions . The contents of the Directive are irrelevant to the suggested requirement of leave. The Directive does not impinge upon the power of a Trial Chamber to control the particular proceedings before it. The Trial Chamber may direct the parties to file certain documents, without infringing the Directive. It may equally direct the parties not to file certain documents without first obtaining leave, again without infringing the Directive. The suggested requirement of leave does not *require* the Registry staff to act in any particular way. If a party seeks to file a document merely labelled "Confidential" on such a basis without leave to do so, and if the Registry staff does not draw the party's attention to that requirement , then the Trial Chamber will exercise its power to order that its confidentiality be lifted, a power which the Registrar recognises.(93) The requirement that leave be obtained in advance will merely ensure that usually this power will not have to be exercised after the filing has been accepted.

63. In relation to the argument of inconvenience, the prosecution informed the Trial Chamber that its confidential filings fell into the following categories:(94)

> (i) witness protection measures,

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(ii) ongoing investigations, pending indictments and sealed indictments, and

(iii) responses to confidential motions filed by the defence and to Trial Chamber decisions which relate to confidential hearings or motions.

Filings in the second category are almost inevitably *ex parte* in nature and so are almost inevitably also confidential in nature. Filings in the third category would also appear to be necessarily confidential in nature. It is therefore with filings in the first category that the issue of inconvenience principally arises , although the Trial Chamber recognises that there may well be other categories in which it would be appropriate to file a document on a confidential basis.

64. If the requirement that leave be sought prior to filing were couched in terms which excluded –

(a) all *ex parte* applications, whatever their nature,

(b) all *inter partes* applications for witness protection which relate to specific persons, and

(c) all applications which fall within the second and third of the prosecution's categories,

there are few documents which would require leave. The prosecution was unable to supply figures, (95) but it was not suggested that there were many such documents. There would be no significant inconvenience ; rather, there will be an opening up of the proceedings to public scrutiny in every case except where confidentiality is really warranted. The Trial Chamber proposes to give such a system a trial in particular cases.

10 Disposition

65. For the foregoing reasons, Trial Chamber II makes the following orders:

1. For the purposes of these orders:

(a) "the Prosecutor" means the Prosecutor of the Tribunal and her staff;

(b) "Brdanin and Talic Defence" means only the accused Radoslav Brdanin and Momir Talic and such defence counsel and their immediate legal assistants and staff, and others specifically assigned by the Tribunal to Radoslav Brdanin and Momir Talic's trial defence teams and specifically identified in a list to be maintained by each lead counsel and filed with the Trial Chamber *ex parte* and under seal within ten days of the entry of this order. Any and all additions and deletions to the initial list in respect of any of the above categories of persons who are necessarily and properly involved in the preparation of the defence shall be notified to the Trial Chamber in similar fashion within seven days of such additions or deletions ;

(c) "the public" means all persons, governments, organisations, entities, clients , associations and groups, other than the judges of the Tribunal and the staff of the Registry (assigned to either Chambers or the Registry), and the Prosecutor, and the Brdanin and Talic Defence, as defined above. "The public" specifically includes, without limitation, family, friends and associates of the accused, the co-accused, the accused in other cases or proceedings before the Tribunal and defence counsel in other cases or proceedings before the Tribunal; and

(d) "the media" means all video, audio and print media personnel, including journalists ,

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authors, television and radio personnel, their agents and representatives.

2. The Prosecutor is to comply, on or before 24 July 2000 at 4.00 pm, with her obligation under Rule 66(A)(i) of the Rules of Procedure and Evidence to supply to each of the accused copies in unredacted form of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by her from that accused;

provided that, in the event that the Prosecutor files a motion within that period for protective measures in relation to particular statements or other material or particular victims or witnesses (which shall be identified in such motion by a number or pseudonym), she need not supply unredacted copies of those statements or that other material identified in that motion until that motion has been disposed of by the Trial Chamber, and subject to the terms of any order made upon that motion .

3. The Brdanin and Talic Defence shall not disclose to the media any confidential or non-public materials provided by the Prosecutor.

4. Save as is directly and specifically necessary for the preparation and presentation of this case, the Brdanin and Talic Defence shall not disclose to the public:

(a) the names, identifying information or whereabouts of any witness or potential witness identified to them by the Prosecutor; or

(b) any evidence (including documentary, physical or other 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.

5. If the Brdanin and Talic Defence find it directly and specifically necessary to disclose such information for the preparation and presentation of this case, they shall inform each person among the public to whom non-public material or information (such as witness statements, prior testimony, or videos, or the contents thereof), is shown or disclosed, that such a person is not to copy, reproduce or publicise such statement or evidence, and is not to show or disclose it to any other person . If provided with the original or any copy or duplicate of such material, such person shall return it to the Brdanin and Talic Defence when such material is no longer necessary for the preparation and presentation of this case.

6. If a member of the Brdanin and Talic Defence team withdraws from the case, all material in his or her possession shall be returned to the lead defence counsel.

7. The stay imposed by the Variation of Scheduling Order of 27 January 2000 dated 2 February 2000, which lifted the "confidentiality" of the Motion for Protective Measures dated 10 January 2000, is removed.

8. The "confidentiality" of the filings in response to the Motion for Protective Measures dated 10 January 2000, of the filings in reply to those responses and of the oral hearing of the Motion on 24 March 2000 is lifted.

9. The remaining orders sought by the Motion for Protective Measures dated 10 January 2000 are refused.

10. Nothing herein shall preclude any party or person from seeking such other or additional protective orders or measures as may be viewed as appropriate concerning a particular witness or other evidence.

Done in English and French, the English text being authoritative. 6262

Dated this 3rd day of July 2000,
At The Hague,
The Netherlands.

Judge David Hunt
|Presiding Judge

[Seal of the Tribunal]

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1. Motion for Protective Measures, 10 Jan 2000 ("Motion"), par 14.

2. Those definitions formed the general basis for the definitions given in par 65.1 of this Decision. The prosecution also seeks to preserve the right of the parties and any other person to seek such other or additional protective orders or measures as may be appropriate concerning a particular witness or other evidence.

3. Transcript, 11 Jan 2000, p 40.

4. Transcript, 24 Mar 2000, p 77.

5. Motion, par 14(6).

6. Case IT-94-1-T, Decision on the Prosecution's Motion Requesting Protective Measures for Witness R, 31 July 1996 ("Second Tadic Protective Measures Decision"), at 4.

7. The emphasis has been added.

8. Prosecutor v Tadic, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, (1995) I JR ICTY 123 ("First Tadic Protective Measures Decision"), at 151 (par 30). See also Prosecutor v Tadic, Decision on the Prosecutor's Motion Requesting Protective Measures for Witness L, (1995) I JR ICTY 307 at 318-319 (par 11).

9. Motion, par 9.

10. Ibid, par 4.

11. Transcript, p 78.

12. Ibid, p 88.

13. First Tadic Protective Measures Decision, at 145-147 (par 23).

14. Transcript, p 135.

15. Ibid, p 84, 87-88, 92.

16. Ibid, p 86.

17. Ibid, p 86-87, 93-94.

18. Ibid, p 140.

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19. Whatever fears that witness may have in being identified as one who is going to give evidence in this trial, it is difficult to see how the prosecution, having used the transcript as supporting material when the indictment was confirmed, could argue that there were exceptional circumstances justifying a non-disclosure in relation to that witness.

20. Transcript, p 140.

21. Further and Better Particulars of "Motion for Protective Measures", 8 Feb 2000 ("Further Particulars"), par 4; Transcript, p 83. See also First Tadic Protective Measures Decision, at 215.

22. First Tadic Protective Measures Decision, at 157 (par 38), citing Axen v Federal Republic of Germany, ECHR decision of 8 Dec 1983, Series A, no 72 (see at par 27).

23. First Tadic Protective Measures Decision, at 175 (par 65), 201.

24. This is subject to Rule 75, which permits appropriate measures to be ordered for the privacy and protection of witnesses unlimited in time, but only if the measures are "consistent with the rights of the accused". No issue arises in the present motion in relation to that power, which is discussed in the First Tadic Protective Measures Decision, by the majority at 169-175,179 (pars 53-66, 71) and by Judge Stephen, dissenting, at 221, 225-235.

25. It was submitted by the prosecution that such a motions should proceed ex parte (Transcript, p 86). That would be appropriate only if the identity of the particular witnesses would otherwise be identified: Prosecutor v Simic, Case IT-95-9-PT, Decision on (1) Application by Stevan Todorovic to Re-open the Decision of 27 July 1999, (2) Motion by ICRC to Re-open Scheduling Order of 18 November 1999, and (3) Conditions for Access to Material, 28 Feb 2000, pars 40-41. Whether ex parte or inter partes, it would nevertheless be appropriate for the application to be made on a confidential basis.

26. Further Particulars, par 12; Transcript, pp 78-79.

27. Further Particulars, par 8.

28. Prosecutor v Simic, Case IT-95-9-R77, Oral Judgment, 29 Mar 2000, Transcript, pp 904-905.

29. Prosecutor v Zlatko Aleksovski, Case IT-95-14/1-T, Finding of Contempt of the Tribunal, 11 Dec 1998.

30. Further Particulars, par 8

31. Ibid, par 9.

32. Ibid, par 10.

33. Transcript, p 90.

34. This provides for a log to be maintained by counsel of those to whom they have disclosed the non-public information in the material provided by the prosecution, and which may be reviewed by the Trial Chamber in the event of a "perceived violation" by counsel or others within the defence team. See Section 8 of this Decision.

35. Paragraph 9 of this Decision.

36. At 179 (par 72). It is perhaps instructive that the authority upon which the majority relied – a decision of the Appellate Division of the Supreme Court of Victoria (Australia), in Jarvie v Magistrates Court of Victoria [1994] VR 84 at 90, delivered by Mr Justice Brooking on behalf of the Court – involved a witness who had been well known to the accused, although only by a pseudonym and not his real name (he was an undercover police officer): First Tadic Protective Measures Decision, per Judge Stephen, at 233.

37. Kostovski v Netherlands, ECHR decision of 20 Nov 1989, Series A, no 166, at 21 (par 44).

38. Transcript, p 115.

39. Transcript, p 123.

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40. Transcript, pp 126-128. This is more consistent with the written response filed on behalf of Talic: Response of General Talic to the Further Particulars Provided by the Prosecutor Relating to the Motion for Protective Measures, 10 Feb 2000, par 5.

41. Transcript, p 81.

42. Ibid, p 80.

43. Ibid, pp 83-84. In other words, it is unlikely that there will be any real dispute about their evidence: Prosecutor v Krnojelac, Case IT-97-25-PT, Decision on Preliminary Motion on Form of Amended Indictment, 11 Feb 2000, par 18 (A).

44. Transcript, p 89.

45. Further Particulars, par 13.

46. Transcript, p 84.

47. Counsel for Brdanin quoted Lord Owen: "Never before in over thirty years of public life have I had to operate in such a climate of dishonour, propaganda and dissembling. Many of the people with whom I have had to deal in the former Yugoslavia were literally strangers to the truth." (Balkan Odyssey, David Owen, 1996, Indigo Edition, p 1.)

48. See, for example, Prosecutor v Tadic, Case IT-94-1-T, Decision on Prosecution Motion to Withdraw Protective Measures for Witness L, 5 Dec 1996, par 4; Prosecutor v Tadic, Case IT-94-1-A, Judgment, 15 July 1999, pp 26-28 (pars 57-65).

49. See, for example, Prosecutor v Tadic, Case IT-94-1-A-R77, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 Jan 2000, pars 46, 136.

50. Prosecutor v Aleksovski, Case IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 Feb 1999, par 18.

51. So far as defence witnesses are concerned, the attention of defence counsel is directed to the provisions of Article 29 of the Tribunal's Statute.

52. See, for example, Prosecutor v Tadic, Case IT-94-1-A-R77, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 Jan 2000.

53. Motion, par 13.

54. Transcript, p 134.

55. Ibid, p 120.

56. Ibid, p 142.

57. Ibid, pp 131, 133-134.

58. Ibid, p 97.

59. Further Particulars, par 15

60. Transcript, p 94-95.

61. Further Particulars, par 16.

62. Ibid, p 133. See also a reference by the prosecution to such documents, at Transcript, pp 99-100.

63. Sexual Offences (Protected Materials) Act 1997, which contains elaborate provisions to prevent disclosure of such

material to any person (including the accused person, even if unrepresented) in such a way which permits that person to retain possession of it at any time or to make a copy of it: Further Particulars, par 18.

64. Transcript, p 97.

65. Ibid, p 134.

66. Ibid, p 134.

67. Response [by Talic] to Prosecutor's Motion, 31 Jan 2000, par 3.

68. Transcript, p 130.

69. Ibid, p 130-132.

70. Such a situation has been justified in some domestic jurisdictions – for example, where lorry drivers are required to keep log books as to their working hours and rest periods.

71. Scheduling Order, 27 Jan 2000, p 3.

72. Letter from James Stewart, Chief of Prosecutions, to the Pre-Trial Judge, 31 Jan 2000 ("Stewart letter"). The prosecution was subsequently required to file the letter: Variation of Scheduling Order of 27 January 2000, 2 Feb 2000, p 2.

73. Variation of Scheduling Order of 27 January 2000, 2 Feb 2000, p 2.

74. Scheduling Order, 29 Feb 2000, p 4.

75. Submission of the Registrar on the Confidential Filing Issue in Accordance with Rule 33(B), 7 Mar 2000 ("Registrar's Submission").

76. Stewart letter, par (a).

77. Ibid, par (b); Transcript, p 102.

78. Paragraph 26 of this Decision.

79. The Trial Chamber has not overlooked that publicity may be given to such documents when publicly filed, although none was in fact given to this Motion notwithstanding its public release when its confidentiality was lifted. In any event, so far as the point made by the Trial Chamber is concerned, it does not matter how the allegations in the filed document might become known to those persons already minded to prevent evidence being given against these two accused.

80. Prosecutor v Tadic, Case IT-94-1-A-R77, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 Jan 2000, a judgment of the Appeals Chamber.

81. Prosecutor v Simic, Case IT-95-9-R77, Judgment in the Matter of Contempt Allegations Against an Accused and his Counsel, 30 June 2000.

82. See also Article 21.2 of the Tribunal's Statute.

83. Transcript, p 148.

84. Ibid, p 104.

85. One example of the approach of the parties to hearing matters in closed session may be seen in Prosecutor v Tadic, Case IT-94-1-A-R77, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 Jan 2000, at par 11. In Prosecutor v Kunarac, Case IT-96-23-T, Order on Defence Motion Pursuant to Rule 79, 22 March 2000, the defence has sought a closed hearing for the evidence of all the prosecution witnesses who had accused the defendant of rape. The application was refused.

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86. IT/121, 1 March 1997, as approved by the Judges sitting in Plenary Session on 25 June 1996.

87. Registrar's Submission, par 3.

88. Ibid, par 4.

89. Ibid, par 4.

90. A recent example was the wise decision within the Registry to file a document on a confidential basis, notwithstanding the absence of any label of confidentiality, because it included references to the transcript of evidence given in closed session: Prosecutor v Delalic, Case IT-96-21-A, Order Relating to Appeal Brief Filed on Behalf of Zegnil Delalic, 26 May 2000. There have been many other such occasions.

91. Registrar's Submission, par 5.

92. Ibid, par 6.

93. Ibid, par 4.

94. Ibid, p 100.

95. Transcript, p 99.