

IN THE APPEALS CHAMBER

Before:

Judge Theodor Meron, President

Judge Mohamed Shahabuddeen

Judge Mehmet Güney

Judge Amin El Mahdi

Judge Inés Mónica Weinberg de Roca

Registrar:

Mr. Hans Holthuis

Order of:

13 May 2005

PROSECUTOR

v.

RADOSLAV BRDJANIN

ORDER TO VARY PROTECTIVE MEASURES

The Office of the Prosecutor:

Mr. Mark J. McKeon

Counsel for the Defence:

Mr. John Ackerman

THE APPEALS CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("International Tribunal");

NOTING that, in its Decision of 10 October 2002 and orally during courtroom proceedings, the Trial Chamber in the present case ordered certain protective measures to be applied to witnesses identified by the pseudonyms BT55, BT56, and BT96;

NOTING motions filed on 11 and 22 February 2005 before the Registry of the International Tribunal, in which the Chief Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina ("BiH Prosecutor") requested the Registry's assistance in obtaining the names, contact information, testimony and other evidence concerning these witnesses for use in an investigation being conducted by the BiH Prosecutor concerning a suspect currently in the custody of the Government of Bosnia and Herzegovina ("BiH");

NOTING the request of the Registry, dated 31 March 2005, for an opinion of the President of the Tribunal on this matter;

NOTING the President's opinion of 6 April 2005, which stated that pursuant to Rule 75 of the Rules of Procedure and Evidence ("Rules"), it is "only one of the parties, defined in Rule 2 as the prosecution and Defence, who can make an application to a Chamber for variation of measures imposed";¹

BEING SEISED of the "Prosecutor's Application for Variation of Protective Measures," filed confidentially on 22 April 2005 ("Application"), which seeks release of the information sought by the BiH Prosecutor under the following conditions: (1) consent of the protected witnesses, (2) an undertaking by the BiH Prosecutor "that the witnesses' identities and the non-public material will be treated as confidential, and that only members of the Special Department for War Crimes of the BiH Prosecutor's Office would be permitted access to the material, and that the materials would not be disclosed to any other persons or parties, and that he will take all necessary measures, both legal and practical, in order to ensure the safety and security of the witnesses";

CONSIDERING that the President's Decision in this matter was public and that, although there is confidential information contained in the Annexes to the Prosecutor's Application, the content of the Application itself is not sensitive and should be made public;

NOTING that similar requests have been filed with the Trial Chambers seized of the cases *Prosecutor v. Milosevic*, No. IT-02-54-T, and *Prosecutor v. Krajisnik*, No. IT-00-39-T, in which some of the same witnesses also testified;

CONSIDERING that, upon the request of the Appeals Chamber and the two Trial Chambers, the above-mentioned witnesses were contacted by the Victims and Witnesses Section of the International Tribunal ("VWS"), that VWS explained the context and the terms of the Prosecutor's request, and that each of the witnesses consented to the disclosure of the requested information;

CONSIDERING Security Council resolutions 1503/2003 and 1534/2004, which emphasize, as a critical portion of the International Tribunal's Completion Strategy, the need to facilitate efforts to bring war crimes prosecutions in the national judicial systems within the Former Yugoslavia;

CONSIDERING the Appeals Chamber's inherent authority, as the Chamber currently seized of proceedings in this case, to modify orders entered earlier in these proceedings, including those issued pursuant to Rule 75(A) of the Rules;²

CONSIDERING the obligations of member states of the United Nations, under Article 29 of the Statute of the International Tribunal, to comply with orders issued by this Tribunal;

CONSIDERING that if the BiH Prosecutor eventually brings charges stemming from its current investigation, and introduces evidence or testimony from the witnesses affected by the present application, justice will likely demand disclosure of certain confidential information to the accused in that case;

HEREBY ORDERS that the Prosecutor's Application, but not its annexes, be made public; and

GRANTS the Prosecutor's Application and **VARIES** the protective measures concerning Witnesses BT55, BT56, and BT96 as follows:

1. The Prosecutor may release the names, contact information, and evidence of the witnesses referenced herein to the BiH Prosecutor, provided that the BiH Prosecutor has submitted a written undertaking, addressed to the Appeals Chamber and the Prosecutor on behalf of the Government of Bosnia and Herzegovina, agreeing to respect the orders of this Chamber concerning this matter, and specifically accepting the following:
 - a. The information disclosed will be treated as confidential, and will be released to no one except members of the Special Department for War Crimes and the courts of Bosnia and Herzegovina as necessary for the purposes of proceedings involving the suspect currently in BiH custody, and to that suspect and his counsel as specified in paragraph (b) below;

- b. The information disclosed will not be released to the suspect and/or his counsel unless the BiH Prosecutor obtains assurances according to relevant BiH law that the suspect and counsel will strictly maintain the confidentiality of the information;
 - c. The BiH authorities will take all necessary measures, both legal and practical, in order to ensure the safety and security of the witnesses; and
2. The Government of Bosnia and Herzegovina is ordered to comply, upon release of the requested material to it, with the above-stated conditions.

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

Judge Theodor Meron
Presiding

Dated 13 May 2005
At The Hague
The Netherlands

[Seal of the International Tribunal]

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1. Decision on Registrar's Submission on a Request from the Office of the Chief Prosecutor of Bosnia and Herzegovina Pursuant to Rule 33(B), Case No. IT-05-85-Misc 2, 6 April 2005 ("President's Decision"), at para. 16.
 2. *Cf.* Rule 54 of the Rules.