



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

Case No.: IT-99-37-PT

Date: 17 July 2003

Original: English

IN THE TRIAL CHAMBER

Before: Judge Richard May, Presiding
Judge Patrick Robinson
Judge O-Gon Kwon

Registrar: Mr. Hans Holthuis

Decision of: 17 July 2003

PROSECUTOR

v.

**MILAN MILUTINOVIĆ
DRAGOLJUB OJDANIĆ
NIKOLA ŠAINOVIĆ**

DECISION ON PROSECUTION'S MOTIONS FOR PROTECTIVE MEASURES

The Office of the Prosecutor

**Mr. Geoffrey Nice
Ms. Cristina Romano**

Counsel for the Accused

**Mr. John Livingston and Mr. Radoje Stefanović, for Milan Milutinović
Mr. Tomislav Višnjić, Mr. Peter Robinson and Mr. Vojislav Selžan, for Dragoljub Ojdanić
Mr. Toma Fila, Mr. Vladimir Petrović and Mr. Zoran Jovanović, for Nikola Šainović**

THIS TRIAL CHAMBER of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (“International Tribunal”),

BEING SEISED of a confidential “Prosecution’s Motion for Protective Measures”, filed *ex parte* by the Office of the Prosecutor (“Prosecution”) on 31 January 2003 and *inter partes* on 4 February 2003, as amended on 26 February 2003 and 31 March 2003 (“the First Motion”), a confidential “Prosecution’s Second Motion for Protective Measures with Confidential and *Ex Parte* Annex A”, filed on 28 March 2003 (“the Second Motion”) and a confidential “Prosecution’s Third Motion for Protective Measures with Confidential and *Ex Parte* Annex A”, filed 18 June 2003 (“the Third Motion” and together “the Motions”); the responses to the First Motion, filed on 18 February 2003 on behalf of the two accused, Dražoljub Ojdanić and Nikola Šainović, and the Prosecution reply, filed 25 February 2003; and the responses to the Second Motion, filed on 9 and 10 April 2003 on behalf of the two accused, Dražoljub Ojdanić and Milan Milutinović, (the three accused, their counsel and their defence teams together being referred to as “the Defence”) and the Prosecution reply, filed on 25 April 2003,

NOTING that the Motions seek a variety of protective measures for fourteen¹ identified witnesses (“the Witnesses”), both at the pre-trial and the trial stages of the proceedings, and other related requests, some of which are sought in relation to pre-trial disclosure pursuant to Rule 66 (A)(ii) of the Rules of Procedure and Evidence of the International Tribunal (“Rules”), and some of which relate to other stages of the proceedings,

NOTING, in particular, the requests: (1) to redact the statements of and use pseudonyms whenever referring to these Witnesses with the Defence, thus delaying disclosure to the Defence of the identities of the Witnesses whose statements or summaries thereof are to be disclosed pursuant to Rule 66 (A)(ii) of the Rules; (2) to delay disclosure to the Defence of the statements and identities of four Witnesses; and (3) for orders for non-disclosure to the public of material disclosed under Rules 66 (A)(ii), 66 (B) and 68 of the Rules,

NOTING the arguments of the Prosecution as set out in the Motions and, in particular, the arguments presented in support of delayed disclosure to the Defence of the statements of the

¹ One additional witness was withdrawn by the Prosecution by way of amendment filed on 26 February 2003.

Witnesses as set out in the First and Second Motions and in the Prosecution reply to the Second Motion, filed on 25 April 2003,

NOTING the various objections to the relief sought raised by the Defence,

NOTING also the Trial Chamber's "Decisions on Ex Parte and Confidential Prosecution's Motion for Witness Protection Measures", issued in relation to the accused Dragoljub Ojdanić and Nikola Šainović on 7 June 2002 (together "the Decisions of 7 June 2002"), which Decisions remain in full force and effect,

NOTING that none of the Witnesses referred to in the Motions have previously been granted protection in this case by the Decisions of 7 June 2002 but that several of the Witnesses enjoy protective measures from other proceedings,

CONSIDERING that Article 20 of the Statute of the International Tribunal ("Statute") requires the Trial Chambers to ensure that proceedings are conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses,

CONSIDERING the rights of the accused under Article 21, paragraph 2, of the Statute to a fair and public hearing, subject to Article 22 of the Statute,

CONSIDERING that, save as otherwise provided in this Decision, the protection sought is necessary and appropriate to protect the Witnesses, while still remaining consistent with the rights of the accused,

CONSIDERING that the Trial Chamber is of the view, as stated in previous decisions,² that "[w]hilst it is extremely important to provide adequately for the protection of victims and witnesses, the requirement that the accused be given a fair trial dictates that Trial Chambers only grant protective measures where it is properly shown in the circumstances of each such witness that the protective measures sought meet the standards set out in the Statute and Rules of the Tribunal, and expanded in its jurisprudence" and that "the balance dictates clearly in favour of an accused's right to the identity of witnesses which the Prosecution intends to rely upon",

² *Prosecutor v. Slobodan Milošević*, "Decision on Prosecution Motion for Provisional Protective Measures Pursuant to Rule 69", Case No. IT-02-54-T, 19 February 2002, paras 28, 32.

CONSIDERING that the Trial Chamber is not satisfied that the Prosecution has demonstrated, pursuant to the criteria set out by this Trial Chamber in previous decisions,³ “the likelihood that Prosecution witnesses will be interfered with or intimidated once their identity is made known to the accused and his counsel” and “the length of time before the trial at which the identity of the victims and witnesses must be disclosed to the accused (the time allowed for preparation must be time *before trial commences* rather than before the witness gives evidence)”, and so has not established that delayed disclosure of identity is appropriate in respect of the eight Witnesses identified in paragraphs 4 (d), (e) and (f) of the First Motion, paragraphs 1 and 5 [sic] of Annex A to the Second Motion and paragraphs 1, 3 and 4 of Annex A to the Third Motion, but that such delayed disclosure is appropriate with respect to the six Witnesses identified in paragraphs 4 (a), (b), (c), (g) and (i) of the First Motion and in paragraph 2 of Annex A to the Third Motion,

CONSIDERING that the Trial Chamber is not satisfied that the Prosecution has established the need for delayed disclosure to the Defence of the statements of the Witness identified in paragraph 1 of Annex A to the Third Motion but that such relief is appropriate in relation to the two Witnesses identified in paragraphs 4 (g) and (i) of the First Motion,

CONSIDERING that the Trial Chamber will follow its own practice and that of other Chambers with respect to the time at which unredacted disclosure of the identities and statements of the Witnesses should be made to the Defence and will fix a period of 30 days prior to the anticipated start of trial as an appropriate time within which the Prosecution must disclose the unredacted statements of witnesses granted protective measures under Rule 69 (A) of the Rules,

CONSIDERING that this Trial Chamber has not generally required the Defence to keep a record of the disclosure of all protected material on the basis that it is not generally useful or appropriate when dealing with such a large volume of material and where protective orders are in place but has done so with respect to certain witnesses on the basis of exceptional security risks attaching to such witnesses and the fact that they are very limited in number, which circumstances do not apply here,

³ See, e.g., *Prosecutor v. Slobodan Milošević*, “First Decision on Prosecution Motion for Protective Measures for Sensitive Source Witnesses”, Case No. IT-02-54-T, 3 May 2002, para. 3 (emphasis in original).

PURSUANT TO Articles 20, 21, paragraph 2, and 22 of the Statute and Rules 54, 69 and 75 of the Rules,

HEREBY GRANTS the Motions in part and **ORDERS** as follows:

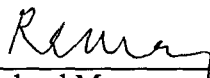
- (1) until further Order, the Prosecution may refer to the Witnesses identified in the Motions by the pseudonyms requested therein in all public proceedings before the International Tribunal;
- (2) the Prosecution may continue to use pseudonyms when referring to the Witnesses in public until such time as each witness is called to testify and the protection set out in this Decision shall apply to the Witnesses until further order;
- (3) those Witnesses who enjoy protective measures ordered in other proceedings shall continue to enjoy the same level of protection unless otherwise provided in this Decision;
- (4) until further Order:
 - (i) the names and other identifying data of the Witnesses, including their whereabouts, shall not be disclosed to the public;
 - (ii) the names, addresses, whereabouts of and identifying data concerning the Witnesses shall be sealed and not included in any public records of the International Tribunal;
 - (iii) to the extent that the names, addresses, whereabouts or other identifying data concerning the Witnesses are contained in existing public documents of the International Tribunal, that information shall be expunged from those documents;
 - (iv) documents of the International Tribunal identifying the Witnesses shall not be disclosed to the public or the media;
- (5) the Prosecution shall, within seven days, disclose to the Defence the full and unredacted statements and identities of the Witnesses identified in paragraphs 4 (d), (e) and (f) of the First Motion, paragraphs 1 and 5 [sic] of Annex A to the Second Motion and paragraphs 1, 3 and 4 of Annex A to the Third Motion;
- (6) the Prosecution shall, within seven days, disclose to the Defence the redacted statements but not the identities of the Witnesses identified in paragraphs 4 (a), (b) and (c) of the First Motion and paragraph 2 of Annex A to the Third Motion;
- (7) the Prosecution shall disclose the full and unredacted statements and identities of the Witnesses referred to in paragraphs 4 (a), (b) and (c) of the First Motion and paragraph 2 of Annex A to the Third Motion to the Defence no later than 30 days prior to the anticipated start of trial, unless otherwise ordered by the Trial Chamber;

- (8) the Prosecution shall disclose the full and unredacted statement of the Witness referred to in paragraph 4 (i) of the First Motion to the Defence no later than 30 days after completion of testimony in *Prosecutor v. Milošević*, IT-02-54-T, unless otherwise ordered by the Trial Chamber;
- (9) the Prosecution shall disclose the full and unredacted statements and identities of the Witness referred to in paragraph 4 (g) of the First Motion to the Defence no later than 30 days prior to the anticipated start of trial, unless otherwise ordered by the Trial Chamber;
- (10) the Defence shall not disclose to the public any confidential or other non-public material disclosed by the Prosecution pursuant to Rules 66 (A)(i), 66 (A)(ii), 66 (B) and 68 of the Rules, including the names, identifying information and whereabouts of any Witness except to the limited extent that such disclosure to members of the public is directly and specifically necessary for the preparation and presentation of the accused's cases or the knowledge of the accused or their counsel or representatives;
- (11) if Defence counsel, their representatives or agents acting pursuant to their instructions wish to contact any of the Witnesses, the Defence shall notify the Prosecution so that the Prosecution may make the necessary arrangements for such contact, in the event that the Witness is willing to be contacted by the Defence;
- (12) the Prosecution shall be at liberty to apply for specific protective measures for individual witnesses when testifying, including the use of pseudonyms, voice- and image-distortion and closed sessions, prior to the date on which each witness is to testify;
- (13) all hearings to consider the issue of protective measures for specific witnesses shall be held in closed session and only released to the public and to the media after review by the Prosecution, in consultation with the Victims and Witnesses Section;
- (14) all material pertaining to the Witnesses shall be returned to the Registry or destroyed following the close of this proceeding.

For the purpose of this decision, "the public" means and includes all persons, governments, organisations, entities, clients, associations and groups, other than the Judges of the International Tribunal, the staff of the Registry, the Prosecutor and her representatives, the accused in this case, the defence counsel, legal assistants and other members of the defence teams, their agents or representatives. "The public" also includes, without limitation, family, friends, and associates of

the accused; accused in other cases or proceedings before the International Tribunal; defence counsel in other cases or proceedings before the International Tribunal and the media and journalists.

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



Richard May
Presiding

Dated this seventeenth day of July 2003
At The Hague
The Netherlands

[Seal of the Tribunal]