



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: 27 July 2004
Original: English

IN THE TRIAL CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge O-Gon Kwon
Judge Bert Swart

Registrar: Mr. Hans Holthuis

Decision of: 27 July 2004

PROSECUTOR

v.

**MILAN MILUTINOVIĆ
DRAGOLJUB OJDANIĆ
NIKOLA ŠAINOVIĆ**

DECISION ON PROSECUTION'S MOTION FOR PROTECTIVE MEASURES

The Office of the Prosecutor

Mr. Geoffrey Nice
Ms. Cristina Romano

Counsel for the Accused

Mr. Eugene O'Sullivan and Mr. Slobodan Zečević, for Milan Milutinović
Mr. Tomislav Višnjić, Mr. Peter Robinson and Mr. Vojislav Selžan, for Dragoljub Ojdanić
Mr. Toma Fila and Mr. Vladimir Petrović, 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 Fourth Motion for Protective Measures with Confidential and *Ex Parte* Annex A”, filed by the Office of the Prosecutor (“Prosecution”) on 27 May 2004, (“the Motion”),

NOTING that only one accused, Milan Milutinović, filed a response to the Motion, which response was filed on 9 June 2004, objecting to the delayed disclosure of the identity of the witness to the accused,

NOTING the Supplemental Filing in relation to the Motion filed by the Prosecution on 1 July 2004 as directed by the Trial Chamber’s “Order for Supplemental Filing” issued 17 June 2004,

NOTING that the Motion seeks a variety of protective measures for one witness (“the Witness”), 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 a pseudonym whenever referring to this Witness with the Defence, thus delaying disclosure to each of the Defence teams (“the Defence”) of the identity of the Witness whose statements or summaries thereof are to be disclosed pursuant to Rule 66 (A)(ii) of the Rules; and (2) for orders for non-disclosure to the public of material disclosed under Rules 66 (A)(ii), 66 (B) and 68 of the Rules,

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, and which also bind the defence for Milan Milutinović pursuant to an undertaking given at a Rule 65 *ter* conference in May 2003¹,

¹ Rule 65 *ter* conference, 12 May 2003, TP. 180.
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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 Witness, 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”,

CONSIDERING that the Trial Chamber is not satisfied that the Prosecution has established that delayed disclosure of identity is appropriate in respect of the Witness,

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,

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

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.

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

- (1) until further Order, the Prosecution may refer to the Witness by the pseudonym identified in the Motion in all public proceedings before the International Tribunal;
- (2) the Prosecution may continue to use a pseudonym when referring to the Witness in public until such time as the Witness is called to testify, and the protection set out in this Decision shall apply to the Witness until further order;
- (3) until further Order:
 - (i) the name and other identifying data of the Witness, including his or her whereabouts, shall not be disclosed to the public;
 - (ii) the name, address, whereabouts of and identifying data concerning the Witness shall be sealed and not included in any public records of the International Tribunal;
 - (iii) to the extent that the name, address, whereabouts or other identifying data concerning the Witness 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 Witness shall not be disclosed to the public or the media;
- (5) the Prosecution shall, within fourteen days of the date of this Decision, disclose to the Defence the full and unredacted statements and identity of the Witness;
- (6) 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 the 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;
- (7) if Defence counsel, their representatives or agents acting pursuant to their instructions wish to contact the Witness, 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;
- (8) the Prosecution shall be at liberty to apply for specific protective measures for the Witness when testifying, prior to the date on which the Witness is to testify;
- (9) all hearings to consider the issue of protective measures for the Witness 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;

- (10) all material pertaining to the Witness 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.



Patrick Robinson
Presiding

Dated this twenty-seventh day of July 2004
At The Hague
The Netherlands

[Seal of the Tribunal]