



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-03-70-PT
Date: 19 May 2005
Original: English

IN THE TRIAL CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge O-Gon Kwon
Judge Iain Bonomy

Registrar: Mr. Hans Holthuis

Decision of: 19 May 2005

PROSECUTOR

v.

**VLADIMIR LAZAREVIĆ
SRETEN LUKIĆ**

CORRECTED VERSION

**DECISION ON PROSECUTION'S MOTION FOR PROTECTIVE MEASURES AND
REQUEST FOR JOINT DECISION ON PROTECTIVE MEASURES**

The Office of the Prosecutor

Mr. Thomas Hannis
Ms. Christina Moeller
Ms. Carolyn Edgerton

Counsel for the Accused

Mr. Mihajlo Bakrač, for Vladimir Lazarević
Mr. Theodore Scudder, for Sreten Lukić

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 (“the International Tribunal”);

BEING SEISED of a “Prosecution’s Motion for Protective Measures” filed by the Office of the Prosecutor (“Prosecution”) on 29 March 2005 (“Lazarević Protective Measures Motion”) in which the Prosecution requests the continuation of protective measures ordered in other cases; and a “Prosecution’s Motion for Joint Decision on Protective Measures and Order of Non-Disclosure to Public of Materials Disclosed Pursuant to Rules 66 and 68”, filed on 8 April 2005 (“Joint Decision & Non-Disclosure Motion”), in which the Prosecution repeats by reference the legal submissions made in the Lazarević Protective Measures Motion, and requests the Chamber to issue a joint decision on protective measures with regard to both Accused Vladimir Lazarević and Sreten Lukić (collectively, “the Accused”);

NOTING that the Defence of Vladimir Lazarević filed no response to either motion;

NOTING the “Defence Request for an Extension of Time for the Filing of a Response to the Prosecution Motion for a Joint Decision on Protective Measures and Order of Non-Disclosure to Public of Materials Disclosed Pursuant to Rules 66 and 68”, filed 21 April 2005 by the Defence of Sreten Lukić (“Lukić Defence Request”);

NOTING the “Prosecution’s Response to Defence Request for an Extension of Time for the Filing of a Response to the Prosecution Motion for a Joint Decision on Protective Measures and Order of Non-Disclosure to Public of Materials Disclosed Pursuant to Rules 66 and 68”, filed on 26 April 2005, whereby the Prosecution does not oppose the Defence Request;

CONSIDERING, however, that the Lukić Defence Request does not establish good cause, as required by Rule 127(A) of the Rules of Procedure and Evidence of the International Tribunal (“Rules”), for the Trial Chamber to vary the time limit for responding to the Prosecution’s motion;

HAVING ISSUED a separate decision on the portion of the Joint Decision & Non-Disclosure Motion requesting an order of non-disclosure to the public with regard to Accused Lukić (“Request for Order of Non-Disclosure”);¹

¹ See *Prosecutor v. Lukić*, Case No. IT-03-70-PT, “Decision on Prosecution’s Request for Order of Non-Disclosure to Public of Materials Disclosed Pursuant to Rules 66 and 68”, 27 April 2005.

NOTING that the Prosecution has acknowledged that of the 179 witness statements included in the supporting material disclosed to Accused Lazarević and due to be disclosed to Accused Lukić, sixteen have pseudonyms in place of the names of the witnesses, and all statements have been redacted to remove information indicating the current whereabouts of all witnesses;

NOTING the “Decision on Prosecution’s Motion for Order of Non-Disclosure to Public of Materials Disclosed Pursuant to Rule 66(A) and Rule 68”, filed on 15 March 2005 (“Non-Disclosure Decision”), in which this Chamber granted the Prosecution’s motion for an order of non-disclosure to the public with regard to Accused Lazarević, but ordered the Prosecution to fulfil its Rule 66(A)(i) obligation to disclose to the Defence the full and unredacted statements of all witnesses, including the names, whereabouts, and other identifying data of the witnesses;

CONSIDERING that although the Non-Disclosure Decision contemplated the possibility of a subsequent Prosecution motion for protective measures with regard to the witnesses whose redacted statements were disclosed to Accused Lazarević under Rule 66(A)(i), this Chamber was not aware until the filing of the Lazarević Protective Measures Motion that several of the witnesses for whom identifying information had been redacted were already subject to protective measures granted in other cases;

NOTING that in the Lazarević Protective Measures Motion, the Prosecution seeks two forms of relief: (1) that the Chamber grant the “same protective measures” previously granted in *Prosecutor v. Milošević* and *Prosecutor v. Milutinović, Ojdanić, and Šainović* to the sixteen witnesses whose statements disclosed to Accused Lazarević pursuant to Rule 66(A)(i) included no identifying information (“sixteen affected witnesses”); and (2) “relief from” the order to disclose the current whereabouts of all witnesses to the Defence (respectively, “Protective Measures Request” and “Whereabouts Request”);

NOTING that the Prosecution’s request with regard to protective measures therefore seeks orders granting (1) delayed disclosure under Rule 69(A) for fourteen of the sixteen affected witnesses;² (2) the use of a pseudonym under Rule 75 for each of the sixteen affected witnesses; and (3) closed session testimony under Rule 79 for six of the sixteen affected witnesses;

² The Lazarević Protective Measures Motion informed the Chamber that two witness statements have already been disclosed to the Defence in unredacted form in compliance with the Non-Disclosure Decision. See para. 15 n.13.

CONSIDERING that Rule 75(F) provides:

Once protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal (the “first proceedings”), such protective measures:

- (i) shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal (the “second proceedings”) unless and until they are rescinded, varied or augmented in accordance with the procedure set out in this Rule; but
- (ii) shall not prevent the Prosecutor from discharging any disclosure obligation under the Rules in the second proceedings, provided that the Prosecutor notifies the Defence to whom the disclosure is being made of the nature of the protective measures ordered in the first proceedings.

CONSIDERING that this Chamber’s orders in the *Milutinović, Ojdanić & Šainović* case, granting delayed disclosure for the fourteen witnesses for whom the Prosecution seeks this protective measure, are still in effect in that case;³

CONSIDERING that all sixteen affected witnesses were granted pseudonyms in the *Milošević* case that still remain in force in the *Milutinović et al.* case,⁴ and one was granted a change of pseudonym in the latter case;⁵

CONSIDERING therefore that pursuant to Rule 75(F)(ii), the appropriate action for the Prosecution to take would have been to disclose the statements of these fourteen witnesses to the Accused, with the statements identified by pseudonym and redacted to remove identifying information, and simultaneously inform the Accused of the existence of the protective measures ordered in respect of those witnesses;

CONSIDERING that as the Prosecution’s request with regard to protective measures seeks merely the application *mutatis mutandis* of existing protective measures, not their rescission, variation, or augmentation,⁶ it was not necessary under the Rules to apply to this Chamber to grant identical protective measures with regard to the Accused in this case;

³ See, e.g., Ojdanić Decision, *supra* note 2, para. 9(d) (ordering that “[t]he statements of all witnesses for whom protective measures are granted pursuant to Rule 69(A) shall be disclosed to the accused in unredacted form by 30 days prior to the timetabled trial date, unless otherwise ordered by the Trial Chamber”) (emphasis added).

⁴ See *Prosecutor v. Milošević*, Case No. IT-02-54-T, “Decision on Prosecution’s Third Motion for Protective Measures and Fourth Motion for Specific Measures for Individual Witnesses”, 16 May 2002; Ojdanić Decision, *supra* note 2, at paras. 1, 9.

⁵ *Prosecutor v. Milutinović, Ojdanić, and Šainović*, Case No. IT-99-37-PT, “Decision on Prosecution’s Motions for Protective Measures”, 17 July 2003, p. 5 (granting the Prosecution leave to refer to the witnesses by the pseudonyms identified in the underlying motions, including one motion that requested a change of pseudonym).

⁶ Compare with *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-PT, “Decision on Confidential Prosecution Motions for Protective Measures”, 26 October 2004, at pp. 3–5 (in which this Chamber noted that the witnesses in question already benefited from delayed disclosure in other cases, and granted a varied timetable for delayed disclosure in the instant case under Rule 75(G)).

NOTING that the Prosecution's second request, for "relief from" the order to disclose the current whereabouts of all witnesses to the Defence, remains to be decided;

CONSIDERING that Article 20 of the Statute of the International Tribunal ("Statute") requires 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 that Article 21(4)(b) of the Statute guarantees the Accused the right to have adequate time and facilities for the preparation of their defence;

CONSIDERING that this Chamber has previously emphasised that the balance between the rights of the Accused and the interests of victims and witnesses dictates clearly in favour of an accused's right to the identity of witnesses upon whom the Prosecution intends to rely, particularly in light of the Accused's right with regard to preparing their defence, subject to any protective measures granted;⁷

CONSIDERING that the decision cited in the Lazarević Protective Measures Motion, in ostensible support of the assertion that the Prosecution need not disclose witnesses' locations, dealt exclusively with "witnesses it intends to call at trial",⁸ *i.e.*, Rule 66(A)(ii) witnesses; and moreover, that in the eight years since that decision, decisions of this Chamber applying that Rule have required the Prosecution to disclose such witnesses' whereabouts to the Defence, or request an order granting delayed or non-disclosure of that information;⁹

CONSIDERING that the Prosecution's redaction of the witnesses' whereabouts from all statements provided to Accused Lazarević is essentially a determination that this information should be withheld from the Accused, an approach that is inconsistent with the requirement in the Tribunal's jurisprudence that the Prosecution justify redactions on the grounds of risk to victims or witnesses, or other grounds recognised in the Rules;¹⁰

⁷ See, *e.g.*, *Prosecution v. Milošević*, Case No. IT-02-54-T, "Decision on Prosecution Motion for Provisional Protective Measures", 19 February 2002, para. 32.

⁸ *Prosecutor v. Delalić*, Case No. IT-96-21-T, "Decision on the Defence Motion to Compel the Discovery of Identity and Location of Witnesses", 18 March 1997, p. 9.

⁹ See, *e.g.*, *Prosecutor v. Milutinović, Ojdanić, and Šainović*, Case No. IT-99-37-PT, "Decision on Prosecution's Motions for Protective Measures", 17 July 2003 ("Milutinović et al. Decision"), pp. 2, 5–6; *Prosecutor v. Banović*, Case No. IT-95-8/1-PT, "Order for Protective Measures", 13 December 2001, pp. 3–4; *Prosecutor v. Došen and Kolundzija (Sikirica et al.)*, Case No. IT-95-8-PT, "Order on Motions Concerning Measures for the Protection of Victims and Witnesses", 10 March 2000 ("Došen and Kolundzija Decision"), p. 5.

¹⁰ See, *e.g.*, *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-PT, "Decision on Motion by Prosecution for Protective Measures", 3 July 2000, para. 65(9)–(10); *Brđanin & Talić*, "Decision on Third Motion by Prosecution for Protective Measures", 8 November 2000, at paras. 2, 23(1).

CONSIDERING that this Chamber has frequently ordered the Prosecution to disclose full and unredacted statements to the Defence when protective measures have been denied, thereby necessarily ordering the disclosure of whereabouts when such information was included in the statements;¹¹

CONSIDERING that the Prosecution therefore cannot redact information indicating the current whereabouts of witnesses without the appropriate protective measures being granted by the Trial Chamber, and that the Prosecution is thus required to comply with its obligation under Rule 66(A)(i) to supply statements in unredacted form to the Accused, except where witnesses have been granted protective measures;

NOTING that the deadline for disclosure to Accused Lukić pursuant to Rule 66(A)(i) expired on 6 May 2005, but that the Prosecution's request for protective measures with regard to this Accused has been pending before this Chamber since 8 April 2005;

PURSUANT TO Rules 54, 66, 75, 126 *bis*, and 127 of the Rules,

HEREBY ORDERS AS FOLLOWS:

1. UNANIMOUSLY:

- (a) The Lukić Defence Request is denied;
- (b) The Prosecution's Whereabouts Request is denied;
- (c) The time for disclosing supporting material to Accused Lukić pursuant to Rule 66(A)(i) is enlarged, and the Prosecution shall, within seven days, disclose to both Accused the full and unredacted statements of all witnesses, including the names, whereabouts, and other identifying data of the witnesses, except for the fourteen witnesses for whom delayed disclosure under Rule 69(A) has been granted previously by this Chamber;
- (d) With regard to those fourteen witnesses, the only redactions the Prosecution may maintain in the statements are those concerning the names and any other identifying data of the witnesses; all other redacted information shall be restored; and

¹¹ See, e.g., *Milutinović, Ojdanić, and Šainović*, "Decision on Prosecution's Motion for Protective Measures", 27 July 2004, pp. 3–4; *Milutinović et al. Decision*, *supra* note 9, p. 5; *Ojdanić Decision*, *supra* note 2, paras. 5, 7.


- (e) The Prosecution shall disclose the full and unredacted statements of the fourteen witnesses subject to delayed disclosure no later than thirty days prior to the anticipated start of trial in this matter, unless otherwise ordered by the Trial Chamber.

2. BY A MAJORITY, Judge Kwon dissenting:

- (a) The Prosecution's Protective Measures Request is dismissed;

Judge Kwon's dissenting opinion is appended to this Decision.

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



Judge Patrick Robinson
Presiding

Dated this nineteenth day of May 2005
At The Hague
The Netherlands

[Seal of the Tribunal]

DISSENTING OPINION OF JUDGE O-GON KWON

1. Rule 75(F)(i) provides that, once protective measures have been ordered in respect of a victim or witness in any proceedings (“first proceedings”) before the Tribunal, such protective measures shall continue to have effect *mutatis mutandis* in any other proceedings (“second proceedings”) before the Tribunal unless and until they are rescinded, varied or augmented in accordance with the procedure set out in this Rule. The majority of the Chamber is of the opinion that delayed disclosure to the Defence of a witness’ identity is included in the protective measures referred to in Rule 75(F)(i) and that, therefore, once such delayed disclosure was granted in the first proceedings, the disclosure of the witness’ identity to the Defence of the second proceedings should also be delayed in the same manner. I respectfully disagree with this interpretation of Rule 75(F)(i) for the following reasons.

2. There are two kinds of protective measures with respect to the identity of a witness. One is a protective measure directed against *the public*, the other against *the Defence*. In my opinion, the former is governed by Rules 53 and 75(B), and the latter Rule 69. Therefore, I am of the opinion that, while protective measures preventing the disclosure of a witness’ identity *to the public* should continue to have effect *mutatis mutandis* in any other proceedings pursuant to Rule 75(F)(i), the issue of whether to allow the disclosure of a witness’ identity *to the Defence* to be delayed at all, and the extent to which it should be allowed, should be decided on a case-by-case basis by the Trial Chamber seized of the case pursuant to Rule 69.

3. Rule 75(F)(ii) provides that protective measures that have been ordered in respect of a victim or witness in any proceedings “shall not prevent the Prosecutor from discharging any disclosure obligation under the Rules in the second proceedings, provided that the Prosecutor notifies the Defence to whom the disclosure is being made of the nature of the protective measures ordered in the first proceedings.” An illustration would assist in better understanding the purpose of this provision. Suppose a witness was afforded protective measures of non-disclosure *to the public* of any records identifying him (Rule 75(B)(i)(b)) and assignment of a pseudonym (Rule 75(B)(i)(d)) in the first proceedings. In the second proceedings, these protective measures would continue to have effect pursuant to Rule 75(F)(i). However, the Defence in the second proceedings is clearly *the public* in terms of the first proceedings. In such a situation, the Prosecutor would need to seek the variation of the protective measures granted in the first proceedings in order to fulfil her obligation, for instance, pursuant to Rule 66(A).¹²

¹² Although Rule 66(A) does not explicitly provide that witness statements that are to be disclosed to the Defence shall include the identity of a witness, it is implicit that witness statements should contain such information if the Defence is to know the case against him and to prepare his case. There is support in this implicit obligation of the Prosecutor when looking at Rule 65ter (E)(ii)(a), which explicitly provides that the name or pseudonym of each witness, whom the Prosecutor intends to call, should be included in the list of witnesses in the pre-trial stage: the

Thus, the effect of Rule 75(F)(ii) is that, although such protective measures shall continue to have effect in relation to *the public* pursuant to Rule 75(F)(i), disclosure to *the Defence* in the second proceedings is a different matter and the Prosecutor cannot be excused from fulfilling her disclosure obligations. In other words, protective measures for a witness's identity in relation to *the public* in the first proceedings "shall not prevent the Prosecutor from discharging any disclosure obligations" in the second proceedings on the condition that the "Prosecutor notifies the Defence to whom the disclosure is being made of the nature of the protective measure ordered in the first proceedings", *i.e.* the Prosecutor should inform the Defence in the second proceedings that the identity of the witness should maintain its confidential nature with respect to the public.

4. If Rule 75(F)(i) is to be interpreted as also applicable to the matter of delayed disclosure of a witness' identity to the Defence, Rule 75(F)(ii) either does not read well or serves no purpose.¹³ There could be no further disclosure that Rule 75(F)(ii) adds despite Rule 75(F)(i): the delayed disclosure of a witness' identity to the Defence granted in the first proceedings is in effect against the Defence in the second proceeding, pursuant to Rule 75(F)(i).¹⁴

5. Finally, as a practical point, I highlight the fact that delayed disclosure is a matter that is assessed in light of the accused in that particular proceeding. It requires a heightened assessment of what the disclosure to the accused in that particular proceeding entails and its careful balance with the rights of the accused, which includes the minimum guarantees to be informed promptly and in detail of the nature and cause of the charge against him, and to have adequate time for the preparation of his defence.¹⁵ In this respect, it is the Trial Chamber that is hearing the case against the accused that is likely to be in the best position to properly address the need for delayed disclosure and, if deemed necessary, to determine the appropriate measures *e.g.* the specific number of days prior to the commencement of a trial or giving of evidence. Accordingly, if the Prosecutor wishes to qualify further such disclosure to *the Defence* in the second proceedings, it should apply anew for delayed disclosure pursuant to Rule 69, and support such application with argumentation and evidence of risk to the witnesses.

identity of the witness shall be disclosed to the Defence be it during the pre-trial stage (*e.g.* 30 days before the anticipated start date of trial) or trial stage (*e.g.* 30 days before the witness is expected to testify).

¹³ See *Prosecutor v. Tadić*, Case No. IT-94-1-A, "Judgement", 15 July 1999, para. 284 (in which the Appeals Chamber stated "It is an elementary rule of interpretation that one should not construe a provision or part of a provision as if it were superfluous and hence pointless: the presumption is warranted that law-makers enact or agree upon rules that are well thought out and meaningful in all their elements").

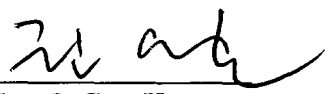
¹⁴ The non-identifying information of a witness, which was not subject of delayed disclosure, remains unaffected in the second proceedings. Such information remains the subject of immediate disclosure to the Defence in the second proceedings as was the case in the first proceedings.

¹⁵ Articles 21(4)(a) and 21(4)(b) of the Statute.

6. Therefore, it should be concluded that Rule 75(F)(i) is applicable only to the protective measures directed against *the public*. Despite such protective measures, disclosure to *the Defence* in the second proceedings is not prevented pursuant to Rule 75(F)(ii). Accordingly, if the Prosecutor wishes to qualify further such disclosure to *the Defence* in the second proceedings, it should apply anew for delayed disclosure pursuant to Rule 69, and support such application with argumentation and evidence of risk to the witnesses.

7. In light of the foregoing, I am of the opinion that the protective measure granted in the form of delayed disclosure to the Defence in *Milutinović et al.* are not in effect for the Defence in this case and that, therefore, the Trial Chamber should deal with this matter anew. Thus, I disagree with the majority's reasoning that it was not necessary for the Prosecutor to apply for the protective measures of delayed disclosure to the Defence in this case. Accordingly, I dissent from the majority opinion that the Prosecution's Protective Measures Request, with respect to the request for delayed disclosure, should be dismissed. Rather, I believe that it should be decided on its merits and in so doing, I find that the information before this Trial Chamber, which includes those submitted by the Prosecutor in *Milutinović et al.* provides a sufficient basis upon which delayed disclosure of the identity or identifying information of these witnesses should be ordered to the Defence in the present case in the same manner.¹⁶ I am in agreement with the majority in all other respects.

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


Judge O-Gon Kwon

Dated this nineteenth day of May 2005
At The Hague
The Netherlands

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¹⁶ If I found otherwise, I would deny the matter without prejudice.