



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-05-87-PT

Date: 1 June 2006

Original: English

IN TRIAL CHAMBER III

Before: Judge Iain Bonomy, Presiding
Judge Krister Thelin
Judge Frank Höpfel

Registrar: Mr. Hans Holthuis

Decision of : 1 June 2006

PROSECUTOR

v.

**MILAN MILUTINOVIĆ
NIKOLA ŠAINOVIĆ
DRAGOLJUB OJDANIĆ
NEBOJŠA PAVKOVIĆ
VLADIMIR LAZAREVIĆ
VLADIMIR ĐORĐEVIĆ
SRETEN LUKIĆ**

DECISION ON PROSECUTION SIXTH MOTION FOR PROTECTIVE MEASURES

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Mr. Tomislav Višnjić and Mr. Norman Sepenuk for Dragoljub Ojdanić
Mr. John Ackerman and Mr. Aleksander Aleksić for Nebojša Pavković
Mr. Mihajlo Bakrač for Vladimir Lazarević
Mr. Branko Lukić and Mr. Dragan Ivetić 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 (“Tribunal”) is seised of a “Prosecution’s Sixth Motion for Protective Measures with Confidential and *Ex Parte* Annex A”, filed on 7 April 2006 (“Motion” and “Annex A”), seeking a variety of protective measures for eight identified witnesses pursuant to Articles 20, 21, and 22 of the Statute of the Tribunal (“Statute”) and Rules 54, 69, and 75 of the Rules of Procedure and Evidence (“Rules”) that would apply during the pre-trial and the trial stages of the proceedings, in particular the following:

- a.) the use of pseudonyms set forth in Annex A for each of the eight witnesses in lieu of their true identity;¹ and
- b.) delayed disclosure to the Defence of the unredacted statements and identities of four “sensitive witnesses”, until thirty days prior to their testimony in this case.²

ARGUMENTS OF THE PARTIES

1. The Prosecution submits that the “Trial Chambers have an affirmative duty to provide for the protection and privacy of witnesses and that protective measures are intended to be prospective rather retrospective. Thus, there is no requirement that particular witness suffer actual violence or threats of violence before it is appropriate to order protective measures.”³

2. The Prosecution argues that “the measures sought are necessary in order to secure the protection of the witnesses identified in Annex A. Due to the nature of their information and/or the positions the individual witnesses held or currently hold, or to their current places of residence, the witnesses in question face serious risks to their safety and that of their families, should it become known that they co-operate with the Office of the Prosecutor (“OTP”) or that they are willing to testify in these proceedings. It is submitted that those who may wish to exact retaliation or revenge upon these witnesses or their families will be in a position to do so if they testify without the protective measures sought in this motion.

¹ Motion, para. 2.

² *Ibid.*, para. 3.

³ *Ibid.*, para. 5.

Furthermore these witnesses will be unlikely to rely upon local agencies and so must look to the Tribunal for protection.”⁴

3. The Prosecution argues that the orders sought in this motion “do not interfere with the rights of the Accused to a fair trial” but rather “strike a fair and appropriate balance between preserving the rights of the Accused and ensuring that the legitimate concerns of witnesses are addressed. In particular, these measures do not deprive the Accused of the right to cross-examine the witnesses.”⁵

4. With respect to delayed disclosure, the Prosecution submits that “there are exceptional circumstances concerning the premature disclosure of four sensitive witnesses. Given the nature of their evidence and various circumstances, including the positions that they held during and after the relevant events in the Second Amended Joinder Indictment, their living situation and the perception that they might be ‘traitors’ to their own ethnic groups, they face exceptional risks to their safety and that of their families, together with potential harassment, intimidation or other undue pressure, if it becomes known that they have provided statements for the OTP and that they intend to be witnesses in these proceedings.”⁶

5. The Prosecution additionally submits that “the circumstance of the witnesses are exceptional in that they will all testify in relation to matters bearing directly on the criminal responsibility of some of the Accused, or matters that relate to perpetrator groups identified in the Indictment. This factor has the consequence of exposing the witness to increased risk from persons associated with these groups, as well as supporters of the Accused.”⁷

6. The Prosecution submits that “[a]ll the witnesses from whom delayed disclosure is requested are Serbs, most of them and their families are still living in Serbia and Montenegro. Disclosing the identities and unredacted statements of these witnesses long before they will actually testify in these proceedings exposes them and their families to unnecessary serious risk.”⁸

7. The Prosecution argues that “due to the nature of these proceedings and the circumstances described in Annex A, it is necessary and appropriate to defer the disclosure of the witnesses’

⁴ *Ibid.*, para. 7.

⁵ *Ibid.*, para. 8.

⁶ *Ibid.*, para. 11.

⁷ *Ibid.*

identities and of their unredacted statements and related documents until 30 days prior to each witness giving his evidence at trial.”⁹

8. On 24 April 2006, the Trial Chamber received “Mr. Milutinović’s Response to the Prosecution’s Sixth Motion for Protective Measures with Confidential and *Ex Parte* Annex A” (“Milutinović Response”) filed by the Defence of Milan Milutinović (“Milutinović Defence”) and “Joint Defence Motion: Joining ‘Mr. Milutinović’s Response to the Prosecution’s Sixth Motion for Protective Measures with Confidential and *Ex Parte* Annex A” (“Joint Defence Motion”) filed by the Defence of Nikola Šainović and the Defence of General Vladimir Lazarević (“Šainović and Lazarević Defence”).

9. The Trial Chamber notes that both Defence Responses—the Milutinović’s Response and the Joint Defence Motion—were filed after the expiration of the time prescribed under Rule 126 *bis*.¹⁰ The Trial Chamber notes that the Milutinović Defence and the Šainović and Lazarević Defence neither explained the delay nor requested an extension of time for the filing of a response to the Motion. None of them requested the Trial Chamber to recognise as validly done the filing of the response after the expiration of the time prescribed. Consequently, they all failed to establish a good cause, as required by Rule 127(A) of the Rules, for the Trial Chamber to vary the time limit for responding to the Prosecution’s Motion. For these reasons, the Trial Chamber will not consider the Milutinović’s Response and the Joint Defence Motion.

10. In their “Joint Request by the Accused for Temporary Provisional Release During the Summer Recess”, filed 22 May 2006 (“Joint Request”), all the Accused have applied for temporary provisional release over the summer recess and in connection therewith have agreed to defer disclosure of the material information for which protection is sought until the Accused return to the United Nations Detention Unit (“UNDU”) following the completion of their temporary provisional release.¹¹

11. On 26 May 2006, the Prosecution filed a “Prosecution’s Response to Joint Request by the Accused for Temporary Provisional Release During the Summer Recess” (“Response to Joint Request”), in which the Prosecution requests, in the event that the Trial Chamber grants the

⁸ *Ibid.*

⁹ *Ibid.*, para. 12.

¹⁰ Pursuant to Rule 126 *bis* of the Rules, a response to a motion filed by a party shall be filed within fourteen days of the filing of the motion.

Joint Request, the Trial Chamber to order that all witness material relating to witnesses for whom delayed disclosure has been granted or applied for, be disclosed only after it is confirmed that the Accused have returned to UNDU in August and that the trial will recommence as scheduled.¹² The Trial Chamber therefore considers that the Prosecution has altered its request for relief from delayed disclosure 30 days prior to the testimony of the witnesses to the date upon which the Accused have returned to UNDU.¹³

12. Subsequently, in their “Application for Leave to File a Reply and Joint Reply to the Prosecution’s Response to Joint Request by the Accused for Temporary Provisional Release During the Summer Recess”, filed 30 May 2006 (“Reply”), the Accused agreed to defer disclosure of *all the witness material that has been granted delayed disclosure in this case* until they have returned to the UNDU, in line with the Prosecution’s reformulated request for relief.¹⁴ The Trial Chamber notes that the Accused’s request for provisional release during the summer recess will be granted, in part, today via a separate decision.

DISCUSSION

13. The Prosecution relies upon Article 20, 21, and 22 of the Statute and Rules 54, 69 and 75 of the Rules.

14. Paragraph 1 of Article 20 of the Statute requires the Trial Chamber 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.”

15. Paragraph 2 of Article 21 of the Statute provides that the accused is “entitled to a fair and public hearing, subject to Article 22 of the Statute.”

16. Article 21(4)(b) of the Statute guarantees the accused the right “to have adequate time and facilities for the preparation of their defence.”

17. Rule 69(A) provides that non-disclosure of the identity of a victim or witness who may be in danger or at risk may “in exceptional circumstances” be ordered until such person is brought under the protection of the Tribunal. Rule 69(C) provides that, subject to Rule 75,

¹¹ Joint Request, para. 7.

¹² Response to Joint Request, para. 3.

¹³ Response to Joint Request, paras 3, 5.

¹⁴ Reply, para. 3.

“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.”

18. In accordance with the Trial Chamber’s jurisprudence, three factors must be considered when delayed disclosure is requested under Rule 69(A), in the context of the balancing exercise mandated by the Statute:

- a. 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 the public;
- b. the distinction between measures to protect individual victims or witnesses in the particular trial, which are permissible under the Rule, and measures which simply make it easier for the Prosecution to bring cases against other persons in the future, which are not; and
- c. 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).¹⁵

19. The Trial Chamber notes its earlier view that “fears expressed by potential witnesses are not in themselves sufficient to establish a real likelihood that they may be in danger or at risk” and that “what is required to interfere with the rights of the accused in this respect is something more. The Trial Chamber sees this as an important element of the first criterion set out above.”¹⁶

20. Furthermore, Rule 75(A) provides that the Chamber or a Judge may “order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused.”

¹⁵ See *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Provisional Protective Measures Pursuant to Rule 69, 19 February 2002 (“Milošević Rule 69 Decision”), para. 26; *Prosecutor v. Milošević*, Case No. IT-02-54-T, First Decision on Prosecution Motion for Protective Measures for Sensitive Source Witnesses, 3 May 2002 (“Sensitive Source Decision”), para. 3; *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-PT, Decision on Confidential Prosecution Motions for Protective Measures, 26 October 2004 (“Stanišić & Simatović Decision”), p. 4 (citing *Prosecution v. Brđanin and Talić*, Case No. IT-99-36-PT, Decision on Motion by Prosecution for Protective Measures, 3 July 2000 (“Brđanin & Talić Decision”), paras. 22–33).

¹⁶ Sensitive Source Decision, *supra* note 12, para. 4 (citing *Brđanin & Talić Decision*, *supra* note 12, para. 31). See further *Prosecutor v. Prlić et al.*, Case No. IT-04-74-PT, Order to Grant Protective Measures to Eleven Sensitive Witnesses, 5 October 2005 (“Prlić et al. Order”), p. 3; *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995 (“Tadić Decision”), paras. 62–66.

21. With respect to granting a measure of anonymity, the Trial Chamber will follow the Tribunal's jurisprudence requiring that "not only must the testimony of the witness be important to the Prosecution's case but the applicant must show that, should it become publicly known that the witness has testified, there is a real risk to her/his security or that of his/her family."¹⁷

22. The Trial Chamber reiterates that the burden rests on the party seeking protective measures to justify in each case why the measures requested should be granted¹⁸ and is of the view, as stated in its previous decisions, 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 dictated that Trial Chamber 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 the Rules, 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."¹⁹

23. The Trial Chamber is satisfied that the Prosecution has demonstrated the existence of a real risk to safety and security of seven of the witnesses listed in Annex A and of their families should it become publicly known that they have testified before the Tribunal. The factors establishing a risk to their security mainly concern the residence of the witnesses in the respective area, the nature of the information they possess, the positions held or currently hold, and previous threats to their security as described in the Annex A. The Trial Chamber therefore considers the use of pseudonyms for each of these seven witnesses as necessary and appropriate to protect them. However, the Trial Chamber considers that the Prosecution has not demonstrated that there exists a real risk to the security of witness K-71 or his family.

¹⁷ Milošević Rule 69 Decision, *supra* note 12, para. 25; *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Trial Related Protective Measures for Witnesses (Bosnia), 30 July 2002, para. 5; *Tadić* Decision, *supra* note 13, paras. 62–66; *Prosecutor v. Blaškić*, Case No. IT-95-14, Decision on the Application of the Prosecutor dated 17 October 1996 Requesting Protective Measures for Victims and Witnesses, 5 November 1996, para. 41; *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, Decision on the Prosecution's Motion for Protective Measures at Trial, 22 November 2004, p. 3, para. 6.

¹⁸ See *Prosecutor v. Limaj et al.*, Case No. IT-03-66-PT, Confidential Decision on the Prosecutor's Motion for Protective Measures Regarding Disclosure, 30 September 2005, p. 5; *Prlić et al.* Order, *supra* note 13, p. 2; Milošević Rule 69 Decision, *supra* note 12, para. 24.

¹⁹ Milošević Rule 69 Decision, *supra* note 12, para. 32. See also *Prosecutor v. Milutinović et al.*, Case No. IT-99-37-PT, Decision on Prosecution's Motions for Protective Measures, 17 July 2003 ("*Milutinović et al.* Decision"), p. 4; *Prosecutor v. Lazarević and Lukić*, Case No. IT-03-70-PT, Decision on Prosecution's Motion for Protective Measures and Request for Joint Decision on Protective Measures, Corrected Version, 19 May 2005, p. 4.

24. The Trial Chamber is also satisfied that the Prosecution has demonstrated, pursuant to the criteria set out by this Trial Chamber in previous decisions, the likelihood that the four “sensitive witnesses” will be interfered with or intimidated once their identity is made known to the Accused and their counsel. The Prosecution has therefore established that delayed disclosure of identity is appropriate in respect of the four “sensitive witnesses” identified in Annex A. Moreover, the Accused have agreed to disclosure being delayed until they return to the UNDU, in the event that their request for temporary provisional release during the summer recess is granted.

25. Based upon the agreement of the parties, the Trial Chamber will modify its general practice in pre-trial proceedings and that of other Chambers of fixing 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, as set forth in the orders below.²⁰ The Trial Chamber is satisfied that this is the most appropriate course to follow in all the circumstances.

26. The 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 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.”²¹ However, the Trial Chamber is satisfied that the Prosecution has established the existence of exceptional security risks with respect to four “sensitive witnesses” and therefore considers the measure of keeping a log of all disclosures of the protected materials pertaining to the four “sensitive witnesses” as appropriate and useful in the present case.

27. The Trial Chamber also notes that nondisclosure obligations contained in this Decision apply to all members of the Defence team such that it is the obligation of lead

²⁰ *Milutinović et al.* Decision, *supra* note 16, p. 4; *Stanišić & Simatović* Decision, *supra* note 12, pp. 4–5; *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Protective Measures for Victims and Witnesses, 19 March 2002, para. 15; *Prosecutor v. Milošević*, Case No. IT-02-54-T, Third Decision on Prosecution Motion for Protective Measures for Victims and Witnesses Pursuant to Rule 69(A), 17 April 2002, paras. 11–12; *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Protective Measures for Victims and Witnesses, 19 March 2002, paras. 15–16; *Prosecutor v. Orić*, Case No. IT-03-68-PT, Decision on Confidential Prosecution Motions for Protective Measures and Nondisclosure, 28 July 2003 (“*Orić* Decision”), p. 5. *See also* *Prosecutor v. Tadić*, Case No. IT-94-1-T, Decision on the Prosecutor’s Motion Requesting Protective Measures for Witness L, 14 November 1995, para. 21 (holding, with respect to period for disclosure pursuant to Rule 69(C), that, whilst there was basis for non-disclosure of identifying information concerning particular witness, exceptional circumstances under Rule 69(A) having been made out, name of witness was to be released not less than thirty (30) days before firm trial date).

²¹ *Milutinović et al.* Decision, *supra* note 16, p. 4; *Orić* Decision, *supra* note 17, p. 5.

counsel to ensure compliance by all members of his or her team both during their participation and upon withdrawal from the case.

DISPOSITION

28. PURSUANT to Articles 20, 21, and 22 of the Statute and Rules 54, 69, 75, 126 *bis*, and 127 of the Rules, the Trial Chamber **HEREBY GRANTS** leave for the Defence to file the Reply, **GRANTS** the Motion, in part, and **ORDERS** as follows:

- a. Seven of the witnesses shall be identified by the following pseudonyms as described in Annex A in all proceedings before the Tribunal and in discussions among the parties: K-68, K-69, K-70, K-72, K-73, K-74, and K-75.
- b. The Motion is DENIED in respect of the witness identified in Annex A as K-71, without prejudice to the Prosecution making a further application in respect thereof.
- c. The names and other identifying data relating to these witnesses shall not be disclosed to the public, the Accused, and their respective Defence Counsel. To the extent the witnesses' identities and whereabouts are known to any or all of the Accused and/or Defence Counsel, their identities and whereabouts shall not be disclosed to the public by any of the Accused or their respective representatives.
- d. All materials pertaining to these witnesses shall be returned to the Registry following the close of the proceedings.
- e. The Prosecution shall provide to the Accused, by no later than 9 June 2006, the redacted statements of the four "sensitive witnesses"—K68, K69, K70, and K73—for whom delayed disclosure was requested, redacting, in particular, the witnesses' names, current whereabouts and dates of birth; and any information which may reveal the witnesses' identities.
- f. The Prosecution shall provide to the Accused, by no later than 31 July 2006, the true identities and unredacted statements of all the witnesses for whom delayed disclosure has been granted, including the four in the preceding paragraph.
- g. Defence Counsel shall keep a log of all disclosures of the protected materials pertaining to the four "sensitive witnesses" including to whom disclosed, on what

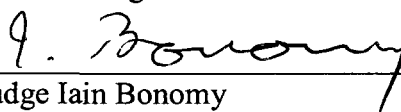
date, and for what purpose. This log shall be made available to the Trial Chamber upon order of the Trial Chamber.

- h. Defence Counsel and their representatives and agents who are acting pursuant to their instructions or requests shall notify the Prosecution of any requested contact with any of the Prosecution witnesses referred to herein, in order to enable the Prosecution to make the necessary arrangements for such contact, in the event the witnesses agree to contact with Defence Counsel.
- i. All hearings to consider the issue of protective measures for the witnesses shall be held in closed session and transcripts will only be released to the public and to the media after review by the Prosecution, in consultation with the Victims and Witnesses Section.
- j. Representatives of the public and/or the media shall not photograph, video-record, or sketch the witnesses while they are on the premises of the Tribunal.
- k. The names, addresses, whereabouts of, and identifying data concerning the witnesses shall be sealed and not included in any public record of the Tribunal.
- l. Documents of the Tribunal identifying the witnesses shall not be disclosed to the public or media.

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 Tribunal and the staff of the Registry, the Office of the Prosecutor, the Accused in this case, the Defence Counsel and their legal assistants, agents or representatives and any other members of the Defence teams. “The public” also includes, without limitation, family, friends, and associates of the Accused, accused in other cases or proceedings before the Tribunal; defence counsel in other cases or proceedings before

the Tribunal, and the media and journalists.

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



Judge Iain Bonomy
Presiding

Dated this first day of June 2006.
At The Hague,
The Netherlands

[Seal of the Tribunal]