



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-04-83-PT

Date: 1 December 2006

Original: ENGLISH

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**IN THE TRIAL CHAMBER**

**Before:** Judge Patrick Robinson, Presiding  
Judge Krister Thelin  
Judge Frank Höpfel

**Registrar:** Mr. Hans Holthuis

**Decision of:** 1 December 2006

**PROSECUTOR**

v.

**RASIM DELIĆ**

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**DECISION ON THE PROSECUTION MOTION FOR PROTECTIVE MEASURES**

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**Office of the Prosecutor**

**Mr. Daryl Mundis**

**Ms. Tecla Henry-Benjamin**

**Counsel for the Accused**

**Mrs. Vasvija Vidović**

**Ms. Quincy Whitaker**

**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”);

**BEING SEISED** of a partly *ex parte* and confidential “Prosecution Motion for Protective Measures” with an *ex parte* and confidential Annex, filed on 13 November 2006 (“Motion” and “Annex”), seeking various protective measures pursuant to Articles 20, 21, and 22 of the Statute of the Tribunal (“Statute”) and Rules 54, 69, 73, 75, and 79 of the Rules of Procedure and Evidence (“Rules”) for a witness identified in Annex that would apply during the pre-trial and the trial stage of the proceedings, in particular the following:

- a.) the use of pseudonym PW1 in lieu of witness’s true identity;
- b.) delayed disclosure of the witness’s identify, his unredacted statement, and related documents until 30 days before PW1’s testimony in this case;<sup>1</sup>

**NOTING** the Prosecution argument that the measures sought are necessary in order to secure the protection of the witness identified in Annex and/or witness’s family because they face grave risk should the identity of the witness become known to the public;<sup>2</sup>

**NOTING** that the application for the protective measures for the witness is supported by Annex describing the exceptional circumstances warranting the protective measures sought by the Prosecution and that the Prosecution has satisfactorily explained the reasons why the information in Annex must be maintained on a confidential and *ex parte* basis at the present time;<sup>3</sup>

**NOTING** that the Defence filed a confidential “Defence Response to the Partly ex Parte and Confidential Prosecution Motion for Protective Measures” (“Response”) on 29 November 2006, two days after the expiration of the time prescribed under Rule 126 *bis* for filing a response to a motion;

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<sup>1</sup> Motion, para. 1.

<sup>2</sup> Motion, para. 8.

<sup>3</sup> See Motion, para. 9.

**CONSIDERING** that the Defence did not seek leave to file the Response after expiration of the deadline prescribed under Rule 126 *bis* and the Trial Chamber will therefore not accept the Response as filed;

**NOTING** that 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;”

**NOTING** that 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;”

**NOTING** 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;”

**NOTING** that Rule 69(A) of the Rules 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 and that Rule 69(C) of the Rules provides that, subject to Rule 75, “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;”

**NOTING** that in accordance with the Trial Chamber’s jurisprudence, three factors must be considered when delayed disclosure is requested under Rule 69(A) of the Rules, 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);<sup>4</sup>

**NOTING** 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” and that “[t]he Trial Chamber sees this as an important element of the first criterion set out above;”<sup>5</sup>

**NOTING** that Rule 75(A) of the Rules 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;”

**NOTING** that 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 his/her security or that of his/her family;”<sup>6</sup>

<sup>4</sup> 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); *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Prosecution Sixth Motion for Protective Measures, 1 June 2006, (“*Milutinović* Sixth Motion Decision”), para. 18.

<sup>5</sup> Sensitive Source Decision, para. 4 (citing *Brđanin & Talić* Decision, 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; *Milutinović* Sixth Motion Decision, para. 19.

<sup>6</sup> *Milošević* Rule 69 Decision, 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, 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; *Milutinović* Sixth Motion Decision, para. 22.

**NOTING** that the burden rests on the party seeking protective measures to justify in each case why the measures requested should be granted<sup>7</sup> and 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;”<sup>8</sup>

**CONSIDERING** that the Trial Chamber is satisfied that the Prosecution has demonstrated the existence of a real risk to safety and security of the witness and of his/her family should it become publicly known that the witness has testified before the Tribunal and that the factors establishing a risk to his security mainly concern the nature of his evidence and various circumstances, including the position he held during the relevant events, the role and the duties performed, threats to his security, the current residence of the witness’s family in the respective area, and the fact that his cooperation might be described as an act of treason as described in the Motion and Annex;<sup>9</sup>

**CONSIDERING THEREFORE** that the use of pseudonym for the witnesses is necessary and appropriate to protect the witness;

**CONSIDERING** that the Trial Chamber is also satisfied that the Prosecution has demonstrated, pursuant to the criteria set out by this Trial Chamber in its previous decisions, the likelihood that the witness will be interfered with or intimidated once his identity is made known to the Accused and his Counsel and therefore established that delayed disclosure of identity is appropriate in respect of the witness identified in Annex;

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<sup>7</sup> See *Milutinović* Sixth Motion Decision, para 22; *Milošević* Rule 69 Decision, para. 24; *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, p. 2.

<sup>8</sup> *Milošević* Rule 69 Decision, 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.

<sup>9</sup> See Motion, para. 8. Cf. *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Decision on Prosecution’s Twelfth Motion for Protective Measures, 12 December 2002, para. 9.

**CONSIDERING** that the Trial Chamber is not satisfied that the Prosecution has justified the need for the delayed disclosure of the witness's identity, his unredacted statement, and related documents until 30 days prior to witness's testimony and that disclosure prior to the commencement of the trial is necessary to enable the Defence to prepare fully for trial;

**CONSIDERING** that the Trial Chamber will follow its own general practice in pre-trial proceedings and that of other Chambers 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 identity, his unredacted statement, and related documents of the witness granted protective measures under Rule 69(A) of the Rules;<sup>10</sup>

**PURSUANT** to Articles 20, 21, and 22 of the Statute and Rules 54, 69, and 75 of the Rules, the Trial Chamber **HEREBY GRANTS** the Motion and **ORDERS** as follows:

- (a) Representatives of the public shall not photograph, video-record, or sketch the witness while he is on the premises of the Tribunal.
- (b) The witness described in Annex shall be identified by the pseudonyms PW1 in all proceedings before the Tribunal and in discussions among the parties.
- (c) The Prosecution shall provide to the Defence a redacted statement of the witness PW1 for whom delayed disclosure was requested, redacting, in particular, the witness's name, current whereabouts, date of birth; and any other information that may reveal the witness's identity.

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<sup>10</sup> *Milutinović et al.* Decision, p. 4; *Stanišić & Simatović* Decision, 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, 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).

- (d) The Prosecution shall provide the Defence with the true identity, the unredacted statement of the witness, and other related documents by no later than 30 days prior to the anticipated start of the trial, unless otherwise ordered by the Trial Chamber.
- (e) The parties shall not disclose to the public any protected material, including information and documents pertaining to this witness except to the limited extent that such disclosure is directly and specifically necessary for the preparation and presentation of the case or the knowledge of the parties. If the parties find it directly and specifically necessary to make disclosures pursuant to this limited purpose, they shall inform each person among the public to whom non-public material or information is shown or disclosed that such person is not to copy, reproduce, or publicise such material or information, and is not to show, disclose, or convey it to any other person. If provided with the original or any copy or duplicate of such material or information, such person shall return it to the party when continued possession of the material or information is no longer necessary for the preparation and presentation of the case.
- (f) 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 the witness referred to herein, in order to enable the Prosecution to make the necessary arrangements for such contact, in the event the witness agrees to contact with Defence counsel.
- (g) The names, whereabouts, and other identifying information concerning the witness shall be sealed and not included in any public record of the Tribunal. To the extent that the names and other identifying information concerning the witness are contained in existing public documents of the Tribunal, that information shall be expunged from those documents.
- (h) If a member of the Prosecution or Defence team withdraws from the case, all material in his or her possession shall be returned to the person serving as lead counsel for that party at that time.

- (i) All materials pertaining to this witness, including those materials disclosed under subsection (e) above, shall be maintained on a confidential basis, destroyed, or returned to the Registry following the close of the above-referenced proceedings.
- (j) Except as provided for by subsection (e) above, any person who knowingly and wilfully discloses the identifying information of this witness, or any other information sufficient to identify this witness, shall be in violation of this Order, and may be subject to prosecution for contempt of the Tribunal pursuant to Rule 77 of the Rules.
- (k) All provisions of this Decision shall apply equally to the Prosecution; the Accused and their Defence counsel, co-counsel, and other members of the Defence team; and the public.
- (l) For the purposes of this decision, “the public” means all persons; governments; organisations; entities; associations; groups; the Accused's family members, friends, and associates; accused and defence counsel in other proceedings before the Tribunal; and the media, but does not mean Judges of the International Tribunal; staff of the Registry and the Office of the Prosecutor; the *Amici Curiae*; or the Accused and their Defence counsel, co-counsel, and other members of the Defence team.

The Trial Chamber hereby **INSTRUCTS** the Registry to take all necessary measures to implement this Decision.

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



Judge Patrick Robinson  
Presiding

Dated this first day of December 2006  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**