



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

Case No. IT-03-69-PT

Date: 7 November 2007

Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Pre-Trial Judge
Judge Christine Van den Wyngaert
Judge Bakone Justice Moloto

Registrar: Mr. Hans Holthuis

Decision of: 7 November 2007

PROSECUTOR

v.

**JOVICA STANIŠIĆ
AND
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION ON PROSECUTION'S REQUEST FOR
CERTIFICATION TO APPEAL THE TRIAL
CHAMBER'S DECISION ON PROTECTIVE
MEASURES OF 13 SEPTEMBER 2007**

The Office of the Prosecutor

Ms. Doris Brehmeier-Metz

Counsel for the Accused

Mr. Geert-Jan Alexander Knoops and Mr. Wayne Jordash for Jovica Stanišić
Mr. Zoran Jovanović for Franko Simatović

TRIAL CHAMBER I (“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”);

NOTING the “Decision on Third Prosecution Motion for Pre-trial Protective Measures”, rendered confidentially on 6 September 2007 (“Decision”), whereby Trial Chamber III granted the Prosecution request that the identity of five scheduled Prosecution witnesses be protected from the public through the assignment of pseudonyms, and at the same time denied the Prosecution request that disclosure to the Defence of the identities of the five witnesses be delayed until 30 days prior to their expected dates of testimony;¹

NOTING the “Order Reassigning a Case to a Trial Chamber”, filed by the President of the Tribunal on 27 September 2007, which reassigned with immediate effect this case to this Trial Chamber;

BEING SEIZED, therefore, of the “Prosecutor’s Request for Certification to Appeal ‘Decision on Third Prosecution Motion for Pre-trial Protective Measures’ Dated 6 September 2007”, filed confidentially on 13 September 2007 (“Request”), whereby the Prosecution seeks leave to appeal the Decision pursuant to Rule 73(B) of the Rules of Procedure and Evidence of the Tribunal (“Rules”) in as far as it denies the protective measures of delayed disclosure, as well as requesting a stay of disclosure while the Request is pending, and if granted, for the duration of any appeal;

NOTING that the Prosecution submits that the Decision involves an issue that significantly affects the fair and expeditious conduct of proceedings in that

- i. it concerns one of the most significant legal and factual issues of this Tribunal, namely the safety and security of victims and witnesses,² and
- ii. it places the security of witnesses in jeopardy and thus adversely affects the Prosecutor’s ability to present its evidence at trial;³

NOTING that the Prosecution also states that immediate resolution of this issue by the Appeals Chamber will materially advance the proceedings because

- i. the *status quo ante* cannot be restored by post-trial appellate review since the Decision requires disclosure and denies protection;⁴

¹ Decision, pp. 3-5.

² Request, para. 8.

³ *Ibid.* para. 9.

⁴ *Ibid.* para. 11.

- ii. the trial date has not yet been set and “an appeal may be dealt with and disposed of as a matter of urgency before the start date”;⁵

NOTING that the Prosecution further argues that Trial Chamber III erred in law by

failing to provide reasons why the Prosecution’s application for delayed disclosure to thirty days before the start of the witness’s testimony should fail entirely,

failing to be consistent in its application of protective measures in relation to Prosecution witnesses, in particular failing to be consistent in the application of delayed disclosure in relation to witnesses, and

failing to grant or affirm the application of delayed disclosure granted in previous proceedings in the absence of a Prosecution application to vary the earlier protective measures or factual justification for such variation;⁶

NOTING that as of 27 September 2007, which was the deadline for the filing of a response pursuant to Rule 126*bis*, neither the Defence for Jovica Stanišić nor the Defence for Franko Simatović responded to the Request;

NOTING that Rule 73(B) of the Rules provides that a Trial Chamber may exercise its discretion to certify a decision for interlocutory appeal if two criteria are satisfied, namely that:

[t]he decision involves an issue that would significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings;

CONSIDERING that the purpose of a request for certification to appeal is not to show that an impugned decision is incorrectly reasoned but rather to demonstrate that the two cumulative conditions set out in Rule 73(B) have been met;⁷

CONSIDERING that the Decision does not involve an issue that would significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial in that:

- i. the arguments put forward by the Prosecution are of such a general nature, that the acceptance of them would imply that every decision dealing with protective measures would also qualify for certification to appeal, and

⁵ *Ibid.*

⁶ *Ibid.* para. 13.

⁷ See *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Certification of a Trial Chamber Decision on Prosecution Motion for Voir Dire Proceeding, 20 June 2005, (“*Milošević* Decision), paras 2 and 4. See also *Prosecutor v. Milutinović, Šainović, Ojdanić, Pavković, Lazarević, and Lukić*, Case No. IT-05-87-T, Decision Denying Prosecution’s Request for Certification of Rule 73*bis* Issue for Appeal, 30 August 2006, para. 4, stating that “although matters of obvious importance might commend themselves for certification, ‘even when an important point of law is raised..., the effect of Rule 73(B) is to preclude certification unless the party seeking certification establishes that both conditions are satisfied’” (quoting *Prosecutor v. Halilović*, Case No. IT-01-48-PT, Decision on Prosecution Request for Certification for Interlocutory Appeal of “Decision on Prosecution Motion Seeking Leave to Amend the Indictment”, 12 January 2005, p. 1).

- ii. the Decision does not significantly affect the Prosecution's ability to present evidence at trial as the only question at issue is *when* the relevant material will be disclosed to the Defence;⁸

CONSIDERING moreover that in respect of the second prong of Rule 73(B), the Prosecution's argument that the trial date has not yet been set could only suggest, at the most, that the proceedings would not be *delayed* by an appeal, and falls short of demonstrating that an immediate resolution by the Appeals Chamber would materially *advance* the proceedings;

CONSIDERING further that the alleged errors in law put forward by the Prosecution address the substance of the impugned Decision, rather than the criteria to be satisfied under Rule 73(B);

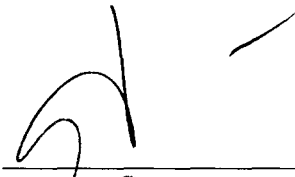
FINDING therefore that the arguments put forth by the Prosecution fail to demonstrate that the Decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which the resolution by the Appeals Chamber may materially advance the proceedings;

FINDING finally that the request for a stay of the Decision is moot because the requirements for certification to appeal are not met;

⁸ The Trial Chamber also notes that, contrary to the Prosecution's contention (Request, para. 9), the decision rendered in the *Milutinović* case is distinguishable from the present situation as it relates to a party's right to cross-examine a witness, which is not at issue here. See *Prosecutor v. Milutinović, Šainović, Ojdanić, Pavković, Lazarević, and Lukić*,

FOR THE FOREGOING REASONS**PURSUANT** to Rule 73(B) of the Rules,**HEREBY DENIES** the Request in its entirety.

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



Judge Alphons Orié
Pre-Trial Judge

Dated this seventh day of November 2007

At The Hague

The Netherlands

[Seal of the Tribunal]

Case No. IT-05-87-T, Decision on Prosecution Request for Certification of Interlocutory Appeal of Second Decision on Addition of Wesley Clark to Rule 65ter List, 14 March 2007, para. 13.