



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-03-69-PT
Date: 4 February 2008
Original: English

IN TRIAL CHAMBER III

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

Registrar: Mr. Hans Holthuis

Decision of: 4 February 2008

PROSECUTOR

v.

**JOVICA STANIŠIĆ
AND
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION RECONSIDERING CONDITIONS FOR THE
DEFENCE ACCESS TO CONFIDENTIAL TESTIMONY
AND DOCUMENTS FROM THE *SLOBODAN
MILOŠEVIĆ* CASE**

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

1. **TRIAL CHAMBER III** (“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”) *proprio motu* issues this Decision, reconsidering the conditions for the Defence of Jovica Stanišić and the Defence of Franko Simatović having access to confidential testimony and documents from the case *Prosecutor v. Slobodan Milošević* (“*Milošević case*”).

2. On 20 October 2003, Trial Chamber III, seised at that time of the proceedings in the *Milošević case*, issued the “Decision on Defence Motion Filed by the Defence of Franko Simatović (IT-03-69-PT) for Access to Transcript and Documents”, ordering that:

[t]he Simatović Defence shall have access to non-public testimonies and exhibits pertaining to crimes and events related to charges against Franko Simatović or his co-accused, Jovica Stanišić from the Bosnia and Herzegovina and Croatia parts of the *Milošević Case*, after:

(i) the Prosecution has had a reasonable opportunity to seek the consent of the witnesses who testified confidentially in the *Milošević Case* for their un-redacted testimony to be disclosed to the Simatović Defence; and

(ii) where such consent is not given by the witness, the Prosecution has redacted those parts of the testimony and exhibits that may reveal the identity of any protected person or that relate to a period other than 1 April 1991 to 31 December 1995;

the Prosecution shall within a reasonable time determine whether any of the confidential material falls under Rule 70 of the Rules and shall contact the providers of such materials to seek their consent for disclosure of that material; and

the Simatović Defence shall not disclose to the public any confidential or non-public material disclosed to it from the *Milošević Case*.¹

3. On 11 March 2005, the Trial Chamber in the case of *Slobodan Milošević* issued its “Decision on Motion of Defence of Jovica Stanišić for Variance of Protective Measures Pursuant to Rule 75(G)(i)”, ordering that:

[t]he Stanišić Defence shall have access to all non-public testimony and exhibits pertaining to the charges against Jovica Stanišić or his co-accused, Franko Simatović from the Bosnia and Herzegovina and Croatia parts of the *Milošević case*, after:

i. the Prosecution has had a reasonable opportunity to seek the consent of the witnesses who testified confidentially in the *Milošević case* for their un-redacted testimony to be disclosed to the Stanišić Defence; and,

ii. where such consent is not given by the witness, the Prosecution has redacted those parts of the testimony and exhibits that may reveal the identity of any protected person or that relate to a period other than 1 April 1991 to 31 December 1995.

¹ *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Defence Motion Filed by the Defence of Franko Simatović (IT-03-69-PT) for Access to Transcript and Documents, 20 October 2003, pp. 4 and 5.

The Prosecution shall within a reasonable time determine whether any of the confidential material falls under Rule 70 of the Rules and shall contact the providers of such materials to seek their consent for disclosure of that material.

The Stanišić Defence shall not disclose to the public any confidential or non-public material disclosed to it from the Milošević Case.²

4. At the status conference held on 23 November 2007 in the *Stanišić and Simatović* case, the Prosecution indicated that, up to that date, it had reached 13 witnesses out of a total number of 54 witnesses identified by the Prosecution as falling under the scope of the two decisions mentioned above (“*Milošević* Decisions”). As stated by the Prosecution, six of these witnesses have given their consent, and the related material has been disclosed to the Defence of both Accused; seven witnesses, however, have not granted their consent, and the Prosecution has consequently disclosed their testimonies to the Defence in redacted form.³ It follows that 41 witnesses remain to be contacted by the Prosecution.

5. The Trial Chamber in these proceedings does not intend to reconsider here the two *Milošević* Decisions in respect of the access of the Stanišić and Simatović Defence to the confidential material from the *Milošević* case, but rather *the conditions upon which this access was predicated*. The issue before the Trial Chamber is whether, in case of a Defence motion seeking access to confidential material from a previous proceeding, the consent of a witness constitutes a prerequisite for access to that material being provided. This Trial Chamber will also have to assess whether continued non-disclosure of the identity of a witness who did not provide such consent is justified, particularly in light of the circumstance that the case is now ready to proceed. In doing so, it will also consider whether the rights of the witnesses can be properly protected if the material is provided without their consent.

6. Pursuant to Article 21 of the Statute, an accused has the right to examine, or have examined, the witnesses against him. In accordance with Article 22 of the Statute, the Rules of the Tribunal address the protection of witnesses. Rule 75 of the Rules governs measures for the protection of victims and witnesses. Any protective measures granted pursuant to Rule 75 are to be consistent with the rights of the Accused. It is also noted that this Rule concerns measures that ensure the protection of the identity of the witness from the public or the media. It does not include measures to shield the identity of the witness from an accused in whose case the witness is giving evidence. This is regulated in Rule 69, which provides that the identity of a witness can be withheld from the Defence of an accused until such person is brought under the protection of the Tribunal. Rule 69(C) provides that the identity of witnesses shall be disclosed in sufficient time prior to the trial to allow

² *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Motion of Defence of Jovica Stanišić for Variance of Protective Measures Pursuant to Rule 75(G)(i), 11 March 2005, p. 4 and 5.

adequate time for preparation of the defence, subject to Rule 75. It follows that an accused will know the identity of the witnesses brought against him.

7. The *Milošević* Decisions suggest that the Trial Chamber in that case thought it necessary to, at that time, protect the identity of the witnesses and not disclose their identity without prior consent. The two Accused in the current proceedings were not co-accused in the case of Slobodan Milošević, and as such would not be entitled to disclosure of the witnesses names pursuant to Rule 69(C). However, in the operative Indictment of the current case, the two Accused are alleged to have been members of a joint criminal enterprise with Slobodan Milošević. As such, the cases are closely connected. The proximity of two cases can affect the necessity of disclosing such information so as to facilitate the adequate preparation for the case.

8. Consent of a witness is required under the Rules only where there is to be a rescission, variation or augmentation of the protective measures. The Trial Chamber notes that an order granting the parties of a second proceeding access to confidential material from a first proceeding does not constitute a rescission, variation or augmentation of protective measures falling within Rule 75(G) or 75(H).

9. The most compelling indication that consent of the witnesses is not required for disclosure of protected material can be found in Rule 75(C), which provides that the witness has to be *informed* before giving evidence that his or her testimony and identity may be disclosed at a later date in another case, pursuant to Rule 75(F). The Trial Chamber also notes that Rule 75(F) provides that all protective measures ordered in the first proceeding continue to have effect *mutatis mutandis* in any other proceeding before the Tribunal, and includes an obligation on the part of the Prosecution to notify the Defence to whom the disclosure is being made of the nature of protective measures ordered in the first proceeding, thus ensuring the protection of the identity of the witnesses. Rules 75(C) and 75(F) do not prescribe the consent of the witness for such disclosure of protected material to parties to other proceedings within the Tribunal.

10. As to the continued non-disclosure of the identity of witnesses who did not provide consent for such disclosure, the Trial Chamber considers that enforcement of the conditions imposed by the two *Milošević* Decisions on the access of the Defence for Jovica Stanišić and Franko Simatović to confidential material from the *Milošević* case could compromise the right of the Defence of the two Accused to adequately prepare the defence and as a consequence could result in a significant delay of the proceedings. The proximity of the current case and the *Milošević* case, in that Jovica Stanišić, Franko Simatović and Slobodan Milošević are alleged to have been members of one and the same

³ Status Conference, 23 November 2007, Transcript, p. 648.

joint criminal enterprise and in that the indictments against these three accused contain allegations of many identical events, requiring disclosure of the identity of the witnesses who did not provide consent for such disclosure. In light of the circumstance that the current case is ready to proceed within a very short period of time, the non-disclosure of this information is no longer justified.

11. For the foregoing reasons, pursuant to Rules 54, 70, and 75 of the Rules, the Trial Chamber hereby **ORDERS** as follows:

- (i) the Stanišić Defence and the Simatović Defence shall have access to non-public testimony and exhibits pertaining to crimes and events related to charges against the two Accused from the Bosnia and Herzegovina and Croatia parts of the *Milošević* case, subject to the disposition (iii) below;
- (ii) the protective measures that had been ordered in relation to the material made accessible to the Defence shall remain in place pursuant to Rule 75(F);
- (iii) the Prosecution shall determine as expeditiously as possible whether any of the confidential material falls under Rule 70 and shall contact the providers of such materials to seek their consent for disclosure of that material;
- (iv) the Stanišić Defence and the Simatović Defence shall not disclose to the public any confidential or non-public material disclosed to it from the *Milošević* case.

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, the Registry, the Prosecution and its representatives, the Accused and their Defence teams. “The public” also includes, without limitation, families, friends and associates of the accused and defence counsel in other cases or proceedings before the Tribunal, the media and journalists.

12. The Trial Chamber further invites the Victims and Witnesses Section and the Prosecution to inform the 13 witnesses who were already approached by the Prosecution of the content and reasoning of the present decision.

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



Judge Patrick Robinson
Pre-Trial Judge

Dated this fourth day of February 2008

At The Hague

The Netherlands

[Seal of the Tribunal]