

IT-03-69-T
D 36174 - D 36169
23 November 2011

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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-T
Date: 23 November 2011
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Michèle Picard
Judge Elizabeth Gwaunza

Registrar: Mr John Hocking

Decision of: 23 November 2011

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**REASONS FOR DECISION OF 4 OCTOBER 2011 AND
INVITATION TO THE REPUBLIC OF SERBIA IN RELATION
TO PROTECTIVE MEASURES FOR FOUR WITNESSES**

Office of the Prosecutor
Mr Dermot Groome

Counsel for Jovica Stanišić
Mr Wayne Jordash
Mr Scott Martin

The Government of the Republic of Serbia
Per: The Embassy of the Republic of Serbia
to the Kingdom of the Netherlands

Counsel for Franko Simatović
Mr Mihajlo Bakrač
Mr Vladimir Petrović

I. PROCEDURAL HISTORY AND SUBMISSIONS

1) Witness Radenko Novaković

1. On 20 and 29 June 2011, the Republic of Serbia (“Serbia”) requested that several witnesses, including Radenko Novaković, testify in closed session and that their identity be protected, in order to protect Serbia’s national security interests.¹ On 1 July 2011, the Chamber invited Serbia to file further submissions identifying in detail the specific national security interests it sought to protect and whether lesser protective measures would suffice.²

2. On 11 July 2011, Serbia reiterated its request for closed session testimony and identity protection and requested in the alternative that the witness testify with pseudonym and face and voice distortion and that Serbia be given the opportunity to propose redactions to his testimony.³ Serbia submitted that Novaković is a former long-serving operative of the State Security Agency and the Serbian state security services which preceded it (together: “BIA”).⁴ Serbia identified the following categories of information which, if publicly disclosed, would jeopardize its national security interests: (i) the methods, activities, and structures of the BIA; (ii) sources of information of the BIA; (iii) locations used by the BIA, both past and present; and (iv) identities of active and former BIA operatives.⁵ Serbia argued that the public disclosure of the identities of former BIA operatives could endanger their security and that of their relatives, obliging the BIA to provide them with protection at considerable financial expense.⁶

3. On 22 July 2011, the Prosecution responded, opposing the request that Novaković testify in closed session.⁷ The Prosecution requested instead that the witness testify in open session and be instructed to request private session if his answer could reveal sensitive information.⁸ The Prosecution did not oppose pseudonym and face and voice distortion for the witness.⁹

4. On 4 October 2011, the Chamber decided, with reasons to follow, that Novaković would testify in open session and instructed the parties and the witness to request provisional private

¹ Letter from the Republic of Serbia Requesting Protective Measures, 20 June 2011 (Confidential); The Republic of Serbia’s Motion for Protective Measures Consisting of Closed Sessions for the Testimony of Five Witnesses, 29 June 2011 (Confidential).

² Invitation to the Republic of Serbia to File Further Submissions in relation to Its Request for Protective Measures for Five Witnesses, 1 July 2011 (Confidential).

³ Further Submission of the Republic of Serbia for Protective Measures for Five Witnesses in Accordance with the Trial Chamber’s Invitation from 1 July 2011, 11 July 2011 (Confidential) (“Further Submission”), paras 3, 6-8.

⁴ Further Submission, para. 3.

⁵ Further Submission, para. 5.

⁶ Ibid.

⁷ Prosecution Response to the Republic of Serbia’s Motion for Protective Measures Consisting of Closed Sessions for the Testimony of Five Witnesses, 22 July 2011 (Confidential) (“Response”), paras 2, 11, 26.

⁸ Response, paras 20, 27.

⁹ Response, paras 5, 21, 28.

session if their questions or answers would reveal the identity of: (i) a person who acted as a BIA source, (ii) a BIA operative, or (iii) a location used by the BIA.¹⁰ Following the witness's testimony, Serbia would be provided with the portions of the transcript held provisionally in private session and be invited to identify the portions which should, in its view, remain confidential.¹¹ The Chamber denied the request for pseudonym and face and voice distortion and instructed the Registry to inform Serbia of its decision.¹²

2) Witnesses Vladimir Čorbić, Vlado Dragičević, and Milorad Leković

5. On 4 October 2011, Serbia requested that Vladimir Čorbić, Vlado Dragičević, and Milorad Leković testify in closed session and that their identities be protected at all times.¹³ Serbia submitted that Čorbić and Dragičević are former BIA members, while Leković is a former member of the State Security Department of the Serbian Ministry of the Interior ("MUP").¹⁴ According to Serbia, the witnesses' expected testimonies concerned the work and functioning of the BIA and public disclosure of this information would affect Serbia's national security interests.¹⁵

6. On 11 October 2011, the Chamber decided, with reasons to follow, that Leković would testify with the same provisional protective measures as Novaković and denied the request that the witness's identity be protected.¹⁶

7. On 12 October 2011, the Prosecution submitted that the provisional protective measures applied to Novaković and Leković struck an appropriate balance between protecting national security interests and the right to a fair and public trial and requested that the same measures be applied to Čorbić and Dragičević.¹⁷ On the same day, the Chamber granted the same provisional protective measures to Čorbić and denied the request that the witness's identity be protected.¹⁸

8. On 8 November 2011, the Chamber granted the same provisional protective measures to Dragičević.¹⁹ The Chamber additionally instructed the witness and the parties to request provisional private session if their questions or answers would reveal sensitive information concerning the

¹⁰ T. 13913, 13915-13916.

¹¹ Ibid.

¹² T. 13913, 13924.

¹³ The Republic of Serbia's Motion for Protective Measure consisting of Closed Sessions for the Testimonies of Three Witnesses, 4 October 2011 (Confidential) ("4 October 2011 Motion"), paras 3, 6-7.

¹⁴ 4 October 2011 Motion, para. 4.

¹⁵ 4 October 2011 Motion, para. 5.

¹⁶ T. 14231-14233.

¹⁷ T. 14313-14314.

¹⁸ T. 14376-14377.

¹⁹ T. 14726-14727, 14730-14731.

contacts between the BIA and foreign intelligence services.²⁰ The Chamber denied the request that the witness's identity be protected.²¹

II. APPLICABLE LAW

9. The Chamber recalls and refers to the applicable law governing protective measures under Rule 54 *bis* of the Rules of Procedure and Evidence ("Rules") as set out in a previous decision.²²

III. DISCUSSION

10. On 4 October 2011, the Chamber decided that only those portions of Novaković's testimony which could reveal a BIA source, a BIA operative, or a location used by the BIA would provisionally be held in private session. The Chamber will now address the reasons for this decision. Prior to its decision, the Chamber had stated on several occasions that it considered Serbia's reasons for its requests for protective measures to be of an overly vague and general nature.²³ In relation to Novaković's testimony, Serbia had identified several categories of information which should, in its view, be withheld from the public to protect its national security interests. The Chamber considered closed session testimony an unnecessarily restrictive measure to protect such information.

11. With regard to BIA sources and active BIA operatives, the Chamber recalled its discussion in previous decisions and considered that information identifying these persons should be protected under Rule 54 *bis* of the Rules, in order to protect Serbia's national security interests.²⁴ Serbia is best positioned to distinguish between active and former BIA operatives. In certain cases, former BIA operatives may also require protection. Consequently, the Chamber decided that testimony revealing the identities of BIA operatives, whether past or present, and of BIA sources should be provisionally held in private session.

12. With regard to locations used by the BIA, the Chamber considered that public disclosure of information revealing locations in active use by the BIA could seriously jeopardize its operatives and activities. Serbia is best positioned to distinguish between former locations and locations in

²⁰ T. 14726-14728, 14731.

²¹ *Ibid.*

²² Decision on the Republic of Serbia's Requests for Protective Measures in relation to Documents Provided to the Prosecution, 7 October 2011 (Confidential) ("7 October 2011 Decision"), paras 17-23.

²³ See Invitation to the Republic of Serbia to File Further Submissions in relation to Its Request for Protective Measures for One Witness (Witness DST-030), 2 September 2011 (Confidential), pp. 1-2; Invitation to the Republic of Serbia to File Further Submissions in relation to Its Request for Protective Measures for Witness DST-074, 1 September 2011 (Confidential), para. 8; T. 13359.

active use. In certain cases, former BIA locations may also require protection. Consequently, the Chamber decided that testimony revealing any locations used by the BIA should provisionally be held in private session in order to protect Serbia's national security interests.

13. The Chamber considered that Serbia had failed to identify any specific methods, activities, and structures of the BIA which it sought to protect. The Chamber further recalled its discussion in a previous decision in this respect.²⁵ On the basis of Serbia's submissions, the Chamber was unable to determine that any additional portions of Novaković's testimony should provisionally be held in private session in order to protect Serbia's national security interests.

14. Serbia did not identify any specific categories of information for which it sought protective measures in relation to Čorbić, Dragičević, and Leković. Nonetheless, considering their former positions and their expected testimony, the Chamber decided that those portions of their testimonies which could reveal a BIA source, a BIA operative, or a location used by the BIA should provisionally be held in private session. Given the topics of Dragičević's expected testimony, the Chamber decided that those portions of his testimony which could reveal sensitive information concerning the contacts between the BIA and foreign intelligence services should also provisionally be held in private session.

15. As indicated above, the Chamber will allow Serbia to make submissions identifying the portions of the testimonies of Novaković, Čorbić, Dragičević, and Leković ("Witnesses") which should, in its view, remain confidential. For this purpose, Serbia shall be provided with the portions of the transcripts of the Witnesses' testimonies which were provisionally held in private session following Serbia's requests for protective measures in respect of the Witnesses,²⁶ as well as with the list of names used during Dragičević's testimony (in evidence as D509).²⁷ This includes any portions initially held in open session and subject to a later order to provisionally redact the transcript based on Serbia's requests for protective measures in respect of the Witnesses.

²⁴ 7 October 2011 Decision, paras 27-28; Second Decision on the Republic of Serbia's Motion for Protective Measures, 3 November 2009 (Confidential), para. 9.

²⁵ 7 October 2011 Decision, para. 29.

²⁶ The Chamber notes that certain portions of the transcripts were held in private session for other reasons, such as T. 13954-13958, 14838-14841, 14915-14916. Such portions need not be sent to Serbia.

²⁷ See T. 14727, 14736, 14870-14871.

IV. DISPOSITION

16. For the foregoing reasons, pursuant to Rules 54, 54 *bis*, and 79 of the Rules, the Chamber

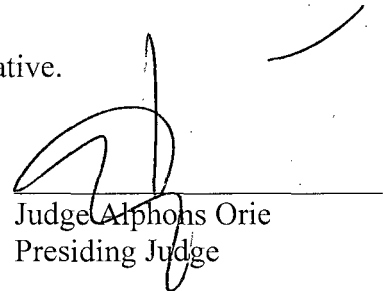
REQUESTS the Registry of the Tribunal to provide Serbia with those portions of the transcripts of the Witnesses' testimonies which were provisionally held in private session and with exhibit D509, and to notify the Chamber when it has done so;

INVITES Serbia to file, within two weeks of receipt of the aforementioned portions of the transcripts, written submissions:

- a. identifying precisely which of those portions should remain confidential;
- b. providing detailed reasons why national security interests or any other grounds would justify keeping those specific portions of the testimonies confidential; and
- c. if it seeks redactions in relation to the identities of former members of the BIA, addressing how public disclosure of those identities could jeopardize national security interests and not merely the private security interests of these persons; and

INVITES the parties to file any submissions in response within two weeks of the filing of Serbia's submissions.

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



Judge Alphons Orié
Presiding Judge

Dated this twenty-third of November 2011
At The Hague
The Netherlands

[Seal of the Tribunal]