

IT-09-92-T
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15 July 2014

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International Tribunal for the Case No. IT-09-92-T
Prosecution of Persons
Responsible for Serious Violations of International Humanitarian Law
Committed in the Territory of the Former Yugoslavia since 1991
Date: 15 July 2014
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Bakone Justice Moloto
Judge Christoph Flügge

Registrar: Mr John Hocking

Decision of: 15 July 2014

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON REPUBLIC OF SERBIA'S MOTION FOR
PROTECTIVE MEASURES**

Office of the Prosecutor

Mr Dermot Groome
Mr Peter McCloskey
Ms Camille Bibles

Counsel for Ratko Mladić

Mr Branko Lukić
Mr Miodrag Stojanović

The Government of the Republic of Serbia

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

I. PROCEDURAL HISTORY

1. On 14 March 2014, the Prosecution sent a letter ("Letter") to the Government of the Republic of Serbia ("Serbia") advising it of the Prosecution's intention to use at trial 32 documents provided by Serbia in accordance with the Prosecution's Requests for Assistance 1302, 1350, 1387, 1504, and 1639 (collectively, "RFAs").¹ On 1 April 2014 Serbia filed a motion ("Motion") for protective measures in relation to 25 of the 32 documents referenced in the Letter (also listed in Annex A of the Motion) ("Documents").² On 15 April 2014, the Prosecution filed its response, partly opposing Serbia's request to keep the Documents confidential and further addressing exhibit P4577 ("Response").³

II. SUBMISSIONS OF THE PARTIES

2. Serbia submits that public disclosure of the Documents could jeopardize its national security interests on the basis that: (i) they disclose the identities of former and presently active members of Serbia's intelligence services; and (ii) the information contained therein was provided in accordance with security methods of the Security and Information Agency ("BIA"). Serbia further submits that the Documents were not produced or adapted for use in legal proceedings and were provided to the Prosecution on the condition that they remain confidential and only be used in closed sessions during proceedings at the Tribunal.⁴ Consequently, Serbia requests that the Chamber: (i) grant an order for protective measures for the Documents; (ii) only allow the Documents to be used in closed sessions of the proceedings; and (iii) grant confidential status to any testimony related to the Documents.

3. The Prosecution submits that, for the vast majority of the Documents, Serbia has not demonstrated the existence of a legitimate national security interest as Serbia's submissions are 'overly broad and vague' and that protective measures should not be granted, or expanded, in respect of the Documents.⁵ The Prosecution further submits that the conditions referenced in the Motion, namely that the Documents only be used in closed sessions and remain confidential, are not binding upon the Chamber.⁶ In relation to exhibits P4311 and P4312, the Prosecution concedes that

¹ The Republic of Serbia's Request for Protective Measures, 1 April 2014 (Confidential), para. 1.

² Motion, para. 7.

³ Prosecution's Response to the Republic of Serbia's Request for Protective Measures, 15 April 2014 (Confidential with Confidential Annex A) para. 1. The Chamber instructed the Court Officer on 2 April 2014 through an informal communication to place all of the Documents provisionally under seal.

⁴ Motion, para. 11.

⁵ Response, para. 14.

⁶ Response, paras 8, 14.

limited protection is warranted based on a previously demonstrated risk to Serbia's national security interests.⁷ These two exhibits contain, *inter alia*, the names of a few active members of the BIA.⁸ The Prosecution agrees with Serbia that the names of active BIA members should remain confidential, but submits that the information relating to former employees of the Serbian State Security Service ("SDB") does not warrant protection as there is no indication that disclosure of those names would give rise of a legitimate national security interest.⁹ Finally, the Prosecution submits that Serbia incorrectly states that it did not provide exhibit P4577 to the Prosecution pursuant to RFA 1350 and on this basis concludes that Serbia appears not to be requesting protective measures for this document.¹⁰

III. APPLICABLE LAW

4. Article 20(4) of the Statute of the Tribunal ("Statute") and Rule 78 of the Rules of Procedure and Evidence ("Rules") provide that hearings and proceedings at the Tribunal shall be held in public unless otherwise provided.¹¹

5. Article 29(1) of the Statute requires States to cooperate with the Tribunal in its investigation and prosecution of persons accused of committing serious violations of international humanitarian law. Under Rule 39(i) and (iii) of the Rules, the Prosecution may seek the assistance of any State authority in its collection of evidence.

6. Rule 54 of the Rules provides that a trial chamber may issue such orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial. A trial chamber is not bound by the conditions that prevailed over the disclosure of material between the Prosecution and the State.¹²

7. As stated in the *Perišić* case:

It is firmly established in the jurisprudence of the Tribunal that Rule 54*bis* allows for protective measures only when demonstrated national security interests are at stake. To allow such measures on the basis of any other State interest would "erroneously extend the

⁷ Response, para. 12.

⁸ Response, paras 10-11.

⁹ Response, paras 10-11.

¹⁰ Response, paras 15-16.

¹¹ Article 20(4) of the Statute provides that "[t]he hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence". Rule 78 of the Rules provides that "[a]ll proceedings before a Trial Chamber, other than deliberations of the Chamber, shall be held in public, unless otherwise provided".

¹² *Prosecutor v. Momcilo Perišić*, Case No. IT-04-81-AR108bis., Decision on the Request of the Republic of Serbia for Review of the Trial Chamber's Decision on Protective Measures of 11 November 2008, 27 February 2009, paras 23, 29.

protections available under 54bis". The State carries the burden of demonstrating that an interest is a national security interest warranting the application of protective measures to the documentation or information provided.¹³

8. The Appeals Chamber has held that a trial chamber has implicit authority, pursuant to Article 29 of the Statute and Rules 39 and 54bis of the Rules, to direct the application of appropriate protective measures to documents produced by a State, whether voluntarily or pursuant to an order of the trial chamber, in the interests of protecting a State's demonstrated national security interests.¹⁴ It is for the chamber, seised of the State's request, to determine whether national security interests warrant protective measures in the specific case.¹⁵ In making this determination, the trial chamber may be guided by prior decisions on the same documents rendered in other proceedings.¹⁶

IV. DISCUSSION

A. Preliminary Issues

9. While the Chamber has no explicit legal obligation under Rule 54bis to hear Serbia's application for protective measures, it finds that the protections of Rule 54bis should be available to Serbia in relation to documents it voluntarily disclosed to the Prosecution. Consequently, it determines that Serbia has *locus standi* to file such applications before the Chamber.¹⁷

10. The Chamber notes that Serbia does not seek protective measures for six of the 32 documents provided pursuant to the RFAs, namely, exhibits P4550, P4559, P4569, P4571, P4576, and P4579.¹⁸ Furthermore, Serbia submits it did not provide exhibit P4577 to the Prosecution. The Chamber considers that the Prosecution has demonstrated that Serbia did in fact provide P4577 to the Prosecution on 8 August 2007.¹⁹ The Chamber notes Serbia's request that the Chamber grant confidential status to any testimony related to the Documents but deems the reasons underlying this request to be too vague and therefore will only determine whether the content of the Documents should be protected from public disclosure.

¹³ *Prosecutor v. Momcilo Perišić*, Case No. IT-04-81-T, Decision on Serbia's Motion and Supplemental Motion for Protective Measures, 11 November 2008, para. 11.

¹⁴ *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR108bis.2, Decision on Serbia and Montenegro's Request for Review, 20 September 2005 (Confidential) ("Appeals Chamber Decision"), paras 11-12.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ Appeals Chamber Decision, paras 3, 10-12..

¹⁸ Motion, para. 6 and Annex B.

¹⁹ Response, paras 15-16 and Annex A.

B. Overview of the Documents

11. The Documents fall into three categories: (i) records of SDB anti-terrorist operations unit per diem payments (exhibits P4311 and P4312); (ii) an order regarding the implementation of requests and coordination between the Yugoslav Army ("VJ"), Army of Serbian Krajina, and the Army of Republika Srpska ("VRS") (exhibit P4578); and (iii) the remaining 22 documents, relate to the supply of ammunition, and are either requests from the Accused or responses from the VJ to the VRS (exhibits P4551-P4558, P4560-P4568, P4570, and P4572-P4575). All of the Documents are dated between October 1993 and October 1995.

12. The Documents were not produced pursuant to an order by the Chamber under Rule 54bis of the Rules. Serbia submitted the Documents to the Prosecution voluntarily, in response to the RFAs. However, the Chamber has 'implicit authority' to decide on the Motion pursuant to Article 29 of the Statute and Rules 39 and 54bis of the Rules and must give due weight to the Accused's right to a public trial enshrined in Article 20(4) of the Statute and provided for in Rule 78 of the Rules.

C. P4311 and P4312 - Category (i)

13. On 3 November 2009, the Trial Chamber in the *Stanišić and Simatović* case granted protective measures requested by Serbia under Rule 54bis of the Rules to exhibits P4311 and P4312.²⁰ In order to safeguard Serbia's national security interests, the Chamber, in that case, allowed that names of active BIA operatives be redacted.²¹

14. The Chamber has considered the grounds upon which the protective measures for P4311 and P4312 were previously granted pursuant to the *Stanišić and Simatović* Decision in its determination of whether protective measures are warranted in this case. The Chamber recalls that in that decision, it was determined that information identifying active BIA operatives should remain confidential in order to protect Serbia's national security interests.²² In this case, the Chamber is in agreement that such information should be redacted under Rule 54bis of the Rules and the Chamber will grant protective measures for those sections of exhibits P4311 and P4312 which mention the names of active BIA members.

²⁰ *Prosecutor v. Jovca Stanišić & Franko Simatović*, Case No. IT-03-69-T, Second Decision on The Republic of Serbia's Motion for Protective Measures, 3 November 2009 (Confidential) ("*Stanišić and Simatović* Decision"), para. 11.

²¹ *Stanišić and Simatović* Decision, paras 9, 11.

²² *Stanišić and Simatović* Decision, para. 9.

15. Regarding the identities of former BIA operatives, Serbia has not demonstrated how a potential threat to their private security interest constitutes a threat to the national security interests of Serbia. Furthermore, Serbia's arguments regarding the need to keep the methods employed by the BIA confidential are of a vague and general nature. For instance, Serbia has failed to argue how the public disclosure of a specific method revealed in a certain document would affect national security interests, or how the redaction of the names of former operatives would keep that specific method confidential. In the absence of sufficiently detailed submissions, the Chamber finds that Serbia has failed to establish how the disclosure of the Documents would affect its national security interests.

D. Remaining Documents - Categories (ii) and (iii)

16. Serbia has indicated that its Ministry of Defence provided exhibits P4551-P4558, P4560-P4568, P4570, P4572-P4575, and P4578 to the Prosecution on the condition that they only be used in closed sessions and be kept confidential.²³ Serbia submits that disclosure of these documents to the public would 'seriously jeopardize national security interests of Republic of Serbia'.²⁴ The Chamber observes that none of these documents appear to be related to the BIA, nor do they contain the names of active BIA members. They also do not appear to relate to, as Serbia submits, the security methods of the BIA or its functioning. The Chamber therefore considers that Serbia has not provided sufficiently specific information to demonstrate the existence of a national security interest warranting protective measures of these documents. For these reasons, the Chamber denies the Motion in respect of the remaining documents. Finally, in the context of Serbia's voluntary disclosure of the Documents and its request for protective measures under Rule 54*bis*, the Chamber finds that it is not bound by the conditions that prevailed over the disclosure of the Documents between the Prosecution and the State.

V. DISPOSITION

17. For the foregoing reasons, pursuant to Article 29 of the Statute and Rules 39, 54, and 54*bis* of the Rules, the Chamber

GRANTS the Motion in part;

ORDERS that P4311 and P4312 remain under seal;

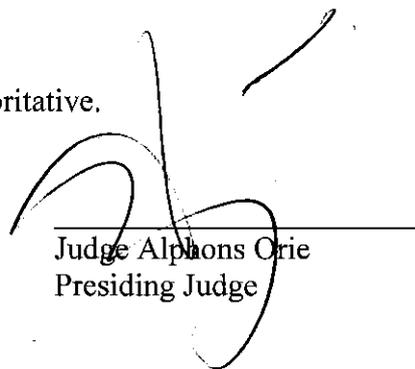
²³ Motion, para. 14.

²⁴ Ibid.

INSTRUCTS the Registry to change the status of exhibits P4551-P4558, P4560-P4568, P4570, P4572-P4575, and P4578 to public; and

DENIES the remainder of the Motion.

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



Judge Alphons Orie
Presiding Judge

Dated this fifteenth day of July 2014
At The Hague
The Netherlands

[Seal of the Tribunal]