

IT-03-69-T
D 37368 - D 37363
19 January 2012

37368
48.



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: 19 January 2012
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr. John Hocking

Decision of: 19 January 2012

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION ON THE REPUBLIC OF SERBIA'S MOTION FOR
PROTECTIVE MEASURES FOR WITNESS DST-074**

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. On 15 July 2011, the Republic of Serbia (“Serbia”) requested that Witness DST-074, Nebojša Bogunović (“Witness”), be allowed to testify under pseudonym and in closed session in order to protect national security interests (“Request”).¹ In support of its Request, Serbia submitted that the Witness, a former employee of the Serbian Ministry of the Interior (“MUP”), would testify in relation to the “structure, methods, measures, and activities” of the Serbian State Security Service (“BIA”).²

2. On 22 July 2011, the Prosecution responded to the Request, opposing closed session testimony for the Witness.³ The Prosecution submitted that the Witness testified publicly in the case of *Prosecutor v. Milutinović et al.* and left the MUP in 2005.⁴ The Prosecution further submitted that Serbia failed to meet its burden of demonstrating that the Witness’s expected testimony implicates national security interests.⁵

3. On 16 August 2011, the Chamber provisionally granted pseudonym, face and voice distortion, and closed session testimony for the Witness.⁶ The Witness testified on 16, 17, and 18 August 2011.⁷ On 1 September 2011, the Chamber invited Serbia to provide submissions identifying which portions of the transcript should, in its view, remain confidential and providing detailed reasons why national security interests or any other grounds would justify keeping those specific portions and the Witness’s identity confidential.⁸

4. On 28 September 2011, Serbia requested that specific portions of the transcripts of the Witness’s testimony that contain information which would identify a number of former operatives remain confidential.⁹ Serbia submits that, under its national legislation, former BIA operatives are entitled to the same protection as active operatives in cases where the operatives, their relatives, or their property are endangered as a result of their engagement in official duties.¹⁰ Public disclosure

¹ The Republic of Serbia’s Motion for Protective Measures Consisting of Closed Sessions for the Testimony of One Witness, 15 July 2011 (Confidential), paras 1, 3-4.

² Request, paras 2-3.

³ Prosecution Response to the Republic of Serbia’s Motion for Protective Measures Consisting of Closed Sessions for the Testimony of One Witness, 22 July 2011 (Confidential) (“Response”), paras 2, 14.

⁴ Response, paras 3, 11-13.

⁵ Response, paras 2, 8-10.

⁶ T. 13149-13150.

⁷ T. 13149-13353.

⁸ 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), paras 7, 9.

⁹ Further Submission of the Republic of Serbia in Relation to its Request for Protective Measures for Witness DST-074 in accordance with the Trial Chamber I Invitation from 1 September 2011, 28 September 2011 (Confidential) (“Submission”), paras 3-5, Annex A1, A2, A3, B1, B2.

¹⁰ Submission, Annex A1, A2, B1, B2.

of former BIA operatives' identities could endanger these operatives and give rise to a legal obligation for the BIA to ensure their safety.¹¹ Providing protection to these former operatives would impose a cost on the BIA in terms of its human resources and its budget, which would impact the BIA's capacity to actively engage in other duties, thereby directly jeopardising Serbia's national security interests.¹² Finally, Serbia argues that public disclosure of the identity of a former BIA operative, who was murdered under unknown circumstances by (an) unidentified perpetrator(s), could endanger his family.¹³

5. On 12 October 2011, the Prosecution responded, opposing the requested redactions and arguing that Serbia had failed to provide sufficient justification for keeping the identities of the Witness and other former BIA operatives confidential.¹⁴ The Prosecution further requested that the Witness's identity and pseudonym sheet, in evidence as exhibit D333 under seal, be made public.¹⁵ The Prosecution argues that the reasons provided by Serbia to protect the identities of former BIA operatives are broad, undefined, and pertain mainly to private security interests.¹⁶ The Prosecution argues that Serbia has failed to establish how public disclosure of past engagement in the BIA over ten years ago could presently endanger the former BIA operatives, their relatives, or their property.¹⁷ The Prosecution notes that the public trial record already mentions two of the individuals as former BIA operatives.¹⁸

II. APPLICABLE LAW

6. The Chamber recalls and refers to the applicable law governing protective measures under Rule 54 *bis* of the Tribunal's Rules of Procedure and Evidence ("Rules") as set out in a previous decision.¹⁹

III. DISCUSSION

7. Serbia has requested protective measures for the Witness on the grounds that he is a former MUP employee. Serbia has not sufficiently explained, nor is it obvious, how the public disclosure

¹¹ Ibid.

¹² Ibid.

¹³ Submission, Annex A2, A3.

¹⁴ Prosecution Response to Further Submission of the Republic of Serbia in Relation to its Request for Protective Measures for Witness DST-074, 12 October 2011 (Confidential) ("Response to Further Submission"), paras 4, 7-8, 11, 14-15, 17-18.

¹⁵ Response to Further Submission, paras 7, 18.

¹⁶ Response to Further Submission, paras 8, 11, 14-15, 17.

¹⁷ Response to Further Submission, paras 11, 17.

¹⁸ Response to Further Submission, para. 11.

¹⁹ 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.

of the Witness's identity would pose a risk to his safety, nor how a potential threat to his safety would constitute a national security interest, as opposed to a private security interest. Nor has Serbia argued how public disclosure of the Witness's identity would reveal or impact any means and methods employed by the BIA in gathering intelligence. On the basis of Serbia's submissions, the Chamber is unable to conclude that the Witness's identity should be kept confidential in order to protect Serbia's national security interests. Accordingly, the provisional protective measures in relation to the Witness's identity can be lifted and exhibit D333 (the Witness's pseudonym sheet) can be made public.

8. Serbia has requested the protection of the identities of a number of former BIA operatives mentioned during the Witness's testimony. Serbia argues that the BIA is bound to provide protection for former BIA operatives who are endangered as a result of their former duties. However, Serbia has not explained, nor is it obvious, how the public disclosure of former BIA operatives' identities would, in all cases, give rise to a potential threat to their safety such that they need protection. Serbia has not addressed the likelihood and seriousness of a potential threat to the safety of the specific operatives mentioned in the Witness's testimony. In the absence of such information, it is unclear which security measures the BIA would need to put into place to ensure their safety. As a result, Serbia's submissions fail to establish that the need to provide such protection, should such a need arise, would interfere with the BIA's ability to perform its other tasks to such an extent that it would jeopardise Serbia's national security interests. In the absence of sufficiently detailed submissions, the Chamber finds that Serbia has failed to establish how public disclosure of these former BIA operatives would affect its national security interests. Accordingly, the Chamber is unable to conclude that such information should be redacted under Rule 54 *bis* of the Rules.

9. Serbia has requested the redaction of information identifying a deceased former BIA operative on the grounds that this person was killed under unclear circumstances and that public disclosure could endanger his family. Serbia has not sufficiently argued how this constitutes a national security interest, as opposed to a private security interest. The Chamber cannot conclude that this information should be redacted under Rule 54 *bis* of the Rules. Nonetheless, Serbia's submissions indicate that there may be a threat to the deceased's family. The Chamber grants the redaction of the name of the deceased former BIA operative in order to protect his family in the interests of justice under Rule 79 of the Rules.

10. Exhibits D334 and D335 (the Witness's Rule 92 *ter* statement and a proofing note) were admitted provisionally under seal. Serbia has not made any specific requests in relation to these

exhibits. In light of the Chamber's findings concerning Serbia's requests for protective measures in relation to the Witness's testimony as set out above, D335 can be made public. Paragraph 46 of D334 mentions the deceased former BIA operative whose identity should be protected under Rule 79 of the Rules. Therefore D334 shall remain under seal.

IV. DISPOSITION

11. For the foregoing reasons, pursuant to Article 29 of the Statute of the Tribunal and Rules 39, 54, 54 *bis*, 75, and 79 of the Rules, the Chamber

DENIES Serbia's requests for protective measures of pseudonym and closed session testimony for the Witness and the redaction of portions of the transcripts of the Witness's testimony on the basis of national security interests;

REVOKES the provisionally applied protective measures of face and voice distortion, with the understanding that, for technical reasons, the distortion cannot be removed from the audio-visual recordings of the testimony;

LIFTS the Witness's provisionally assigned pseudonym;

LIFTS the provisional confidential status of exhibits D333 and D335;

LIFTS the confidentiality of those portions of the Witness's testimony in the transcripts of 16, 17, and 18 August 2011 which were provisionally held in closed session in connection with Serbia's Request for protective measures in relation to the Witness's testimony;

CLARIFIES that any portions of the Witness's testimony which were held in closed session in connection with other requests for protective measures shall remain confidential;

NOTES in this context that the Prosecution orally submitted that T. 13266 line 11 through T. 13267 line 21 and T. 13276 line 19 through T. 13279 line 5 should remain confidential as a result of the in-court use of exhibits P406 and P2452, respectively, both of which were provisionally admitted under seal;

INSTRUCTS the Prosecution to inform the Chamber, within two weeks of this decision, whether the confidentiality of exhibits P406 and P2452 and the aforementioned transcript portions can now be lifted in view of the Chamber's current decision and its decision of 7 October 2011;

FURTHER NOTES in this context that the Simatović Defence orally submitted that T. 13222 lines 8 through 17 should remain confidential and **INSTRUCTS** the Simatović Defence to inform the Chamber, within two weeks of this decision, whether the confidentiality of this portion of transcript can now be lifted;

ORDERS protective measures under Rule 79 of the Rules in respect of the former BIA operative mentioned in the transcript of 16 August 2011, T. 13193 lines 7 and 21, and T. 13194 line 18, and **INSTRUCTS** the Registry to redact the transcript and the audio-visual recordings of the Witness's testimony accordingly;

LIFTS the confidentiality of the corresponding audio-visual recordings in accordance with the above;

DÉCIDES that exhibit D334 shall remain under seal;

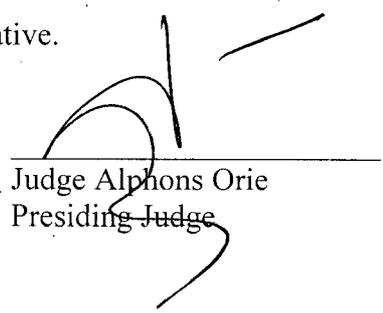
INSTRUCTS the Stanišić Defence to submit a public redacted version of exhibit D334 in accordance with the Decision on Prosecution Motion for Admission of Redacted Copies of Confidential Exhibits as Public Exhibits, filed on 23 August 2010;

INSTRUCTS the parties to review the exhibits tendered through the Witness which were admitted or marked for identification under seal in this case and notify the Chamber, within six weeks of the date of this decision, if the confidentiality of any of these documents can now be lifted;

REMINDS the parties of their continuous obligation to review the trial record and request status changes where appropriate; and

INSTRUCTS the Stanišić Defence to file a public summary of the Witness's Rule 92 *ter* statement within ten days of the date of this decision.

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



Judge Alphons Orié
Presiding Judge

Dated this nineteenth of January 2012.

At The Hague
The Netherlands

[Seal of the Tribunal]