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D 39598 - D 39590
17 April 2012

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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: 17 April 2012
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 17 April 2012

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION ON THE REPUBLIC OF SERBIA'S MOTION FOR
PROTECTIVE MEASURES CONCERNING THREE
WITNESSES**

Office of the Prosecutor

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The Government of the Republic of Serbia

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

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Mr Vladimir Petrović

I. PROCEDURAL HISTORY AND SUBMISSIONS

1. On 5 August 2011, the Republic of Serbia (“Serbia”) filed a motion (“Motion”) invoking Rules 54 *bis*, 75, and 79 of the Tribunal’s Rules of Procedure and Evidence (“Rules”) and requesting that the identity of witnesses Dragoslav Krsmanović (DST-040), Dušan Knežević (DST-044), and Milenko Lemić (DST-063) be protected and that they testify in closed session in order to protect Serbia’s national security interests.¹ Serbia noted that witnesses Krsmanović and Knežević were former members of its Ministry of Interior Departments of State Security and Public Security, respectively, while Lemić was a former member of its State Security Agency (“BIA”).² In response to a request made by the Stanišić Defence, the three witnesses were granted waivers by Serbia to testify on classified information concerning the operation of Serbia’s security services.³ On 15 August 2011, the Prosecution responded, opposing the Motion and stating that it represented a blanket and unsubstantiated request.⁴

2. On 17 August 2011, the Chamber invited Serbia to identify the specific national security interests it sought to rely on for the purpose of its Motion and to clarify whether any lesser protective measures would suffice to protect such interests.⁵

3. On 18 August 2011, the Chamber ordered that witness Knežević should testify provisionally with pseudonym and in closed session while the extent of his testimony’s confidentiality would be considered upon receipt of Serbia’s additional submissions.⁶ In addition, the Chamber decided that his testimony should be given without voice or face distortion noting that the witness had not requested protective measures himself.⁷

4. On 22 August 2011, Serbia filed further submissions (“Further Submissions”) reiterating its request for protection of the identity of all three witnesses by introducing their evidence in closed session.⁸ As for witness Knežević, Serbia requested the opportunity to review the transcript of his testimony and propose redactions to protect its national security interests.⁹

¹ The Republic of Serbia’s Motion for Protective Measures consisting of Closed Sessions for the Testimony of Three Witnesses, 5 August 2011 (Confidential).

² Motion, para. 2.

³ Motion, paras 1-2.

⁴ Prosecution Response to the Republic of Serbia’s Motion for Protective Measures consisting of Closed Session for the Testimony of Three Witnesses, 15 August 2011 (Confidential).

⁵ Invitation to the Republic of Serbia to File further Submissions in relation to its Request for Protective Measures for Three Witnesses (Witnesses DST-040, DST-044, and DST-063), 17 August 2011 (Confidential).

⁶ T. 13358-13359.

⁷ T. 13359.

⁸ Further Submission of the Republic of Serbia for Protective Measures for Three Witnesses in accordance with the Trial Chamber’s Invitation from 17 August 2011, 22 August 2011 (Confidential) (“Further Submissions”).

⁹ Further Submissions, paras 8-9.

5. On 24 August 2011, the Chamber, noting that there was no personal request for protective measures, ordered witness Lemić to testify in closed session without face or voice distortion.¹⁰
6. On 29 August 2011, the Prosecution responded to Serbia's Further Submissions, maintaining its objection to the use of protective measures as the Motion remained effectively unsubstantiated.¹¹ The Prosecution requested the Chamber not to apply provisional measures with regard to the forthcoming testimony of witness Krsmanović, to impose a time frame for Serbia to propose redactions to the transcripts of the testimony of witnesses Knežević and Lemić, and to allow it to respond to such proposals.¹²
7. On 1 September 2011, the Chamber decided that witness Krsmanović should testify with the same provisional protective measures as witnesses Knežević and Lemić.¹³
8. On 17 November 2011, the Chamber observed that, having heard the witnesses' testimony, Serbia's national security interests could be sufficiently protected by redactions to the transcripts of their testimony and invited Serbia to review such transcripts and propose redactions deemed necessary to protect its national security interests.¹⁴
9. On 9 January 2012, Serbia requested that witness Lemić's identity remain protected and submitted proposed redactions to the transcripts of the three witnesses' testimony with a view to protecting the identity of former members of the BIA and its predecessors, the identity of sources providing information to the security services, and certain methods used to collect, process, and distribute classified information.¹⁵ With regard to the need not to identify former members of the BIA and its predecessors, including witness Lemić, Serbia submitted that public disclosure of such information could jeopardise their safety and that, under the relevant domestic legislation, its security services would be obliged to provide such persons with protection which, as a result, would undermine the security services' capacity to engage in other activities.¹⁶ As to the protection of sources, Serbia referred to the risks created for the security and privacy of such persons and the

¹⁰ T. 13552-13553.

¹¹ Prosecution Response to Further Submission of the Republic of Serbia for Protective Measures for Three Witnesses in Accordance with the Trial Chamber's Invitation from 17 August 2011, 29 August 2011 (Confidential) ("Prosecution Response of 29 August 2011"), para. 2.

¹² Prosecution Response of 29 August 2011, paras 4-10.

¹³ T. 13812.

¹⁴ Second Invitation to the Republic of Serbia in Relation to its Request for Protective Measures for Witnesses DST-040, DST-044, and DST-063, 17 November 2011 (Confidential).

¹⁵ The Republic of Serbia's Submission for Protective Measures in relation to Witnesses DST-040, DST-044, and DST-063 and in accordance with the Trial Chamber I Second Invitation from 17 November 2011, 9 January 2012 (Confidential) ("Serbia's Submissions of 9 January 2012") and Annexes B-K1.

¹⁶ Serbia's Submissions of 9 January 2012, paras 7-12 and Annexes B1, C1, D1, E1-E2, E4, E6-E7, E9, F1-F3, F5-F6, G1-G3, H1, I1, J1, K1.

potential deterrent effect that disclosure would have on potential sources.¹⁷ Lastly, as to the protection of methods used by its security services, it referred to the potential danger of alerting terrorists to them and the fact that such information is classified under national legislation.¹⁸

10. On 23 January 2012, the Prosecution noted that Serbia had failed to substantiate the request concerning former, as opposed to active, BIA operatives and invited the Chamber to find the request for protection of the identity of witnesses Krsmanović and Knežević effectively withdrawn.¹⁹ No position was taken with regard to the request concerning sources and methods used by Serbia's security services.²⁰

II. APPLICABLE LAW

11. Article 20 (4) of the Tribunal's Statute ("Statute") and Rule 78 of the Rules provide that proceedings before a Trial Chamber shall be held in public unless otherwise provided.

12. Article 29 (1) of the Statute requires States to cooperate with the Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

13. Rule 54 of the Rules provides, in so far as relevant, that a Trial Chamber may issue such orders, summonses, subpoenas, warrants, and transfer orders as may be necessary for the purposes of the conduct of trial.

14. Rule 54 *bis* of the Rules reads, in so far as relevant, as follows:

"Orders Directed to States for the Production of Documents

- (A) A party requesting an order under Rule 54 that a State produce documents or information shall apply in writing to the relevant Judge or Trial Chamber [...]
- (F) The State, if it raises an objection [...] on the grounds that disclosure would prejudice its national security interests, shall file a notice of objection [...]. In its notice of objection the State:
 - (i) shall identify, as far as possible, the basis upon which it claims that its national security interests will be prejudiced; and
 - (ii) may request the Judge or Trial Chamber to direct that appropriate protective measures be made for the hearing of the objection, including in particular: [...]

¹⁷ Serbia's Submissions of 9 January 2012, Annexes E5-E6, E11, F4-F5.

¹⁸ Serbia's Submissions of 9 January 2012, Annexes E3, E8, E10.

¹⁹ Prosecution Response to the Republic of Serbia's Second Further Submission on Protective Measures in relation to Witnesses DST-040, DST-044, and DST-063, 23 January 2012 (Confidential) ("Prosecution Response of 23 January 2012"); paras 2, 4-7.

²⁰ Prosecution Response of 23 January 2012, para. 8.

(b) allowing documents to be submitted in redacted form, accompanied by an affidavit signed by a senior State official explaining the reasons for the redaction [...]

(I) An order under this Rule may provide for the documents or information in question to be produced by the State under appropriate arrangements to protect its interests”.

15. Rule 75 (A) of the Rules provides that a Chamber may order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused.

16. Rule 79 of the Rules provides that a Trial Chamber may order that the press and the public be excluded from all or part of the proceedings for reasons of: (i) public order or morality; (ii) safety, security, or non-disclosure of the identity of a victim or witness as provided in Rule 75; or (iii) the protection of the interests of justice.

17. The Appeals Chamber in *Prosecutor v. Krstić* clarified that applications for State documents, for which the State as the custodian of documents would have to produce them through its proper officer, would have to be made according to the procedure envisaged in Rule 54 *bis* of the Rules.²¹ However, where a party sought to have State officials testify as witnesses on what they saw or heard in the course of exercising their official functions it should do so by applying for a *subpoena* under Rule 54 of the Rules.²² If such officials would be questioned on matters concerning national security, a procedure analogous to that provided for by Rule 54 *bis* may need to be adopted.²³

18. The Appeals Chamber has reiterated in *Prosecutor v. Milošević* that the Rules had been intentionally drafted to incorporate safeguards for the protection of certain State interests in order to encourage the fulfilment of States’ obligations under the Tribunal’s Statute and Rules.²⁴ Accordingly, it held that a Trial Chamber has implicit authority pursuant to Article 29 of the Statute and Rules 39 and 54 *bis* 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.²⁵

²¹ *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Decision on Application for Subpoenas (“*Krstić* Decision on Subpoenas”), 1 July 2003, paras 23-24, 27.

²² *Krstić* Decision on Subpoenas, paras 22-27.

²³ *Krstić* Decision on Subpoenas, para. 28.

²⁴ *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR108*bis*.2, Decision on Request for Review, 20 September 2005 (Confidential) (“*Milošević* Decision”), para. 11.

²⁵ *Milošević* Decision, paras 11-12.

III. DISCUSSION

19. While Serbia invokes Rules 54 *bis*, 75, and 79 of the Rules as the basis for its Motion, the Chamber notes that the request concerns protective measures with regard to the testimony of former State officials concerning matters they saw or heard in the exercise of their official functions. The three witnesses were not subpoenaed under Rule 54 of the Rules and no order addressed to Serbia was made under Rule 54 *bis* of the Rules. Through its Motion, Serbia requested protection of its national security interests as affected by the testimony of the three witnesses to whom it had voluntarily granted waivers permitting them to testify before the Tribunal on matters involving the operation of its security services. In these circumstances, the Chamber finds that it has the implicit authority to assess whether Serbia's concerns about public disclosure of matters pertaining to its national security interests are indeed legitimate and, if so, grant the requested protective measures. Such authority is derived from Article 29 of the Statute requiring States to cooperate with the Tribunal and Rule 79 of the Rules allowing the Chamber to exclude the public from all or part of the proceedings for, *inter alia*, the protection of public order, the interests of witnesses as provided in Rule 75 and the interests of justice. In addition, this enables Serbia to benefit from safeguards protecting its demonstrated national security interests "analogous" to those envisaged by Rule 54 *bis* of the Rules concerning the production of documents.²⁶

20. Having considered the parties' submissions, the Chamber will consider in turn Serbia's requests for protective measures concerning (i) the identity of former members of Serbia's security services including the identity of the three witnesses; (ii) the identity of sources providing information to the security services; and (iii) certain means and methods employed by its security services as referred to in the relevant transcripts.

A. Identity of former agents of the security services including the three witnesses

21. With regard to Serbia's submission that disclosure of the identity and status of former agents would pose a threat to their safety, triggering as such an obligation for Serbia to protect them, the Chamber has previously held that, in order for such information to be protected under Rule 54 *bis* of the Rules, Serbia would have to demonstrate how a potential threat to the safety of former agents constitutes a national security interest, as opposed to a private security interest of such individuals.²⁷

²⁶ *Krstić* Decision on Subpoenas, para. 28.

²⁷ 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"), para. 29; Decision on the Republic of Serbia's Requests for Protective Measures in relation to Two Witnesses and Related Documents, 11 November 2011 (Confidential), para. 19; Decision on the Republic of Serbia's Motion for Protective Measures for Witness DST-074, 19 January 2012, paras 7-8.

Serbia has not demonstrated how public disclosure of the identity of the particular former agents and witnesses would prejudice its national security interests. The Chamber notes that, in any event, none of the witnesses made any suggestion as to any perceived threat to their safety and no other possible prejudice to Serbia's national security interests has been demonstrated. In these circumstances, the Chamber is unable to conclude that public disclosure of the identity of former agents, including the witnesses, would prejudice Serbia's national security interests or otherwise undermine the interests of justice.

B. Identity of sources

22. With regard to Serbia's request concerning the identity of sources providing information to its security services, the Chamber reiterates its considerations set out in its Decision of 7 October 2011 and finds that such information should be redacted in order to protect Serbia's national security interests.²⁸ Accordingly, the Chamber finds that the information identified by Serbia in its proposed redactions in Annexes E5, E11, and F4 to its submissions of 9 January 2012 should be protected. The Chamber notes that in Annexes E6 and F5 to its submissions of 9 January 2012, Serbia requested the redaction of the names of former agents as well as the names of sources. For the reasons set out in paragraph 21 above, the Chamber grants the request only in so far as the protection of the identity of sources is concerned and denies the request concerning the identity of former agents identified as such in other annexes to Serbia's submissions.²⁹

C. Methods employed by the security services

23. The Chamber considers that, in order for methods employed by Serbia's security services to be granted confidentiality so as to protect Serbia's national security interests, there must be a clear and identifiable link between public disclosure and any ensuing prejudice to such interests. As the Chamber previously noted in the context of a request under Rule 54 *bis* of the Rules, this could be the case, for instance, in the event of disclosure capable of endangering ongoing intelligence gathering efforts or disclosure identifying cooperation with foreign intelligence services.³⁰

24. The redactions proposed in Annexes E3 and E8 to Serbia's Submissions of 9 January 2012 concern general information about the compilation of analytical reports, the use of discussions with persons from areas with deteriorated security to obtain information and the use of pseudonyms for persons under investigation. The Chamber does not find that, as such, disclosure of this information would result in any prejudice to national security interests.

²⁸ 7 October 2011 Decision, para. 27.

²⁹ In particular, Annexes B1 and E9 to Serbia's submissions of 9 January 2012.

³⁰ 23 November 2011 Decision, para. 14; 7 October 2011 Decision, para. 29.

25. The Chamber notes that in Annex E10 to Serbia's Submissions of 9 January 2012, Serbia sought protection of information concerning methods of gathering intelligence which identifies contacts with foreign intelligence services. Given that public disclosure of such information would most likely undermine Serbia's cooperation with foreign intelligence services and could potentially affect another State's national security interests, the Chamber is prepared to accept that public disclosure of this information could prejudice Serbia's national security interests and, accordingly, grants this part of the request.

IV. DISPOSITION

26. For the foregoing reasons, pursuant to Article 29 of the Statute, Rule 54, and Rule 79 read in conjunction with Rule 54 *bis* of the Rules, the Chamber hereby

DENIES Serbia's request for protective measures concerning the identity of witnesses Lemić, Krsmanović, and Knežević and the identity of the former members of Serbia's security services identified in the annexes to Serbia's submissions of 9 January 2012;

LIFTS the protective measures ordered provisionally with regard to protection of the identity of witnesses Lemić, Krsmanović and Knežević;

INSTRUCTS the Registry to lift the confidentiality of pseudonym sheets D370, D387 and D408 concerning the above witnesses;

INSTRUCTS the Stanišić Defence to submit a public summary of Witnesses Krsmanović and Knežević's Rule 92 *ter* statements within ten days from the date of this decision;

GRANTS Serbia's request for redactions to parts of the transcripts of the three witnesses' testimony identifying sources used by its security services;

GRANTS Serbia's request for redactions to parts of the above transcripts identifying methods employed by its security services in part and, in particular, in so far as information identifying contacts with foreign intelligence services is concerned;

INSTRUCTS the Registry to omit the following from the public version of the transcript of the proceedings and to edit the corresponding parts of the audio-visual record:

- (i) information concerning sources identified in Serbia's proposed redactions set out in Serbia's Submissions of 9 January 2012 and, in particular, Annex E5, Annex E11,

Annex F4, Annex F5 only in respect of lines 15-21 of T. 13700 and lines 22 and 25 of T. 13701, and Annex E6 only in respect of line 20 of T. 13586;

- (ii) information concerning methods employed by Serbia's security services that appear in the proposed redactions set out in Annex E10 to the above submissions;

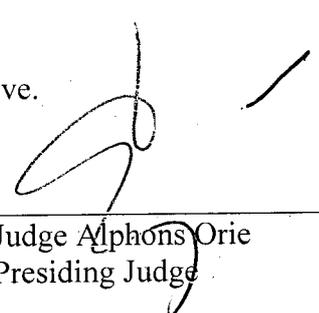
LIFTS the provisional order for confidentiality of the remainder of the transcript of the above witnesses' testimony and the corresponding audio-visual record of such testimony;

CLARIFIES that any portions of the witnesses' testimony held in private or closed session in connection with any decision on or request for protective measures or any other confidential matter, including the discussion in court of under-seal documents, shall remain confidential;

INSTRUCTS the parties to review the exhibits tendered through these witnesses 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 be lifted; and

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

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



Judge Alphons Orie
Presiding Judge

Dated this seventeenth of April 2012
At The Hague
The Netherlands

[Seal of the Tribunal]