

IT-03-69-T
D 44541 - D 44535
19 October 2012

44541
fig.

**UNITED
NATIONS**



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 October 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 October 2012

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION ON SERBIA'S REQUESTS FOR PROVISIONAL
PROTECTIVE MEASURES
IN RELATION TO DEFENCE DOCUMENTS**

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

(i) Requests in relation to documents in the possession of the Stanišić Defence

1. On 20 June and 3 July 2012, the Republic of Serbia ("Serbia") requested provisional protective measures in relation to a total of 34 documents in the possession of the Stanišić Defence ("Defence") which had originated from the Serbian State Security Agency ("BIA") and the authenticity of which Serbia had confirmed at least to a high degree of probability ("Request of 20 June 2012" and "Request of 3 July 2012", respectively).¹ Serbia requested to be provided an opportunity to make further submissions upon notification by the Defence of its intention to use the documents in the proceedings and that the documents be provisionally admitted under seal and used only in closed session pending a final decision by the Chamber.²

2. On 2 July 2012, the Prosecution responded to the Request of 20 June 2012, objecting on the basis that Serbia lacked standing to request protective measures under Rule 54 *bis* of the Tribunal's Rules of Procedure and Evidence ("Rules") in relation to the 30 documents subject to the request, because Serbia had not provided them to the Defence.³

3. On 5 July 2012, Serbia filed a reply, reiterating its request for provisional protective measures.⁴ Serbia argued that it has standing to request protective measures for documents originating from its archive which it confirms have a high probability of authenticity.⁵ Serbia pointed out that public use of documents can jeopardize national security interests regardless of how the parties obtained them and submitted that Rule 54 *bis* of the Rules exists to protect the national security interests of States which cooperate with the Tribunal.⁶ Serbia further submitted that it has cooperated with the Tribunal in good faith and that it would have provided these documents voluntarily, had the documents not previously been taken from its archives.⁷ Serbia contended that depriving a State of standing to request protective measures where documents are

¹ The Republic of Serbia's Request for Protective Measures for Thirty Documents in the Possession of the Defence Team of the Accused Jovica Stanišić, 20 June 2012 (Confidential); The Republic of Serbia's Request for Protective Measures for Four Documents in the Possession of the Defence Team of the Accused Jovica Stanišić, 3 July 2012 (Confidential).

² Request of 20 June 2012, paras 7-9; Request of 3 July 2012, paras 7-9.

³ Prosecution Response to the Republic of Serbia's Request for Protective Measures for Thirty Documents in the Possession of the Defence Team of the Accused Jovica Stanišić, 2 July 2012 (Confidential), paras 2, 6.

⁴ The Republic of Serbia's Response to the Prosecution's Motion from 2 July 2012 regarding Serbia's Request for Protective Measures for Thirty Documents In the Possession of the Defence Team of the Accused Jovica Stanišić, 5 July 2012 (Confidential) ("Reply"), paras 3-4, 19.

⁵ Reply, paras 6-9, 11.

⁶ Reply, paras 9, 12-13.

⁷ Reply, paras 12, 15.

obtained from its archives outside of the official channels would discourage States from acting upon requests to confirm authenticity.⁸

4. On 17 July 2012, the Prosecution responded to the Request of 3 July 2012, reiterating that Rule 54 *bis* of the Rules does not provide a legal basis for requesting protective measures for documents which were not provided by a State.⁹ The Prosecution deferred to the Chamber's discretion as to whether to grant protective measures for such documents under its inherent power to issue orders necessary for the conduct of the trial.¹⁰ However, the Prosecution argued that Serbia would have to provide a stronger basis for asserting that the documents originated from its archives instead of relying on general factors as indicia of authenticity (such as seals, log numbers, stamps, or signatures).¹¹ According to the Prosecution, protective measures could be appropriate where Serbia can confirm that an additional copy of the document exists in its archives or where the document's markings suggest authenticity and it is referenced in a logbook in Serbia's archives.¹² The Prosecution requested that the Chamber either deny the Request of 3 July 2012, or deny it without prejudice and require Serbia to provide additional details on the authenticity of the documents.¹³

(ii) Request in relation to documents provided to the Defence

5. On 3 July 2012, Serbia requested provisional protective measures in relation to eleven documents it had provided to the Defence.¹⁴ Serbia requested to be provided an opportunity to make further submissions upon notification by the Defence of its intention to use the documents in the proceedings and that the documents be provisionally admitted under seal and used only in closed session pending a final decision by the Chamber.¹⁵

6. On 17 July 2012, the Prosecution responded, not opposing the request.¹⁶

⁸ Reply, paras 10, 15.

⁹ Prosecution Response to the Republic of Serbia's Request for Protective Measures for Four Documents in the Possession of the Defence Team of the Accused Jovica Stanišić, 17 July 2012 (Confidential) ("Response of 17 July 2012"), paras 5-7.

¹⁰ Response of 17 July 2012, para. 8.

¹¹ Response of 17 July 2012, paras 9-11.

¹² Response of 17 July 2012, para. 11.

¹³ Response of 17 July 2012, para. 13.

¹⁴ The Republic of Serbia's Request for Protective Measures for 11 Documents Provided to the Defence Team of the Accused Jovica Stanišić, 3 July 2012 (Confidential) ("Second Request of 3 July 2012").

¹⁵ Second Request of 3 July 2012, paras 5, 7.

II. APPLICABLE LAW

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

8. Rule 54 *bis* of the Rules reads, in relevant part:

"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: [...]
 - (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".

9. In *Prosecutor v. Milošević*, the Appeals Chamber 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.¹⁷ The Appeals Chamber held 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.¹⁸

10. Rule 54 of the Rules provides, in relevant part, that a Trial Chamber may issue such orders as may be necessary for the conduct of the trial.

¹⁶ Prosecution Response to the Republic of Serbia's Request for Protective Measures for 11 Documents Provided to the Defence Team of the Accused Jovica Stanišić, 17 July 2012 (Confidential), para. 2.

¹⁷ *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR108*bis*.2, Decision on Serbia and Montenegro's Request for Review, 20 September 2005 (Confidential) ("*Milošević* Decision"), paras 10-12.

¹⁸ *Milošević* Decision, paras 10-11.

III. DISCUSSION

11. Serbia requests provisional protective measures for certain documents pending notification of their use during the proceedings (“Requests for Provisional Protective Measures”). Serbia provided a number of these documents to the Defence voluntarily. Serbia’s standing to request protective measures in relation to these documents is not in dispute.

12. The remainder of the documents are in the possession of the Defence and were not provided by Serbia. The Prosecution objects that Serbia does not have standing to request provisional protective measures for these documents under Rule 54 *bis* of the Rules.

13. Pursuant to Rule 54 *bis* of the Rules, a Chamber may direct appropriate protective measures to documents produced by a State pursuant to an order of the Chamber. The Appeals Chamber has held that a Chamber may also order protective measures pursuant to Rule 54 *bis* in relation to documents produced by a State voluntarily.

14. Neither Rule 54 *bis* of the Rules, nor the Appeals Chamber case law cited above explicitly provide for protective measures for documents not provided by a State. Nevertheless, per Appeals Chamber case law, the Chamber understands the Rules to incorporate safeguards for the protection of certain State interests in order to encourage the fulfilment of States’ obligations to cooperate with the Tribunal under Article 29 of the Statute.

15. Public disclosure of a document containing sensitive information can jeopardise a State’s national security interests irrespective of the origins of that document or the manner in which it was provided to the parties. As a result, a State may be able to demonstrate that public disclosure of a document which it did not provide would jeopardise its national security interests. In such cases, denying a State standing to request protective measures and disclosing the document publicly would disregard the safeguards for the protection of certain State interests incorporated in the Rules and discourage States from cooperating with the Tribunal, including from confirming the origins or authenticity of documents containing sensitive information. For these reasons, the Chamber concludes that pursuant to Rule 54 *bis* of the Rules, it may direct appropriate protective measures to documents not provided by a State, in the interests of protecting a State’s demonstrated national security interests.

16. However, the Chamber notes that the effect of any such protective measures ordered pursuant to Rule 54 *bis* of the Rules may be limited. An order for protective measures under Rule 54 *bis* of the Rules is necessarily limited to the context of the Tribunal proceedings. For instance, a

Chamber may order that a document be placed under seal and be used only in private or closed session. A party to the proceedings who publicly discloses the document would be in breach of the Chamber's orders. When a State requests protective measures for documents provided to the parties by a source other than that State, protective measures ordered by the Chamber may not necessarily protect against public disclosure by the source, who possesses the documents, having obtained them outside of the context of Tribunal proceedings, and who may not be aware of the Chamber's orders. Such public disclosure and the manner in which that source obtained the documents would primarily be an issue to be resolved between the State and that source.

17. Finally, the issue of whether a document originated from a State may be a factor in determining whether public disclosure thereof would in fact affect that State's national security interests. However, the issue is not determinative of a State's standing to request provisional protective measures. Consequently, the Chamber will not request further information from Serbia in this respect at this stage and finds that Serbia may request protective measures for these documents.

18. As per the ongoing practice in the present case, the Chamber expects the parties to request provisional private session when using any documents in court which are subject to a pending or prospective request for protective measures and to request, when tendering such documents, that they are provisionally placed under seal.

IV. DISPOSITION

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

GRANTS Serbia's Requests for Provisional Protective Measures, in part;

REMINDS the parties to request provisional private session when using any documents in court which are subject to a pending or prospective request for protective measures and to request, when tendering such documents, that they are provisionally placed under seal and **INSTRUCTS** the parties to apply this approach to the documents subject to Serbia's Requests for Provisional Protective Measures ("Documents");

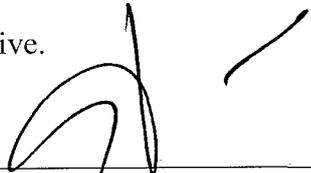
INSTRUCTS the parties to notify Serbia of which of the Documents they have used in court or tendered into evidence within two weeks of the date of filing of this decision (insofar as they have not already done so);

INVITES Serbia to file reasoned requests for protective measures within three weeks of having received such notification from the parties;

INVITES Serbia to distinguish in future requests for protective measures between active and former BIA operatives and between persons who are presently subject to monitoring by the BIA and persons who were merely mentioned in BIA documents; and

INSTRUCTS the parties to file any responses to Serbia's above requests within two weeks of the date of the filing of the entirety of Serbia's submissions (including annexes).

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



Judge Alphons Orié
Presiding Judge

Dated this Nineteenth day of October 2012

At The Hague
The Netherlands

[Seal of the Tribunal]