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D 39568 - D 39563
12 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: 12 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: 12 April 2012

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION ON THE REPUBLIC OF SERBIA'S REQUEST FOR
PROTECTIVE MEASURES FOR FOUR 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

1. On 19 January 2012, the Republic of Serbia (“Serbia”) filed a request for protective measures in relation to four documents provided to the Prosecution in response to Request for Assistance number 1695-A (“Request”).¹ On 2 February 2012, the Prosecution responded (“Response”), objecting to Serbia’s request in part.² The Defence did not file a response.

2. Serbia requests protective measures in relation to four documents (“Documents”), namely exhibits P3025-P3028.³ It proposes to have the Documents redacted so as to withhold from the public (i) the names of the Serbian State Security Agency (“BIA”) officials responsible for creating the Documents (“Authors”), (ii) the sources from whom the information in the Documents originated (“Sources”), and (iii) the recipients of the Documents (“Recipients”).⁴ Serbia contends that similar protective measures were granted in relation to the Documents in the *Lukić and Lukić* case.⁵ Serbia submits that public disclosure of the identities of the Authors affects the security of these individuals and its national security interests.⁶ The Request makes clear that the Authors for whom protective measures are sought are former members of the BIA.⁷ In respect to the Sources, Serbia submits that public disclosure would affect its national security interests as it would discourage potential sources from providing information to the State and would jeopardize the personal safety and safety of the properties of both the Source and its family members.⁸ Regarding the Recipients, Serbia further argues that public disclosure jeopardizes its national security interests as it could reveal the organisational structure and reporting system within the security service.⁹

3. The Prosecution does not object to Serbia’s proposed redactions in relation to the Authors and the Sources.¹⁰ The Prosecution objects to the redaction of the Recipients,¹¹ submitting that Serbia’s assertion that public disclosure of the Recipients could reveal the organizational structure and reporting system within the BIA and thus jeopardize its national security interests is unsubstantiated.¹² The Prosecution further notes that Serbia has also proposed to redact certain

¹ Republic of Serbia’s Request for Protective Measures for four Documents Provided to the Office of the Prosecutor in Response to a Request for Assistance Number 1695-A, 19 January 2012 (Confidential).

² Prosecution Response to the Republic of Serbia’s Request for Protective Measures for Four Documents Provided to the Office of the Prosecutor’s Request for Assistance Number 1695-A, 2 February 2012 (Confidential), paras 2, 4-6.

³ Request, para. 2.

⁴ Request, paras 4, 7, Annex A.

⁵ Request, para. 6.

⁶ Request, Annex A.

⁷ Ibid.

⁸ Ibid.

⁹ Ibid.

¹⁰ Response, paras 2, 4-6.

¹¹ Response, paras 2, 7, 10.

¹² Response, para. 7.

initials, which appear to be related to the Authors, and some of the Documents' places and dates of filing.¹³ The Prosecution only opposes these latter redactions.¹⁴

II. APPLICABLE LAW

4. Article 20 (4) of the Statute and Rule 78 of the Rules provide that hearings and proceedings at the Tribunal shall be held in public unless otherwise provided.¹⁵

5. Article 29 (1) of the Tribunal's 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.

7. 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. Rule 75 (F) of the Rules provides that once protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal, such protective measures shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal, unless and until they are rescinded, varied, or augmented.

8. 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 public order or morality; safety, security, or non-disclosure of the identity of a victim or witness as provided in Rule 75; or the protection of the interests of justice.

9. The Appeals Chamber has 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

¹³ Ibid.

¹⁴ Response, para. 10.

¹⁵ 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".

interests.¹⁶ The Appeals Chamber has further held that protective measures granted under Rule 54 *bis* of the Rules in a specific case do not apply *mutatis mutandis* in other proceedings.¹⁷ It is for the Chamber seised of the State's request to determine whether national security interests warrant protective measures in the specific case.¹⁸ In making this determination, the Trial Chamber may be guided by prior decisions on the same documents rendered in other proceedings.¹⁹

III. DISCUSSION

10. The Chamber notes that non-redacted versions of the Documents have been admitted into evidence under seal as exhibits P3025-P3028.²⁰

11. In the *Lukić and Lukić* case the Trial Chamber decided that the arguments, raised by Serbia before it, demonstrated that public disclosure of the Documents could jeopardize Serbia's national security interests ("Lukić Order").²¹ Accordingly, it granted protective measures pursuant to Rule 54 *bis* of the Rules in relation to Authors, Sources, and Recipients.²² As set out above, protective measures granted under Rule 54 *bis* of the Rules in a specific case do not apply *mutatis mutandis* in the present proceedings. The Chamber, however, has considered the Lukić Order in its determination of whether protective measures should be granted.

12. In respect of the Authors, who are former BIA members, the Chamber recalls its previous finding that in order for the identities of former BIA members to be protected under Rule 54 *bis*, Serbia would have to demonstrate how a potential threat to their safety constitutes a national security interest, as opposed to a private security interest of such individuals.²³ Serbia has not explained in its Request how public disclosure of the identities of the Authors would affect its national security interests. Although the Prosecution does not oppose the redaction in relation to the Authors, the Chamber is unable to conclude, on the basis of Serbia's submissions, that such information should be redacted.

¹⁶ *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), paras 11-12.

¹⁷ *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-AR108*bis*.2, 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 (Confidential), para. 18.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ T. 15130, 15149-15150.

²¹ *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Order on Serbia's Second and Third Motions for Protective Measures, 27 November 2008 (Confidential), para. 20.

²² Lukić Order, paras 20, 27.

²³ Decision on the Republic of Serbia's Requests for Protective Measures in Relation to Documents Provided to the Prosecution, 7 October 2011 (Confidential) ("October 2011 Decision"), para. 29.

13. In relation to redacting the Sources, the Chamber has previously found that Serbia has demonstrated how information of this category concerns its national security interests.²⁴ Accordingly, information revealing the identity of a BIA source should be redacted in order to protect Serbia's national security interests.

14. With regard to the Recipients, Serbia has failed to demonstrate how public disclosure would reveal the organisational structure and the system of reporting that is operational within the BIA or how public disclosure would affect Serbia's national security interests. Serbia has also failed to explain why some of the Documents' places and dates of filing would need to be redacted. In the absence of sufficiently detailed submissions, the Chamber is unable to determine that this information should be protected under Rule 54 *bis* of the Rules. Accordingly, the Chamber will not grant protective measures for this information.

15. The Chamber would be assisted in fully ensuring the granted measures, also in relation to other evidentiary material, if the Prosecution provided it with a list of names of persons to be redacted from the Documents pursuant to this decision.

IV. DISPOSITION

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

GRANTS the Request in part;

ORDERS protective measures for identifying information in relation to the Sources;

ORDERS that exhibits P3025-P3028 shall remain under seal;

INSTRUCTS the Prosecution to prepare versions of P3025-P3028 redacted in accordance with this decision for use during trial proceedings;

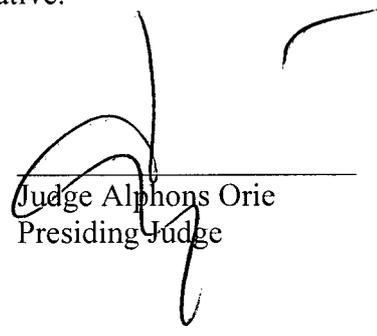
INSTRUCTS the Prosecution to file an overview of the names of persons to be redacted pursuant to this decision within two weeks of this decision;

INSTRUCTS the Prosecution to submit public redacted versions of P3025-P3028 in accordance with the Decision on Prosecution Motion for Admission of Redacted Copies of Confidential Exhibits as Public Exhibits, filed on 23 August 2010; and

²⁴ October 2011 Decision, para. 27.

DENIES the remainder of the Request.

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



Judge Alphons Orié
Presiding Judge

Dated this Twelfth of April 2012
At The Hague
The Netherlands

[Seal of the Tribunal]