

IT-09-92-T
D 47756 - D 47751
30 November 2012

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**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-09-92-T
Date: 30 November 2012
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 30 November 2012

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON URGENT PROSECUTION MOTION FOR
PROTECTIVE MEASURES AND CONDITIONS FOR
WITNESSES RM-055, RM-120, RM-163, AND RM-176
PURSUANT TO RULE 70**

Office of the Prosecutor

Mr Dermot Groome
Mr Peter McCloskey

Counsel for Ratko Mladić

Mr Branko Lukić
Mr Miodrag Stojanović

I. PROCEDURAL HISTORY AND SUBMISSIONS OF THE PARTIES

1. On 19 November 2012, the Prosecution filed a motion (“Motion”) requesting protective measures and certain conditions for the testimony of four witnesses pursuant to Rule 70 of the Tribunal’s Rules of Procedure and Evidence (“Rules”).¹ The Defence responded to the Motion on 23 November 2012 (“Response”), opposing it.²

2. In the Motion, the Prosecution requests that (i) Witnesses RM-163, RM-176, RM-120, and RM-055 (“Witnesses”) be granted the protective measures of pseudonym and face and voice distortion; (ii) the Chamber allow, upon request, to hear certain parts of the Witnesses’ testimony in private session in order to protect the Witnesses’ identities or the Rule 70 provider’s interests, including national security interests; (iii) a representative of the Rule 70 provider be allowed to be present during the Witnesses’ testimony; and (iv) any private session testimony of the Witnesses not be disclosed to parties in other cases without the consent of the Rule 70 provider.³ Lastly, the Prosecution requests leave to exceed the word limit.⁴ According to the Prosecution, these conditions do not prejudice the Accused as the Witnesses’ identities are known to him, he is in possession of all of their prior statements and testimony, and will have an opportunity to cross-examine the Witnesses.⁵

3. The Defence contends that the Prosecution’s late filings reduce the time available to the Defence to adequately respond.⁶ It submits that the Prosecution adopts an excessively broad interpretation of Rule 70 by not providing any justifications for the protective measures sought.⁷ Furthermore, the Defence submits that the Accused’s right to a public trial is infringed should the Motion be granted.⁸ Lastly, it submits that the Witnesses are to provide critical testimony which “must be confronted freely and without restrictions by the defence”.⁹

¹ Urgent Prosecution Motion for Protective Measures and Conditions for Witnesses RM-055, RM-120, RM-163, and RM-176 Pursuant to Rule 70, 19 November 2012 (Confidential).

² Defence Response to Urgent Prosecution Motion for Protective Measures and Conditions for Witnesses RM-055, RM-120, RM-163, and RM-176 Pursuant to Rule 70, 23 November 2012 (Confidential), paras 2, 18.

³ Motion, paras 2, 24.

⁴ Motion, para. 4.

⁵ Motion, para. 12.

⁶ Response, paras 7-9.

⁷ Response, paras 11-12.

⁸ Response, para. 14.

⁹ Response, para. 16.

II. APPLICABLE LAW

4. Rule 70 of the Rules provides, in relevant part, as follows:

(B) If the Prosecutor is in possession of information which has been provided to the Prosecutor on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information and shall in any event not be given in evidence without prior disclosure to the accused.

(C) If, after obtaining the consent of the person or entity providing information under this Rule, the Prosecutor elects to present as evidence any testimony, document or other material so provided, the Trial Chamber, notwithstanding Rule 98, may not order either party to produce additional evidence received from the person or entity providing the initial information. [...]

(D) If the Prosecutor calls a witness to introduce in evidence any information provided under this Rule, the Trial Chamber may not compel that witness to answer any questions relating to the information or its origin, if the witness declines to answer on grounds of confidentiality.

5. The Chamber has the authority to assess whether information has been provided in accordance with Rule 70 of the Rules, but can limit itself to an examination of whether the information was in fact provided on a confidential basis.¹⁰

6. Under Rule 70 of the Rules, the provider of the information controls its confidentiality and makes its own determination that this material should be subject to protection.¹¹ However, when the question arises of tendering that material into evidence in a manner which involves a departure from the normal arrangements in court, then it is for the Chamber to decide whether it is appropriate, having regard to the need to ensure that the trial is fair, to allow the evidence to be presented in accordance with the conditions stipulated by the Rule 70 provider.¹²

III. DISCUSSION

7. At the outset, considering that the Motion deals with four witnesses, the Chamber grants the Prosecution's request to exceed the word limit. The Chamber further urges the Prosecution to file motions in a timely manner so as to avoid expedited responses and decisions.

8. The Chamber accepts that the purpose of Rule 70 of the Rules is to allow states and other entities or persons to share information with parties to the proceedings before the Tribunal on a

¹⁰ *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR108bis & AR73.3, Decision on the Interpretation and Application of Rule 70, 23 October 2002 (Confidential), para. 29.

¹¹ *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-AR108bis.2, Decision on Request of the United States of America for Review, 12 May 2006, para. 35.

¹² *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-AR73.1, Decision on Interlocutory Appeal Against Second Decision Precluding the Prosecution from Adding Wesley Clark to its Rule 65 *ter* Witness List, 20 April 2007, para. 18; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Decision on the Prosecution Motion for Rule 70 Conditions for Three Witnesses, 30 November 2009 (Confidential), para. 13.

confidential basis. A provider of such information may also refuse consent that this information be used as evidence at trial. At the same time, once a Rule 70 provider has permitted that certain information be used as evidence at trial, it should not be up to the provider to determine selectively which Accused before the Tribunal may have access to that information. In that respect, the Chamber will pay specific attention to any conditions imposed when first permitting the information's use at trial.

9. Based on the Prosecution's statement that the proffered material was provided under Rule 70 and that the Witnesses have testified in other trials under similar conditions, the Chamber is satisfied that Rule 70 applies. The Prosecution is under no obligation to provide additional justifications as submitted by the Defence.

10. As set out above, the Chamber must assess whether, in the circumstances of the present case, the conditions stipulated by the Rule 70 provider are consistent with the Accused's right to a fair trial or should lead to the barring of the proposed evidence.

11. As for the first condition, the suggested protective measures of pseudonym and face and voice distortion do not impact negatively on the Accused's right to a fair trial. The identities of the Witnesses are known to him and his Defence team. The Chamber further considers that the initial conditions by the Rule 70 provider when giving up its prerogative on the use of the information in previous cases were stricter than what is requested in the Motion.¹³ Under these circumstances, the Chamber accepts the first condition.

12. As for the second condition, namely the Prosecution's request that the Chamber allow, upon request, to hear certain parts of the Witnesses' testimony in private session in order to protect the Witnesses' identities or the Rule 70 provider's national security interests, the Chamber expects the parties, or the Rule 70 provider, to make such requests at the appropriate time during the testimony. Partial private session testimony in order to protect the identity of the Witnesses is the natural consequence of having granted protective measures. Partial private session testimony in order to protect the Rule 70 provider's interests, including national security interests, should only be requested sparsely. In light of the Rule 70 provider's initial stricter conditions in previous cases, as well as Rule 70 (D) of the Rules, the Chamber accepts the second condition. The Defence's

¹³ See *Prosecutor v. Perišić*, Case No. IT-04-81-PT, Decision on Prosecution's Rule 70 Motion for Protective Measures for Witnesses MP-072, MP-408, MP-409, MP-433, and MP-434, 4 June 2008 (Confidential), p. 2; *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Decision on Prosecution's Application for Rule 70 Conditions for Testimony of Witness W-46, 12 March 2007; *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Decision on Prosecution's Application for Rule 70 Conditions for Testimony of Witness W-156 and Prosecution Motion for Admission of Witness Statement Pursuant to Rule 92 *ter*, 23 April 2007 (Confidential), p.

submissions alleging that the Accused's right to a public trial are infringed are terse and barely comprehensible. Should large portions of the Witnesses' testimony eventually be received in private session, the Chamber may consider whether this impacts upon the public nature of the trial to such an extent as to violate the right of the Accused to a fair trial. The Defence has further not demonstrated how the proposed conditions would hinder the Defence to "confront [the Witnesses] freely and without restrictions".

13. As for the third condition, the Chamber sees no reason to disallow a representative of the Rule 70 provider to be present during the testimony of the Witnesses. In fact, the presence of one of its representatives may be conducive to resolving any matters in relation to whether certain questions may be answered by the Witnesses in open session. The Chamber thus accepts the third condition.

14. In relation to the last condition, namely that any private session testimony of the Witnesses not be disclosed to parties in other cases without the consent of the Rule 70 provider, the Chamber notes that the Tribunal's case-law imposes a duty on the parties to seek a provider's consent prior to each disclosure. Accordingly, the Chamber accepts the fourth condition.

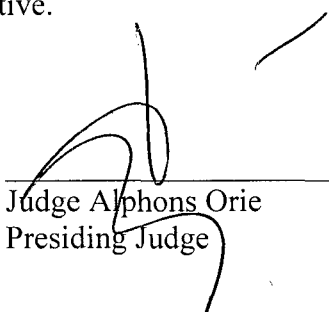
2; *Prosecutor v. Galić*, Case No. IT-98-29-T, Decision on the Prosecutor's Request for Protective Measures in Respect of Witnesses W and Y, 7 June 2002 (Confidential), p. 2.

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IV. DISPOSITION

15. For the foregoing reasons, pursuant to Rule 70 of the Rules, the Chamber
GRANTS the Prosecution's request to exceed the word limit in the Motion;
GRANTS the Motion; and
INSTRUCTS the Registry to inform the Rule 70 provider of this decision.

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



Judge Alphons Orié
Presiding Judge

Dated this Thirtieth day of November 2012
At The Hague
The Netherlands

[Seal of the Tribunal]