



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-02-60-A  
Date: 13 December 2007  
Original: English

**IN TRIAL CHAMBER I**

**Before:** Judge Alphons Orie, Presiding  
Judge Christine Van Den Wyngaert  
Judge Bakone Justice Moloto

**Registrar:** Mr. Hans Holthuis

**Decision of:** 13 December 2007

**PROSECUTOR**

v.

**VIDOJE BLAGOJEVIĆ  
AND  
DRAGAN JOKIĆ**

***PUBLIC***

**DECISION ON THE REQUEST OF THE COURT OF  
BOSNIA AND HERZEGOVINA FOR VARIATION OF  
PROTECTIVE MEASURES PURSUANT TO RULE 75(H)**

**The Office of the Prosecutor**

Mr. Norman Farrell  
Mr. Antoinette Issa  
Ms. Marie-Ursula Kind  
Mr. Matteo Costi

**Court of Bosnia and Herzegovina**

Panel seized of *Prosecutor v. Mitrović et al.*  
(Case No. X-KR/05/24)

**Counsel for the Accused**

Mr. Vladimir Domazet for Vidoje Blagojević  
Mr. Peter Muphy and Ms. Chrissa Loukas for Dragan Jokić

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## I. INTRODUCTION

1. Trial Chamber I is seized of the “Request for assistance”, dated 15 August 2007 but filed before the President of the Tribunal on 24 August 2007 (“Request”) by the Panel of the Court of Bosnia and Herzegovina (“Panel”) hearing the case *Prosecutor v. Mitrović et al.* (Case No. X-KR/05/24) (“*Mitrović et al.*”).<sup>1</sup> On 24 August 2007, the President of the Tribunal, considering Rule 75(H) of the Rules of Procedure and Evidence (“Rules”) as amended on 12 July 2007, assigned Trial Chamber I “to consider the Application from the Panel of the Court of Bosnia and Herzegovina seeking the variation or rescinding of protective measures granted with regard to certain witnesses in *Prosecutor v. Vidoje Blagojević and Dragan Jokić* (Case No. IT-02-60-T).<sup>2</sup> On 20 September 2007, the Presiding Judge of Trial Chamber I composed a Bench for this purpose.<sup>3</sup>

2. The Request is submitted pursuant to Rule 75(H) and the Panel seeks to be provided “with the witness testimonies, which are available in BCS language” of the following witnesses from *Prosecutor v. Vidoje Blagojević and Dragan Jokić*:

- Richard Butler, testimony on 10, 12, 17, 24, and 26 November 2003;
- Dragan Mirković, testimony on 21 April 2004;
- Petar Salapura, testimony on 8 and 9 June 2004;
- Dragomir Keserović, testimony on 10 June 2004;
- Witness P130, testimony on 26 and 27 January 2004;
- Witness P206, testimony on 27 February 2004; and
- Witness P210, testimony on 26 February 2004.<sup>4</sup>

The Panel, noting that protective measures apply to some of the witnesses, submits that:

during the presentation of its evidence, the Defense Counsel for the accused faced a situation in which it could not familiarize itself with all the available information that would be important for the adequate preparation of the defense because it did not have access to the ICTY trial transcripts. Hence, the purpose of the present application is to allow the Defense Counsel for the accused [...] to make adequate preparations so that we can observe the right to defense as one of the fundamental aspects of the right to a fair trial.<sup>5</sup>

The Panel further submits that the testimonies:

may be relevant to this case because the assumption is that those witnesses testified in part about facts that could be linked to the charges against the accused in the case pending before the Court of BiH. Upon receipt of the testimonies, the Defense would have an opportunity to consider and

<sup>1</sup> The Panel also requests certain testimonies from *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-T and the Request was cross-filed in that case.

<sup>2</sup> Order assigning a Trial Chamber to consider the variation or rescinding of protective measures, filed 24 August 2007.

<sup>3</sup> Order regarding composition of Trial Chamber, filed 20 September 2007.

<sup>4</sup> Request, p. 1. Witnesses P130, P206 and P210 testified with pseudonym and image distortion, Hearing, 26 January 2004, T. 6577 (Witness P130); Hearing, 27 February 2004, T. 7463 (Witness P206); Hearing, 26 February 2004, T. 7368 (Witness P210). Furthermore, parts of the testimonies of all requested testimonies were in private session.

<sup>5</sup> Request, p. 1.

possibly use the testimonies in accordance with Article 5 of the Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Use of Evidence Collected by the ICTY in the Proceedings before the Courts in BiH.<sup>6</sup>

Lastly, the Panel requests that “[a]s the Defense has already commenced with the presentation of its evidence, it is necessary that the requested testimonies be delivered to us at your earliest convenience, preferably by 20 September 2007.”<sup>7</sup>

## II. DISCUSSION

3. Following its amendment on 12 July 2007, Rule 75 provides in relevant parts:

- (F) Once protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal (the “first proceedings”), such protective measures:
  - (i) shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal (“second proceedings”) or another jurisdiction unless and until they are rescinded, varied or augmented in accordance with the procedure set out in this Rule;

[...]
- (H) A Judge or Bench in another jurisdiction or parties in another jurisdiction authorised by an appropriate judicial authority may seek to rescind, vary or augment protective measures ordered in proceedings before the Tribunal by applying to the President of the Tribunal, who shall refer the application:
  - (i) to any Chamber, however constituted, remaining seised of the first proceedings;
  - (ii) if no Chamber remains seised of the first proceedings, to a Chamber seised of the second proceedings; or,
  - (iii) if no Chamber remains seised, to a newly constituted Chamber.
- (I) Before determining an application under paragraph (G)(ii), (H)(ii), or (H)(iii) above, the Trial Chamber shall endeavour to obtain all relevant information from the first proceedings, including from the parties to those proceedings, and shall consult with any Judge who ordered the protective measures in the first proceedings, if that Judge remains a Judge of the Tribunal.
- (J) The Chamber determining an application under paragraphs (G) and (H) above shall ensure through the Victims and Witnesses Section that the protected witness has given consent to the rescission, variation, or augmentation of protective measures; however, on the basis of a compelling showing of exigent circumstances or where a miscarriage of justice would otherwise result, the Chamber may, in exceptional circumstances, order *proprio motu* the rescission, variation, or augmentation of protective measures in the absence of such consent.

4. The Request specifically mentions the amended Rule 75(H) as its basis.<sup>8</sup> However, the Trial Chamber is of the view that the Request must be understood as a request for transfer of the identified testimonies in their entirety to a judicial institution in another jurisdiction, and not as a request to vary, rescind or augment protective measures. Moreover, the Trial Chamber considers the Request to be different from one where *parties* in another jurisdiction, when duly authorised in accordance with Rule 75(H), submit a request pursuant to that provision. The Trial Chamber recalls

<sup>6</sup> Request, pp 1-2.

<sup>7</sup> Request, p. 2.

that cases transferred to national jurisdictions pursuant to Rule 11 *bis* are accompanied by an order to the effect that any existing orders and decisions issued in the case, including orders concerning protective measures, shall remain in force until they are either amended or withdrawn, or other provisions are made, by the appropriate national Court or competent authorities.<sup>9</sup> This is in line with Rule 75(F), as amended on 12 July 2007, that protective measures shall continue to have effect *mutatis mutandis* in any other proceedings before [...] another jurisdiction.<sup>10</sup> It should also be noted that the transfer of the supporting material and other evidentiary material relevant to a case referred to a national jurisdiction pursuant to Rule 11 *bis* does not ordinarily require an order under Rule 75. It would be inconsistent to follow a different procedure when the requesting party is a Judge or a Bench in another jurisdiction but that is not seized of a case that has been transferred pursuant to Rule 11 *bis*.

5. The Trial Chamber recalls that pursuant to the jurisprudence under Rule 75 “a party is always entitled to seek material from any source, including from another case before the International Tribunal, to assist in the preparation of its case if the material sought has been identified or described by its general nature and if a legitimate forensic purpose for such access has been shown”.<sup>11</sup> The Trial Chamber considers that the same standard may be applied in the present case where the applicant is the Court of BiH. Under the jurisprudence, the relevance of the material sought may be determined by showing the existence of a nexus between the applicant’s case and the cases from which such material is sought, that is if the cases stem from events alleged to have occurred in the same geographic area and at the same time.<sup>12</sup> Access to confidential material from another case may be granted when the Chamber is satisfied that it has been established that the

<sup>8</sup> Request, p. 1.

<sup>9</sup> See e.g. *Prosecutor v. Gojko Janković*, Case No. IT-96-23/2-PT, Decision on referral of case under Rule 11 *bis*, filed 22 July 2005, p. 34; *Prosecutor v. Rahim Ademi and Mirko Norac*, Case No. IT-04-78-PT, Decision for referral to the authorities of the Republic of Croatia pursuant to Rule 11 *bis*, filed 14 September 2005, p. 18; *Prosecution v. Milorad Trbić*, Case No. IT-05-88/1-PT, Decision on referral of case under Rule 11 *bis*, 27 April 2007, para. 49.

<sup>10</sup> Prior to the amendment on 12 July 2007, Rule 75(F)(i) read:

Once protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal (the “first proceedings”), such protective measures:

- (i) shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal (“second proceedings”) until they are rescinded, varied or augmented in accordance with the procedure set out in this Rule;

<sup>11</sup> *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Decision on “Motion by Mićo Stanišić for access to all confidential materials in the Krajišnik case”, 21 February 2007 (“*Krajišnik* Decision”), p. 4, referring to *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-R, Decision on “Defence motion on behalf of Rasim Delić seeking access to all confidential material in the *Blaškić* case”, 1 June 2006, p. 8, with further references in footnote 34.

<sup>12</sup> *Krajišnik* Decision, p. 4, referring to *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Decision on appellants Dario Kordić and Mario Čerkez’s request for assistance of the Appeals Chamber in gaining access to appellate briefs and non-public post appeal pleadings and hearing transcripts filed in the *Prosecutor v. Blaškić*, 16 May 2002 (“*Blaškić* Decision”), para. 15.

material is “likely to assist the applicant’s case materially, or that there is at least a good chance that it would”.<sup>13</sup>

6. The Trial Chamber considers the Appeals Chamber holding that Security Council resolutions 1503/2003 and 1534/2004 “emphasise, as a critical portion of the Tribunal’s Completion Strategy, the need to facilitate efforts to bring war crimes prosecutions in the national judicial systems within the Former Yugoslavia”.<sup>14</sup> The Trial Chamber further considers that the Request identifies the testimonies sought and that the testimonies are relevant in view of the temporal and geographical overlap of the present case and that of *Prosecutor v. Mitrović et al.* The Trial Chamber therefore finds that a legitimate forensic purpose has been shown.

7. The Trial Chamber is mindful of the Appeals Chamber’s holding in the present case that when considering requests by the Office of the Prosecutor of the Tribunal to vary protective measures in order to disclose admitted evidence and confidential materials in cases before the Tribunal for use by the State Prosecutor of Bosnia and Herzegovina, a Chamber must uphold its obligation under the Statute to protect victims and witnesses.<sup>15</sup> The Appeals Chamber continued that this obligation “requires that, prior to any variation of protective measures granted to a witness, particularly in relation to a proceeding in another jurisdiction, the witness must be given an opportunity to be heard.”<sup>16</sup>

8. Rule 75(F) as amended on 12 July 2007 extends the automatic protection of victims and witnesses also to proceedings in other jurisdictions. Thus, the Trial Chamber finds itself in a situation which is procedurally different from that in which the Appeals Chamber ruled. The Trial Chamber therefore holds that it is not required in the case of a request from a national Bench or Judge to follow the procedure laid down in the newly adopted Rule 75(I). However, in consideration of Article 22 of the Statute, the Trial Chamber has considered that Rule 75 was amended long after the protected witnesses had testified and that they may, at the time of their testimony, have been under the impression that their testimony would remain within the Tribunal. As a matter of guidance, therefore, the Trial Chamber has ascertained whether the protected

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<sup>13</sup> *Krajišnik* Decision, p. 4, referring to *Blaškić* Decision, para. 14, and *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Decision on Momčilo Perišić’s motion seeking access to confidential material in the Blagojević and Jokić case, 18 January 2006, para. 4.

<sup>14</sup> *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Order to vary protective measures, 13 May 2005, p. 3, referred to in *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Decision on the Prosecutor’s application for variation of protective measures, filed confidentially on 12 April 2007, para. 15, where the Appeals Chamber also held that these resolutions “provide that national institutions in the former Yugoslavia prosecuting violations of international humanitarian law are to be assisted in their work”; S/RES/1503 (2003); S/RES/1534 (2004).

<sup>15</sup> *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Decision on the Prosecutor’s applications for variation of protective measures, filed 12 April 2007, para. 13, referring to Article 22 of the Statute.

witnesses would consent to the transfer of their testimonies to the Panel. For the same reasons, the Trial Chamber consulted Judge Daqun Liu, who was the Presiding Judge at trial and who remains a Judge of the Tribunal, and contacted the former counsel of the case in an endeavour to obtain all relevant information.

9. On 22 October 2007, the Victims and Witness Section (“VWS”) of the Tribunal informed the Trial Chamber by way of email that it is unable to contact Witness P210. On 7 November 2007, Witness P206 informed VWS that he would consent to the release of his testimony provided that he obtain further information concerning the *Mitrović et al.* case from the defence counsel in that case. On 8 November 2007, VWS informed the Trial Chamber via email that Witness P130 does not consent to the disclosure of his testimony to the Panel.

10. On 9 November 2007, former lead counsel for Vidoje Blagojević, Michael Karnavas, informed the Trial Chamber by way of email that there are no objections to the request. On 15 November 2007, Counsel for the Prosecution at trial informed the Trial Chamber by way of email that it “agrees to the disclosure of the BCS audio tapes for the requested dates with a blanket condition that all protective measures remain in effect and that private session testimony not be disclosed to third parties”. On 12 November 2007, Judge Daqun Liu informed the Trial Chamber by way of internal memorandum that he is not aware of any facts militating against the granting of the Request and that if a legitimate forensic purpose for access has been shown he would not have any objection to the disclosure to the Panel of the testimonies of Witness P130, Witness P206 and Witness P210. Former lead and co-counsel for Dragan Jokić did not respond to the Trial Chamber’s requests for information.

11. Based on the above consultations, even considering the fact that Witness P210 could not be contacted and that Witness P130 does not give his consent, the Trial Chamber holds based on the protection afforded by Rule 75(F) that there are no impediments to providing the Court of BiH with the requested testimonies in full.

12. As noted above the Panel requests the testimonies in the BCS language. However, the Trial Chamber recalls that the working languages of the Tribunal are English and French.<sup>17</sup> Moreover, as per the “Registry policy governing translation services provided by the Registry”, translations into the BCS language of transcripts will only be carried out upon an order of a Chamber.<sup>18</sup> The Trial Chamber considers that the translation of transcripts, which is a resource-demanding task, should

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<sup>16</sup> *Ibid.*

<sup>17</sup> Article 33 of the Statute.

not be ordered unless the testimonies cannot be provided in any other suitable manner. The Registry Court Management and Support Section has informed the Trial Chamber that the video recordings of the testimonies of the requested witnesses contain the testimonies in the BCS language and may, thus, be provided without the need for translation. The Trial Chamber considers this to be the most appropriate manner of disclosing the requested testimonies to the Court of BiH.

13. In view of the fact that parts of the testimonies were held in private session and that three witnesses testified with the protective measures of pseudonym and image distortion, the Trial Chamber stresses that it is the duty of the Court of BiH and the authorities of Bosnia and Herzegovina, including the State Prosecutor of Bosnia and Herzegovina, to maintain the confidentiality of the information subject to these measures. The Trial Chamber particularly invokes Article 29 of the Statute in this respect, which obligates member states of the United Nations to comply with orders issued by a Trial Chamber.

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<sup>18</sup> Registry policy governing translation services provided by the Registry, 16 November 2006, p. 6.

### III. DISPOSITION

14. Pursuant to Article 29 of the Statute and Rule 75 of the Rules, the Trial Chamber:

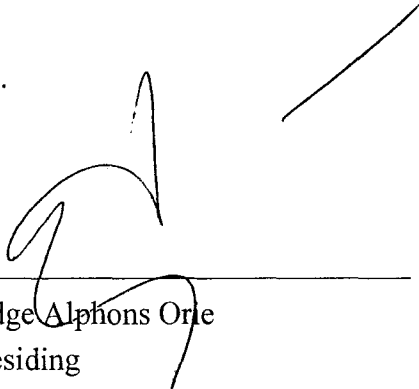
**GRANTS** the Request;

**AUTHORISES** the Registry to release to the Panel the BCS language video recordings of the testimonies of the requested witnesses;

**ORDERS** the Panel and the authorities of Bosnia and Herzegovina:

- (a) to treat as confidential the parts of the testimonies which are subject to protective measures, including the name and particulars of Witness P130, Witness P206 and Witness P210, the fact that they testified before the Tribunal, and the parts of the testimonies which were held in private session (“protected parts”);
- (b) only to release the protected parts to the Defence and the Prosecution in *Mitrović et al.* for the purpose of those proceedings and after having obtained assurances from the Defence under the threat of criminal sanction that the Defence will strictly maintain the confidentiality of the protected parts; and
- (c) to take all necessary measures, both legal and practical, that the protected parts are not disclosed to any third party or in open session proceedings.<sup>19</sup>

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



\_\_\_\_\_  
Judge Alphons Orie  
Presiding

Dated this thirteenth day of December 2007

At The Hague

The Netherlands

**[Seal of the Tribunal]**

<sup>19</sup> The term “third party” excludes the accused in *Mitrović et al.*, their counsel and members of their defence teams, members of the State Prosecutor of Bosnia and Herzegovina, and authorised personnel of the Court of BiH.