



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
IT-98-29
Date: 24 August 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: 24 August 2012

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON PROSECUTION MOTION FOR VARIATION
OF THE PROTECTIVE MEASURES FOR WITNESS RM-147**

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 12 June 2012, the Prosecution filed a motion pursuant to Rules 69 and 75 of the Rules of Procedure and Evidence (“Rules”) for augmentation of the protective measures for Witness RM-147 (“Witness”) ordered in a previous case and consisting of pseudonym, image and voice distortion (“Motion”).¹ The Witness is at present concerned about his identity becoming known because during his last testimony before the Tribunal a self-represented accused used language in the courtroom that could potentially identify him.² The Prosecution submits that virtually none of the Witness’s anticipated evidence can be discussed in open session without potentially revealing his identity and request that the whole of his testimony be received in closed session.³ In support of its Motion, it submits a declaration of a Prosecution investigator who met with the Witness in early June 2012 and confirms that the Witness himself requested the augmentation.⁴

2. On 25 June 2012, the Defence opposed the Motion (“Defence Response”) and requested the Chamber to ensure the right of the accused to a fair trial and keep interferences with the public nature of the proceedings at a minimum level.⁵ It submits that the Prosecution failed to meet the burden of justifying the onerous measure of closed session for the whole of the Witness’s testimony and, in particular, to show that the previously ordered protective measures in combination with receiving potentially identifying information in private session could not sufficiently protect him.⁶ It also notes the importance of confronting this Witness in public given the significance of his evidence.⁷

3. On 2 July 2012, the Prosecution sought leave to reply to the Defence Response, submitting its proposed reply in an Annex, which was granted by the Chamber and communicated to the parties by informal communication.⁸ In its reply, it submits that significant parts of the Witness’s testimony in previous cases were received in closed session particularly those concerning the Witness’s identity, the time frame of his service, the location where he executed his duties, the

¹ Prosecution Motion for Variation of the Protective Measures for Witness RM147, 12 June 2012 (“Motion”), paras 1-2, 6-7.

² Motion, paras 8, 10, Annex, para. 5.

³ Motion, paras 11-13.

⁴ Motion, Annex, para. 5.

⁵ Defence Response to Motion for Variation of the Protective Measures for Witness RM147, 25 June 2012, paras 3-4.

⁶ Response, paras 4-5.

⁷ Response paras 6, 9.

⁸ Prosecution Request for Leave to Reply to Defence Response to Prosecution Motion for Variation of Protective Measures for Witness RM147, 2 July 2012, para. 1.

name of his unit, the identity of his immediate superiors, and the identity of his neighbours.⁹ In addition, it requested that the following be added on that list: the identity of members of his family, the witness and his family's address, the identity of members of the Witness's unit, and his relationship and particular encounters with certain persons referred to in his consolidated Rule 92 *ter* witness statement.¹⁰

II. APPLICABLE LAW

4. The Chamber refers to the applicable law on granting protective measures pursuant to Rule 75 (A) of the Rules as set out in a previous decision.¹¹

5. The Chamber also notes that Rule 75 (F) – (J) of the Rules provides, to the extent that is relevant, as follows:

(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; ...

(G) A party to the second proceedings seeking to rescind, vary, or augment protective measures ordered in the first proceedings must apply:

(i) to any Chamber, however constituted, remaining seised of the first proceedings; or

(ii) if no Chamber remains seised of the first proceedings, to the Chamber seised of the second proceedings.

(...)

(I) Before determining an application under paragraph (G) (ii) (...) above, the 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) shall ensure through the Victims and Witnesses Section that the protected victim or 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.

6. The Chamber further recalls that pursuant to Rule 79 of the Rules, a Trial Chamber may order hearings in closed session for reasons of protection of the safety, security or non-disclosure of

⁹ Prosecution Request for Leave to Reply to Defence Response to Prosecution Motion for Variation of Protective Measures for Witness RM147, 2 July 2012, Annex: Prosecution Reply to Defence Response to Prosecution Motion for Variation of the Protective Measures for RM-147 (“Reply”), para. 5.

¹⁰ Reply, para. 6.

the identity of a witness as provided in Rule 75 and that the reasons for such an order must be made in public.

7. Lastly, it reiterates that according to the Tribunal's case-law on this matter, in seeking a fair balance between the right of the accused to a fair trial and the duty to adequately protect victims and witnesses, a Trial Chamber needs to ensure that the interference with an accused's right to a fair trial must not exceed what is proportionate to the risk asserted and be strictly necessary to protect the victim or witness concerned.¹² Accordingly, an order under Rule 79 for closed session can only be issued where it is shown that the risk asserted is sufficiently founded and no other less restrictive protective measure can adequately address that risk.¹³

III. DISCUSSION

8. The Chamber notes that pursuant to Rule 75 (F) of the Rules the protective measures ordered in the first proceedings remain in force in the present proceedings. As no Chamber remains seised of the first proceedings, and the Chamber is currently seised of the "second proceedings" within the meaning of Rule 75 (G) of the Rules, it finds that it has jurisdiction to rule on the Motion. In addition, considering that the only Judge from the first proceedings who remains a Judge of the Tribunal is the Presiding Judge in the present proceedings, the Chamber finds that the requirement of Rule 75 (I) of the Rules is satisfied. Further, in light of the declaration of the Prosecution's investigator confirming the Witness's consent to the requested augmentation, the Chamber is of the view that the requirement of Rule 75 (J) of the Rules is also satisfied.

9. The Chamber considers that, given the subject matter of the Witness's anticipated evidence which is such that it is difficult to separate testimony that could reveal his identity from testimony which could be heard in public, and considering that no less restrictive measure can adequately protect the Witness against that risk, the Chamber finds it appropriate to augment the protective measures as proposed by the Prosecution.

¹¹ Decision on Prosecution Motion for Protective Measures for Witness RM-115, 15 August 2012, paras 3-6.

¹² *Prosecutor v. Dragomir Milošević*, Decision on Prosecution's Motion for Protective Measures, 12 February 2007 ("*Dragomir Milošević Decision*"), paras 10-11; *Prosecutor v. Slobodan Milošević*, Decision on Prosecution Motion for Trial related Protective Measures for Witnesses (Bosnia), 30 July 2002 ("*Slobodan Milošević Decision*"), paras 4-5.

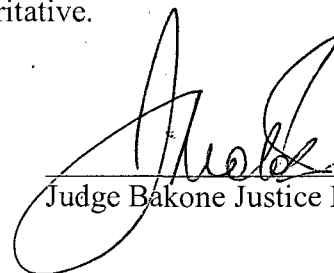
¹³ *Dragomir Milošević Decision*, para. 11.

IV. DISPOSITION

10 For the foregoing reasons, pursuant to Articles 20 and 22 of the Statute, and Rules 75 and 79 of the Rules the Chamber hereby

GRANTS the Motion.

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



Judge Bakone Justice Moloto

Dated this Twenty-fourth of August 2012
At The Hague
The Netherlands

[Seal of the Tribunal]