

IT-09-92-T
Δ73160-Δ73156
18 October 2013

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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-09-92-T
Date: 18 October 2013
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 18 October 2013

PROSECUTOR

v.

RATKO MLADIĆ

PUBLIC

**DECISION ON URGENT PROSECUTION MOTION FOR
PROTECTIVE MEASURES AND CONDITIONS FOR WITNESS
RM-401 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 30 September 2013, the Prosecution filed a motion (“Motion”) requesting protective measures and certain conditions for the forthcoming testimony of witness RM-401 (“Witness”) pursuant to Rule 70 of the Tribunal’s Rules of Procedure and Evidence (“Rules”).¹ The Defence responded to the Motion on 14 October 2013 (“Response”), opposing it.²

2. In the Motion, the Prosecution requests that (i) the Witness be granted the protective measures of pseudonym and face and voice distortion; (ii) upon request, certain parts of the Witness’s testimony be heard in private session in order to protect the witness’s identity or the Rule 70 provider’s interests; (iii) a representative of the Rule 70 provider be allowed to be present in court during the Witness’s testimony; and (iv) any private session testimony of the Witness not to be disclosed to parties in other cases without the consent of the Rule 70 provider.³ According to the Prosecution, these conditions do not prejudice the Accused as the Witness’s identity is known to him, he is in possession of the Witness’s prior statement, and he will have an opportunity to cross-examine the Witness.⁴

3. The Defence contends that the Motion was filed as “urgent” with unjustifiable delay, despite the fact that the Prosecution had been aware of the need for the requested measures for some time.⁵ The Defence further claims that there is no basis for the application of Rule 70 and that a private session testimony of the Witness would result in an infringement of the Accused’s right to a public trial as it will not be properly subjected to public scrutiny.⁶

¹ Urgent Prosecution Motion for Protective Measures and Conditions for Witness RM401 Pursuant to Rule 70, 30 September 2013 (Confidential).

² Defence Response to Urgent Prosecution Motion for Protective Measures and Conditions for Witness RM401 Pursuant to Rule 70, 14 October 2013 (Confidential).

³ Motion, paras 2, 16.

⁴ Motion, para. 10.

⁵ Response, paras 7-11.

⁶ Response, paras 12-17.

II. APPLICABLE LAW

4. The Chamber recalls and refers to the applicable law governing the disclosure of information provided to the Prosecutor on a confidential basis pursuant to Rule 70 (B) to (G) of the Rules, as set out in previous decisions.⁷

5. When the Prosecutor presents evidence under Rule 70 (C) of the Rules, a Trial Chamber has the authority to assess whether the information was provided in accordance with Rule 70 (B), i.e. whether it was provided on a confidential basis. “[S]uch enquiry must be of a very limited nature [...]. The Chambers may be satisfied of this simply by a consideration of the information itself, or by the mere assertion of the Prosecutor, or they may require confirmation from the information provider or, where the information is in the form of a document, for example, there may be something on the face of the document which indicates that it was indeed provided on a confidential basis.”⁸ However, pursuant to Rules 70(G) and 89(D), a Trial Chamber may assess the conditions placed upon a proposed Rule 70 witness’s testimony and determine, without hearing that testimony, that it may not be admitted on the basis that Rule 70 conditions would result in substantial unfairness to the trial, which outweighs that testimony’s probative value.⁹

III. DISCUSSION

6. As a preliminary observation, the Chamber notes that the Prosecution has shown no good cause justifying the late filing of the Motion. However, the Chamber considers that in the present case there is a prevailing interest in receiving the witness’s evidence. In light of the foregoing, the Chamber will now address the proposed Rule 70 conditions.

7. Considering the Prosecution’s statement that the proffered material was provided under Rule 70 and observing that the Witness has testified in another trial under similar conditions,¹⁰ the

⁷ 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, 30 November 2012 (“30 November 2012 Decision”), paras 4-6; Decision on Rule 70 Restrictions in Relation to the Testimony of Witness Smith, 28 June 2013 (Confidential) (“28 June 2013 Decision”), para. 7.

⁸ *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR108bis & AR73.3, Decision on the Interpretation and Application of Rule 70 (Confidential), 23 October 2002, para. 29.

⁹ 28 June 2013 Decision, para. 7; *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-AR73.1, Decision on Interlocutory Appeal Against Second Decision Precluding the Prosecution from Adding General Wesley Clark to its 65th Witness List, 20 April 2007, para. 18.

¹⁰ Motion, para. 11.

Chamber is satisfied that Rule 70 applies. Contrary to what has been submitted by the Defence,¹¹ the Prosecution is in these circumstances under no obligation to provide additional justifications.¹²

8. The Chamber will now assess whether the proposed evidence, given in the conditions stipulated by the Rule 70 provider, outweighs the Accused's right to a fair trial pursuant to Rules 70(G) and 89(D).¹³ As for the first condition of Rule 70 request, the Chamber considers that the proposed protective measures of pseudonym and face and voice distortion are necessary to ensure the protection of the Witness's identity. Given that the identity of the Witness is known to the Accused and his Defence team, the Chamber does not consider these measures to impact on the Accused's rights to an unreasonable extent and thus accepts this condition.

9. As for the second condition of Rule 70 request, the Chamber recalls that the parties or the Rule 70 provider are expected to make their requests for hearing certain parts of the Witness's testimony in private session at the appropriate time during the testimony. The Chamber further reaffirms that (i) when aimed at protecting the identity of the Witness, partial private session testimony is a natural consequence of having granted protective measures; and (ii) when directed to protect the Rule 70 provider's interests, partial private session testimony should only be granted sparsely.¹⁴ In view of the above, the Chamber accepts the second condition. Should large portions of the Witness's testimony be eventually received in private session, the Chamber will 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 and thus necessitate exclusion of all or portions of the witness's evidence.

10. As for the third condition of Rule 70 request, the Chamber observes that the presence of a representative of the Rule 70 provider in court may be conducive to promptly resolving any matters in relation to whether, *inter alia*, particular questions may be answered by the Witness in open session. The Chamber thus accepts the third condition.

11. In relation to the fourth condition of Rule 70 request, namely that no private-session testimony of the Witness should be disclosed to parties in other cases without the Rule 70 provider's consent, the Chamber recalls that the parties have the duty to seek such consent prior to

¹¹ Response, paras 12-13.

¹² 30 November 2012 Decision, para. 9.

¹³ The Chamber recalls that, in a previous decision, similar measures requested in relation to other witnesses were considered compatible with the Accused's right to a fair trial: 30 November 2012 Decision, paras 11-14.

¹⁴ 30 November 2012 Decision, para. 12.

each disclosure or variation of protective measures.¹⁵ Accordingly, the Chamber accepts the fourth condition.

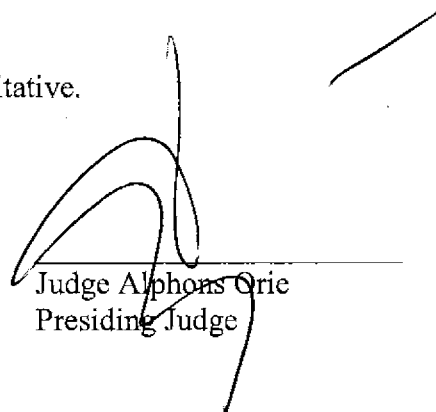
IV. DISPOSITION

12. For the foregoing reasons, pursuant to Rule 70 of the Rules, the Chamber

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 Orie
Presiding Judge

Dated this eighteenth day of October 2013
At The Hague
The Netherlands

[Seal of the Tribunal]

¹⁵ *Prosecutor v. Galić*, Case No. IT-98-29-A, Decision on Momčilo Perišić's Motion Seeking Access to Confidential Material in the Galić Case, 16 February 2006, para. 13.