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Mechanism for International Criminal Tribunals

Case No. MICT-15-88-R86H.1
MICT-15-88-R86H.2
Date: 9 February 2016
Original: English

BEFORE A SINGLE JUDGE

Before: Judge Bakone Justice Moloto
Registrar: Mr John Hocking
Decision of: 9 February 2016

PROSECUTOR

v.

**DRAGOLJUB KUNARAC
RADOMIR KOVAČ
ZORAN VUKOVIĆ**

PUBLIC

**PUBLIC REDACTED VERSION OF 16 JULY 2015
DECISION ON APPLICATIONS
PURSUANT TO RULE 86(H)**

Applicant

[REDACTED]

The Office of the Prosecutor

Mr Hassan Bubacar Jallow
Mr Mathias Marcussen

I, **BAKONE JUSTICE MOLOTO**, Judge of the Mechanism for International Criminal Tribunals (“Mechanism”), am seised of two applications filed confidentially and *ex parte* on 20 April 2015 (“Applications”), whereby the Prosecutor’s Office of [REDACTED] requests variation of protective measures pursuant to Rule 86(H) of the Rules of Procedure and Evidence of the Mechanism (“Rules”) that apply to Witnesses [REDACTED] and [REDACTED] (“Witnesses”) in the case of *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, Case Nos IT-96-23/T and IT-96-23/1-T (“*Kunarac et al.* case”) for the purpose of an investigation and presentation of evidence before the Court of [REDACTED] in the cases against [REDACTED].¹

I. Procedural history

1. On 28 April 2015, the President of the Mechanism assigned the Applications to me.²
2. On 5 May 2015, I ordered the Registry’s Witness Support and Protection Unit (“WISP”) to contact the Witnesses to ascertain whether they consent to the requested variation of protective measures and to file a submission by 4 p.m. on 29 May 2015.³ I also ordered the Registry to serve copies of the Applications upon the Prosecution and invited the Prosecution to file responses by the same date.⁴ On 27 May 2015, the WISP filed a submission (“WISP Submission”).⁵ On 29 May 2015, the Prosecution responded (“Prosecution Response”).⁶ On 5 and 16 June 2015, the Prosecution filed corrigenda to its response.⁷

¹ Application of the Prosecutor’s Office of [REDACTED] for variation of protective measures pursuant to Rule 86(H), Case No. MICT-15-88-R86H.1 and Application of the Prosecutor’s Office of [REDACTED] for variation of protective measures pursuant to Rule 86(H), Case No. MICT-15-88-R86H.2, both filed confidentially and *ex parte* on 20 April 2015.

² Order assigning a Single Judge to consider an application pursuant to Rule 86(H), Case No. MICT-15-88-R86H.1 and Order assigning a Single Judge to consider an application pursuant to Rule 86(H), Case No. MICT-15-88-R86H.2, both issued confidentially and *ex parte* on 28 April 2015.

³ Order for submissions on applications pursuant to Rule 86(H), issued confidentially and *ex parte* on 5 May 2015, p. 2.

⁴ *Ibid.*

⁵ Registrar’s submission in compliance with order for submissions on applications pursuant to Rule 86(H), filed confidentially and *ex parte* with confidential and *ex parte* annex on 27 May 2015.

⁶ Consolidated Prosecution’s response to applications of the Prosecutor’s Office of [REDACTED] for variation of protective measures pursuant to Rule 86(H), issued confidentially and *ex parte* with confidential and *ex parte* annex on 29 May 2015.

⁷ Corrigendum to annex to consolidated Prosecution’s response to applications of the Prosecutor’s Office of [REDACTED] for variation of protective measures pursuant to Rule 86(H), issued confidentially and *ex parte* on 5 June 2015 and Second Corrigendum to annex to consolidated Prosecution’s response to applications of the Prosecutor’s Office of [REDACTED] for variation of protective measures pursuant to Rule 86(H), issued confidentially and *ex parte* on 16 June 2015 (“Second Corrigendum”).

II. Submissions

3. [REDACTED].⁸ [REDACTED].⁹

4. The [REDACTED] further submits that the testimony of the Witnesses contains crucial information and would, therefore, be of critical importance to the aforementioned cases.¹⁰ With regard to the [REDACTED] case, the [REDACTED] submits that the Witnesses identified [REDACTED] as a perpetrator of the suspected criminal offences,¹¹ [REDACTED].¹² Moreover, the Witnesses named other victims of [REDACTED] and other perpetrators' actions.¹³ In the [REDACTED] case, the [REDACTED] has information from other witnesses about [REDACTED] where [REDACTED] are suspected to have raped [REDACTED].¹⁴ For these reasons, the [REDACTED] requests to be provided with the following material for the purpose of using it in the proceedings against [REDACTED] and [REDACTED] and "other suspects identified during the course of the continuing investigation" by the [REDACTED]:¹⁵

- (i) the Witnesses' full names, permanent or temporary residences, contact telephone numbers or other addresses through which it would be possible to establish contact;
- (ii) electronically certified copies of the Witnesses' testimony before the ICTY or contained in the reports made by Prosecution investigators in the cases in which the Witnesses testified, as well as the audio recordings (English and BCS) of the testimony;
- (iii) electronically certified copies of documentary evidence and any other evidence, and
- (iv) statements of the Witnesses.

5. The WISP submits that none of the Witnesses consents to the requested variation of protective measures.¹⁶ All the Witnesses stated that they suffer from significant psychological and physical health issues due to the incidents about which they testified in the *Kunarac et al.* case and that they fear that involvement in the [REDACTED] proceedings would have a further negative impact on

⁸ Applications, para. 4.

⁹ *Ibid.*

¹⁰ *Id.*, para. 5.

¹¹ *Id.*, para. 6.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ Application of the Prosecutor's Office of [REDACTED] for variation of protective measures pursuant to Rule 86(H), Case No. MICT-15-88-R86H.1, para. 6.

¹⁵ Applications, paras 7, 10-11.

¹⁶ WISP Submission, para. 2.

their lives, including re-traumatisation and health deterioration.¹⁷ Witnesses [REDACTED] and [REDACTED] expressed security concerns.¹⁸ [REDACTED].¹⁹ [REDACTED].²⁰ [REDACTED].²¹

6. The Prosecution submits with regard to Witness [REDACTED], who recently testified before the ICTY Trial Chamber seized of *Prosecutor v. [REDACTED]*, Case No. [REDACTED] that the Applications should be referred to the President of the Mechanism for further referral to and decision by that Trial Chamber, being seized of the second proceedings.²²

7. The Prosecution further submits that the Applications should be denied with respect to Witnesses [REDACTED] and [REDACTED] (and, as an alternative to referral, with respect to Witness [REDACTED]) because the threshold of Rule 86(I) of the Rules for variation of protective measures absent consent has not been met.²³ Specifically, regarding the [REDACTED] case, the Prosecution submits that the Witnesses did not mention the suspect in their evidence in the *Kunarac et al.* case, which therefore cannot be considered unique or critical to the local case.²⁴ Moreover, regarding the [REDACTED] case, while the evidence may be considered to be of crucial importance, as the Witnesses testified to [REDACTED], the Prosecution is of the view that, due to the expected negative impact on the Witnesses, the threshold of Rule 86(I) of the Rules has not been met.²⁵

¹⁷ *Id.*, Annex, para. 3.

¹⁸ *Id.*, para. 4.

¹⁹ *Ibid.*

²⁰ *Id.*, Annex, fn. 5.

²¹ *Id.*, para. 5 and fn 5.

²² Prosecution Response paras 3, 13 and Annex para. 2 together with Second Corrigendum, paras 1-2.

²³ *Id.*, paras 2, 9, 13.

²⁴ Prosecution Response, para. 10.

²⁵ *Id.*, para. 11.

III. Applicable law

8. Rule 86 of the Rules provides, in relevant parts, as follows:

- (H) A judge or bench in another jurisdiction, parties in another jurisdiction authorised by an appropriate judicial authority, or a victim or witness for whom protective measures have been ordered by the ICTY, the ICTR, or the Mechanism may seek to rescind, vary, or augment protective measures ordered in proceedings before the ICTY, the ICTR, or the Mechanism by applying to the President of the Mechanism, who shall refer the application to a Single Judge or to the Chamber remaining seised of the proceedings.
- (I) The Chamber determining an application under paragraphs (G) and (H) above 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 order *proprio motu* the rescission, variation, or augmentation of protective measures in the absence of such consent.

IV. Discussion

9. Witness [REDACTED], who was granted protective measures for use in the [REDACTED] case²⁶ and whose measures were varied and continued in subsequent cases,²⁷ testified [REDACTED] in the [REDACTED] case.²⁸ The [REDACTED] case has been pending before the ICTY since prior to the commencement date of the Mechanism. Thus, as an ICTY Trial Chamber is currently seised of that case, I conclude that I lack jurisdiction over the Applications with regard to this witness.²⁹

10. Witnesses [REDACTED] and [REDACTED] do not consent to the requested variation of protective measures.³⁰ Accordingly, I will analyse the Applications pursuant to Rule 86(I) of the Rules.

11. As for the [REDACTED] case, Witnesses [REDACTED] and [REDACTED] did not mention [REDACTED] in their evidence. In view of this fact and absent exigent circumstances, the threshold of Rule 86(I) of the Rules is not met.

12. [REDACTED].³¹ [REDACTED].³² The evidence of these Witnesses, who allegedly suffered personally at the hands of [REDACTED], is evidently very relevant to the [REDACTED]'s investigation into crimes committed, *inter alia*, by [REDACTED] against [REDACTED] at [REDACTED] in the municipality of [REDACTED]. This speaks in favour of granting variation in

²⁶ [REDACTED].

²⁷ [REDACTED].

²⁸ [REDACTED].

²⁹ S/RES/1966(2010), Annex 2, Transitional Arrangements, Articles 1(1), 5(1).

³⁰ [REDACTED].

³¹ [REDACTED]; see also Prosecution Response, para. 11.

the absence of the Witnesses' consent in order to prevent a miscarriage of justice. However, and despite the [REDACTED]'s submissions on the importance of the evidence, it is not evident from the Applications that the investigation of, or indeed a future case against, [REDACTED] would collapse if the [REDACTED] were not to be granted access to the requested evidence and information of these Witnesses. Moreover, I note the very grave concerns raised by the WISP and the Prosecution regarding the well-being of both Witnesses, and in particular with respect to Witness [REDACTED]. Having considered the evidence's relevance and importance against the likely very negative impact that variation of the protective measures and possible participation in the investigation and subsequent cases against [REDACTED] and other identified suspects would have on the Witnesses, I find that the threshold of Rule 86(I) of the Rules has not been met.

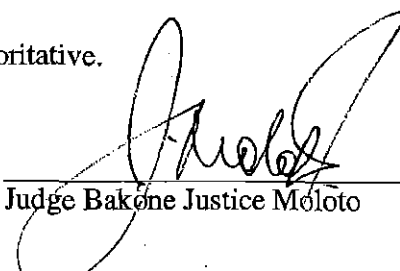
V. Disposition

13. Pursuant to Article 20 of the Statute and Rules 55 and 86 of the Rules, I:

DISMISS the Applications for lack of jurisdiction with regard to Witness [REDACTED]; and

DENY the Applications with regard to Witness [REDACTED] and Witness [REDACTED].

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



Judge Bakone Justice Moloto

Dated this 9th day of February 2016

At The Hague

The Netherlands

[Seal of the Mechanism]

³² [REDACTED]; see also Prosecution Response, para. 11.



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