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Public redacted version of the 14 May 2014 Decision on Prosecution Motion for reconsideration or certification of Decision on application pursuant to rule 86 (H), submitted by Judge on 10 February 2016			

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Mechanism for International Criminal Tribunals

Case No.: MICT-13-52-R86H.1

Date: 10 February 2016

Original: English

BEFORE A SINGLE JUDGE

Before: Judge Bakone Justice Moloto
Registrar: Mr John Hocking
Decision of: 10 February 2016

PROSECUTOR

v.

**MILAN LUKIĆ
SREDOJE LUKIĆ**

PUBLIC

**PUBLIC REDACTED VERSION OF THE 14 MAY 2014
DECISION ON PROSECUTION MOTION FOR
RECONSIDERATION OR CERTIFICATION OF
DECISION ON APPLICATION PURSUANT TO
RULE 86 (H)**

The 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 the “Prosecution motion for reconsideration or certification of decision on application pursuant to Rule 86(H) by defence counsel [REDACTED]”, filed confidentially and *ex parte* by the Prosecution on 18 February 2014 (“Motion”), and hereby render my decision thereon.

I. Procedural history

1. On 7 October 2013, [REDACTED] (“Applicant”), defence counsel for [REDACTED], an accused before [REDACTED], requested variation of the protective measures (“Request”) that apply to Prosecution witnesses [REDACTED] and Chamber witness [REDACTED] (“Witnesses”), who testified in the *Prosecutor v. Milan Lukić and Sredoje Lukić* case (Case No. IT-98-32/1-T) before the International Criminal Tribunal for the former Yugoslavia (“Tribunal”).¹ On 8 October 2013, the President of the Mechanism assigned the Request to me.² On 5 February 2014, I granted the Request (“Decision”).³ On 7 February 2014, the Prosecution requested a stay of the Decision, which I granted on 11 February 2014.⁴ On 18 February 2014, the Prosecution filed the Motion. On 20 February 2014, I ordered the Applicant to file any response to the Motion by 7 March 2014.⁵ The Applicant did not respond to the Motion. On 7 March 2014, the Registry filed a submission (“Submission”) pursuant to Rule 31(B) of the Mechanism’s Rules of Procedure and Evidence (“Rules”).⁶

II. Submissions

2. The Prosecution submits that the Decision contains a clear error of reasoning and that reconsideration is necessary to prevent an injustice.⁷ According to the Prosecution, the Decision erroneously held that the evidence of the Witnesses was “potentially exculpatory” because they

¹ Application pursuant to Rule 86(H), filed confidentially and *ex parte* on 7 October 2013. The [REDACTED] sent a confidential and *ex parte* letter of reminder on 9 May 2014, inquiring about a decision on the Request. I note that this letter erroneously suggests that there has been no decision yet on the Request and also mischaracterises the scope of the Request by referring to more witnesses than actually covered by the Request.

² Order assigning a Single Judge to consider an application pursuant to Rule 86(H), issued confidentially and *ex parte* on 8 October 2013.

³ Decision on application pursuant to Rule 86(H) by defence counsel [REDACTED], issued confidentially and *ex parte* on 5 February 2014.

⁴ Urgent motion for stay of decision on application pursuant to Rule 86(H) by defence counsel [REDACTED], filed confidentially and *ex parte* on 7 February 2014; Decision on Prosecution urgent motion for stay of decision on application pursuant to Rule 86(H) by defence counsel [REDACTED], issued confidentially and *ex parte* on 11 February 2014

⁵ Order for submissions, issued confidentially and *ex parte* on 20 February 2014.

⁶ Registrar’s Rule 31(B) submission regarding the decision on application pursuant to Rule 86(H) by defence counsel [REDACTED], filed confidentially and *ex parte* on 7 March 2014.

⁷ Motion, para. 2.

were eye-witnesses to the incidents for which [REDACTED] is charged and did not mention his name in their evidence.⁸ The Prosecution submits that not all of the Witnesses were eye-witnesses.⁹ Further, the Prosecution argues that the Decision lowers the threshold of Rule 86(I) of the Rules, which only in exceptional cases allows for disclosure of information in spite of a witness's expressed non-consent.¹⁰ According to the Prosecution, the standard used in the Decision that non-disclosure of "potentially exculpatory" evidence occasions a miscarriage of justice pursuant to Rule 86(I) of the Rules, broadens disclosable information to *any* relevant evidence, warranting reconsideration.¹¹ The Prosecution submits that the Decision resulted in an abuse of discretion requiring reconsideration to prevent an injustice.¹² Providing additional information from rulings by the [REDACTED], the Prosecution submits there is a real risk of witness interference by [REDACTED].¹³

3. In the alternative, the Prosecution requests certification to appeal the Decision, arguing that the proper application of the test under Rule 86(I) is an issue that is bound to reoccur within the Mechanism.¹⁴ The Prosecution submits that certification is necessary considering the gravity of the Decision's impact on the Witnesses and that clarification of the standard to be applied by the Appeals Chamber would materially advance the proceedings in relation to future requests under Rule 86(H).¹⁵

4. The Registry submits that the physical and psychological safety of witnesses and the impact of a decision pursuant to Rule 86(I) of the Rules on the ability of the Witness Support and Protection Unit ("WISP") to fulfil its mandate should be relevant to any Rule 86(I) analysis.¹⁶ It recommends that a Judge or Chamber, when considering varying a witness's protective measures over the objection of the witness, first consult with the WISP regarding a risk-assessment.¹⁷ This would allow a Judge or Chamber to appropriately balance the risk of disclosure against the potential prejudice to the applicant.¹⁸ The Registry further is of the view that the Witnesses have an objectively reasonable fear of retaliation, threat, or intimidation and that disclosure of their identities alone may already harm them psychologically, thus exacerbating pre-existing trauma (in addition to actual retaliation) and may jeopardise the Mechanism's witness protection program

⁸ Motion, paras 3, 7, 9.

⁹ *Ibid.*

¹⁰ Motion, paras 6, 8.

¹¹ *Ibid.*

¹² Motion, para. 9.

¹³ Motion, paras 4, 11-13.

¹⁴ Motion, paras 14, 16.

¹⁵ Motion, paras 5, 16.

¹⁶ Submission, paras 11, 17-19.

¹⁷ Submission, para. 11.

¹⁸ *Ibid.*

should their identities, locations, or testimony be disclosed to [REDACTED].¹⁹ Particularly in the case of victims of [REDACTED], disclosure of their evidence against their express non-consent would lead to extreme anguish and a severe disruption of their lives.²⁰ The WISP submits that the consequences of the Decision would be particularly egregious for those witnesses who currently reside in the area where [REDACTED] is presently [REDACTED].²¹ The Registry additionally provided the reasons of many of the Witnesses for their non-consent, which included fear of retribution or intimidation if they are exposed to [REDACTED] or his associates.²²

III. Applicable law

5. In accordance with the jurisprudence of the Tribunal, an applicant requesting reconsideration of a decision must satisfy the relevant Trial Chamber of the existence of a clear error of reasoning in the impugned decision, or of particular circumstances justifying its reconsideration in order to avoid injustice.²³ Such circumstances may include new facts or new arguments.²⁴ The applicant must demonstrate how these new facts or arguments justify reconsideration.²⁵ The Mechanism is bound to interpret its statute and rules in a manner consistent with the jurisprudence of the Tribunal.²⁶

6. 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.

¹⁹ Submission, paras 2, 10, 13, 15-17, 20.

²⁰ Submission, para. 15.

²¹ Submission, para. 13.

²² Submission, para. 16.

²³ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.16, Decision on Jadranko Prlić's Interlocutory Appeal Against the Decision on Prlić Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence, 3 November 2009 ("*Prlić Decision*"), para. 18; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Defence's Request for Reconsideration, 16 July 2004 ("*Galić Decision*"), p. 2.

²⁴ *Ibid.*

²⁵ *Prlić Decision*, paras 18-19; *Galić Decision*, p. 2.

²⁶ *Phénéas Munyarugarama v. Prosecutor*, Case No. MICT-12-09-AR14, Decision on Appeal against the referral of Phénéas Munyarugarama's case to Rwanda and Prosecution motion to strike, 5 October 2012, para. 6.

IV. Discussion

7. At the outset, I clarify that in my understanding it is within the WISP's mandate to inform a Judge or a Chamber of any risk-assessments or concerns on its own initiative, without needing to be prompted by a Judge or Chamber. In my view, it is preferable that any concerns the WISP may have should be expressed as soon as possible so that they can be taken into account when determining applications for variation of protective measures. I take this opportunity to invite the WISP to provide its submissions as soon as possible if it deems it has information that is relevant to a determination on a request for a variation of protective measures.

8. In the Decision, I held that the Witnesses were eye-witnesses to the events that took place in [REDACTED], at the [REDACTED], and at the [REDACTED].²⁷ I noted that none of them, with the exception of Witness [REDACTED], mentioned [REDACTED] in their testimony and found that their testimony was potentially of an exculpatory character which would occasion a miscarriage of justice if it was not provided to [REDACTED].²⁸ As for Witness [REDACTED], I found that the fact that the witness mentions [REDACTED] does not reduce the importance of the witness's evidence.²⁹

9. I have considered the information, which was initially not provided by the Prosecution and the Registry. Specifically, the Prosecution provided decisions by [REDACTED] on the [REDACTED] of [REDACTED] which discuss the risks of witness interference by [REDACTED]. The Registry also provided the reasons underlying the Witnesses' decisions not to consent to a variation of their protective measures. While I am not privy to all facts which led the [REDACTED] to hold that the "existence of a *serious risk* or justified indication [...], which exist in this particular case, is enough to make a conclusion that the accused, if he found himself at liberty, probably would influence witnesses or accessories"³⁰, I consider this finding to be a relevant new fact. Moreover, the additional information provided by the Witnesses, as well as the Registry's general assessment, similarly represent relevant new and important facts. Based on the foregoing, I will consider whether the Decision stands in light of all new information.

[REDACTED]

²⁷ Decision, para. 18.

²⁸ Decision, paras 18-19.

²⁹ Decision, para. 18.

³⁰ Motion, Annex A, p. 7. I note that by a later decision of [REDACTED] was [REDACTED], despite the fact that the [REDACTED] held that "there continue to exist special circumstances which indicate that the accused [REDACTED] would obstruct the criminal proceedings by trying to influence his co-perpetrators", see Motion, Annex B, p. 3. As the

10. In the Decision, I focused on the potentially exculpatory nature of not mentioning [REDACTED] in most of the Witnesses' testimony on certain incidents in the *Lukić and Lukić* case. Having reviewed the Witnesses' testimony again, and noting the Prosecution submissions on their evidence, I note that Witnesses [REDACTED], and [REDACTED] only provided hearsay evidence regarding the perpetrators of the [REDACTED] incident. Considering the limited evidentiary value of the evidence of these witnesses as well as the new information provided by the Prosecution and the Registry in relation to the impact disclosure would have on these witnesses, I conclude that the threshold of Rule 86(I) has not been met for Witnesses [REDACTED], and [REDACTED].

Witness [REDACTED]

11. The Prosecution submits that I erred in assessing the relevance of this witness's evidence.³¹ In the Decision, I held that Witness [REDACTED] mentioned [REDACTED] and that this does not reduce the importance of his/her evidence.³² There was no discussion, however, about how the witness's evidence, which is in fact potentially incriminating, would meet the test of Rule 86(I) of the Rules. I thus find merit in the Prosecution's submission requiring reconsideration in this respect. Considering the Applicant's request afresh, I conclude that the threshold of Rule 86(I) has not been met for Witness [REDACTED].

Witnesses [REDACTED]

12. In their testimony, Witnesses [REDACTED], and [REDACTED] provide direct evidence regarding some of the alleged perpetrators of the incidents in [REDACTED], the [REDACTED], and the [REDACTED]. While I stand by the conclusion that their evidence is *potentially* of an exculpatory nature, I acknowledge that the mere possibility of exculpation needs to be emphasized alongside the new information provided by the Prosecution and the Registry. It remains unclear whether the Witnesses' failure to mention [REDACTED] is really due to the fact that he was not there. Considering the limited evidentiary value of the evidence of these witnesses as well as the new information provided by the Prosecution and the Registry in relation to the impact disclosure would have on these witnesses, I conclude that the threshold of Rule 86(I) has not been met for Witnesses [REDACTED], and [REDACTED].

decision attached in Annex A of the Motion also makes reference to indirect influence of witnesses through contacting accessories, I do not consider that the decision to [REDACTED] negates the risk of witness intimidation.

³¹ Motion, para. 7.

³² Decision, para. 18.

Witness [REDACTED]

13. The Prosecution submits that Witness [REDACTED] already testified in the case of [REDACTED] and that the [REDACTED] was previously granted access to this witness's identity and evidence in the *Lukić & Lukić* case.³³ Under these circumstances, I consider that the Applicant, in line with domestic disclosure obligations, has been provided with the information he initially sought in the Request in relation to this witness. Based on the foregoing, the request for variation of the protective measures of Witness [REDACTED] has become moot.

V. Disposition

14. Pursuant to Articles 20 and 28 of the Statute and Rules 55 and 86 of the Rules, I:

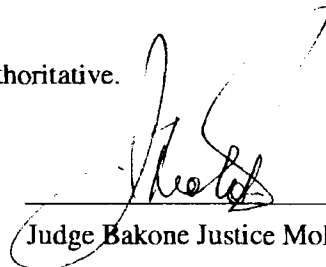
GRANT the Motion;

REVOKE the Decision;

DECLARE MOOT the Request as it pertains to Witness [REDACTED]; and

DENY the remainder of the Request.

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



Judge Bakone Justice Moloto

Dated this 10th day of February 2016

At The Hague

The Netherlands

[Seal of the Mechanism]

³³ Motion, paras 3, 7.



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