



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-95-5/18-PT
Date: 30 October 2008
Original: English

IN THE TRIAL CHAMBER

Before: Judge Patrick Robinson, Presiding
Judge Iain Bonomy, Pre-Trial Judge
Judge Michèle Picard

Registrar: Mr. Hans Holthuis

Decision of: 30 October 2008

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON PROTECTIVE MEASURES FOR WITNESSES

Office of the Prosecutor

Mr. Alan Tieger
Mr Mark B. Harmon

The Accused

Mr. Radovan Karadžić

THIS TRIAL CHAMBER of the 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 (“Tribunal”) is seised of the following:

- a. “Prosecution Notification of Protective Measures for Witnesses Currently in Force” with Confidential *Ex Parte* Annex, filed on 15 September 2008 (“**First Prosecution Notification**”);
 - i. “Supplement to Prosecution Notification for Protective Measures for Witnesses” with Confidential *Ex Parte* Appendix, filed on 2 October 2008 (“**Supplement to First Prosecution Notification**”);
 - ii. “Accused Motion for Clarification of Prosecution Notification of Protective Measures Currently in Force”, filed on 9 October 2008 (“**First Accused Motion for Clarification**”);
 - iii. “Prosecution’s Response to Radovan Karadžić’s Motion for Clarification of Notification of Protective Measures Currently in Force”, filed on 20 October 2008 (“**Prosecution Response to First Accused Motion for Clarification**”);
- b. “Prosecution Motion Seeking Delayed Disclosure of Witness P’s Identity and Notification of Protective Measures in Force” with Confidential *Ex Parte* Annex, filed confidentially on 15 September 2008 (“**Prosecution Motion**”);
 - i. “Accused Motion for Extension of Time to Respond to Prosecution Motion Concerning Witness P”, filed on 6 October 2008 (“**Accused Motion for Extension**”);
 - ii. “Prosecution’s Response to Accused’s Motion for an Extension of Time and Prosecution’s Motion Seeking Further Delayed Disclosure of Witness P’s Identity”, filed confidentially on 15 October 2008 (“**Prosecution Response and Further Motion**”);
- c. “Prosecution Notification of Delayed Disclosure” with Confidential *Ex Parte* Appendix, filed on 22 September 2008 (“**Second Prosecution Notification**”);

- i. “Accused Motion for Clarification of the Prosecution Notification of Delayed Disclosure”, filed on 21 October 2008 (“**Second Accused Motion for Clarification**”);
 - ii. “Prosecution’s Response to Motion for Clarification of Prosecution Notification of Delayed Disclosure”, filed on 28 October 2008 (“**Prosecution Response to Second Accused Motion for Clarification**”); and
- d. “Prosecution’s Second Notification of Protective Measures for Witnesses Currently in Force and Request for Different Pseudonyms”, filed on 24 September 2008 (“**Third Prosecution Notification**”).

The Trial Chamber hereby renders its decision on all the above submissions.

I. Background and Submissions of Parties

(i) First Prosecution Notification and related submissions

1. In the **First Prosecution Notification**, the Prosecution, pursuant to Rule 75(F) of the Rules of Procedure and Evidence of the Tribunal (“Rules”), notifies the Trial Chamber of the continuation of various protective measures granted in other proceedings to 31 witnesses it intends to call at trial. The measures include, *inter alia*, the trial-related measures of image distortion, voice distortion, and closed session. In respect of four of the witnesses, the Prosecution requests the continuation of delayed disclosure to the Accused of identity and statements until 30 days before trial, or until another date as determined by the Chamber. Additionally, the Prosecution requests the assignment of different pseudonyms to those used in other proceedings, and the continuation of various protective measures related to the restriction of disclosure to the public and the media of information which may identify the witnesses.

2. On 26 September 2008, the Trial Chamber issued a “Preliminary Order on Prosecution Motion for Protective Measures for Witnesses”, ordering the Prosecution to provide additional information in relation to protective measures currently in force for two of the witnesses for whom delayed disclosure was requested in the First Prosecution Notification.¹ In the **Supplement to the First Prosecution Notification**, the Prosecution provides that information.

¹ Preliminary Order on Prosecution Motion for Protective Measures for Witnesses, 26 September 2008, para. 6.

3. The First Prosecution Notification was intimated to the Accused in B/C/S on 19 September 2008 which, according to the established practice of this Trial Chamber, commenced the 14-day period during which the Accused had the opportunity to issue a response under the Rules. The Accused filed the **First Accused Motion for Clarification** on 9 October 2008, which was seven days after the expiry of this period. In his Motion for Clarification, the Accused requests first an order from the Trial Chamber that the Prosecution re-file the First Prosecution Notification as a Motion, and secondly an order requiring the Prosecution to disclose the pseudonyms used by the witnesses in previous cases so that he may assess the public testimony and orders in relation to them and determine whether he wishes to submit a motion to vary the protective measures.

4. In the **Prosecution Response to the First Accused Motion for Clarification**, the Prosecution voluntarily clarifies several issues in relation to the First Prosecution Notification and the Third Prosecution Notification (discussed below). The Prosecution asserts, citing authority, that the First and Third Prosecution Notifications were properly filed as Notifications of the continuation of previous grants of trial-related protective measures and delayed disclosure pursuant to Rule 75(F), rather than as Motions.² The Prosecution withdraws its requests for relief in respect of disclosure to the public and the media, and corrects a number of errors in the Notifications. The Prosecution appends a list of pseudonyms previously applicable to witnesses listed in the First and Third Prosecution Notifications.

(ii) Prosecution Motion and related submissions

5. In the **Prosecution Motion**, the Prosecution notifies the Trial Chamber of protective measures granted in other proceedings to a witness identified in the Prosecution Motion as Witness P, including pseudonym and closed session. The Prosecution requests the assignment to Witness P of a different pseudonym to that assigned to Witness P in other proceedings, and the grant of delayed disclosure to the Accused of the identity of Witness P for a period of 30 days. The Prosecution also requests the continuation of various protective measures related to the restriction of disclosure to the public and the media of information that may identify Witness P.

6. The Prosecution Motion was intimated to the Accused in B/C/S on 22 September 2008. The Accused filed his **Motion for Extension** on 6 October 2008, which, being a Monday, was the final day of the period allowed for response. In the Motion for Extension, the Accused asserts that the Prosecution Motion, filed as a confidential document, should be re-filed as a public document. The Accused seeks an extension of time “until 14 days after the Registry has approved an

² Prosecution Response to the First Accused Motion for Clarification, paras. 2–3.

appropriate level of funding for his defence team”³ to respond to the Prosecution Motion in order to “obtain information through members of his defence team” who will “advise him as to whether there are arguments which can be made to oppose the motion ... or to apply ... to modify the protective measures” previously ordered in respect of the witness.⁴

7. In the **Prosecution Response and Further Motion**, the Prosecution states that the Prosecution Motion should remain confidential and gives reasons for this.⁵ The Prosecution further states that the Accused has already received Witness P’s prior testimony, as a copy thereof was disclosed to the Accused as part of the material supporting the First Amended Indictment.⁶ Further, the Prosecution seeks a grant of delayed disclosure of the identity of Witness P until the Prosecution has been able to make contact with the witness or for a further 30 days, whichever is shorter, as contact with the witness has not yet been made despite the Prosecution’s endeavours.⁷

(iii) Second Prosecution Notification and related submissions

8. In the **Second Prosecution Notification**, the Prosecution, pursuant to Rule 75(F) of the Rules, notifies the Trial Chamber of the continuation of a previous grant of delayed disclosure made in respect of a Prosecution witness. The Prosecution also requests the assignment to the witness of a different pseudonym to that assigned to the witness in other proceedings.

9. The Second Prosecution Notification was intimated to the Accused in B/C/S on 10 October 2008. In the **Second Accused Motion for Clarification**, filed within time on 21 October 2008, the Accused requests first that the Second Prosecution Notification be re-filed as a Motion rather than a Notification, and secondly that the Trial Chamber order the Prosecution to disclose the pseudonym used by the witness in the previous case in which the grant of delayed disclosure was made, so that he may access the public testimony and orders made concerning that witness in order to analyse whether the delayed disclosure remains necessary or whether he should bring an order to vary it.

10. In the **Prosecution Response to Second Accused Motion for Clarification**, the Prosecution asserts that the Second Prosecution Notification was properly filed as a Notification pursuant to Rule 75(F), and that revealing the previous pseudonym of the witness in question may

³ Accused Motion for Extension, para. 5.

⁴ Accused Motion for Extension, para. 3.

⁵ Prosecution Response and Further Motion, para. 3.

⁶ Prosecution Response and Further Motion, para. 4.

⁷ The Trial Chamber notes that the Accused received the Prosecution Response and Further Motion in B/C/S on 21 October 2008. However, the Trial Chamber does not find it necessary, based upon the particular procedural history of this matter, to hear from the Accused on this issue. Should the Accused have reason to do so, he may apply within seven days of receiving this Decision in B/C/S to set aside the ruling on this matter.

prematurely disclose that witness' identity and will, in any case, be of no assistance to the Accused under the circumstances.

(iv) Third Prosecution Notification

11. In the **Third Prosecution Notification**, the Prosecution, pursuant to Rule 75(F) of the Rules, notifies the Trial Chamber of trial-related protective measures previously granted to 66 additional witnesses whose statements and transcripts form part of the material supporting the "Motion to Amend the First Amended Indictment" filed by the Prosecution on 22 September 2008. The Prosecution requests the assignment of new pseudonyms to 64 of those witnesses.

12. The Third Prosecution Notification was intimated to the Accused in B/C/S on 8 October 2008, and he has not responded within the time allotted under the Rules.

II. Applicable Law

A. Extension of time to respond

13. Pursuant to Rule 127(A)(i) of the Rules, a Trial Chamber may, on good cause shown by motion, vary time limits prescribed under the Rules. The Trial Chamber refers to one of its previous decisions in this case,⁸ in which it found instructive a determination in the case of *Prosecutor v. Krajišnik*.⁹ In that decision, the Appeals Chamber considered whether there was good cause for a request for extension of time from an accused, made on the basis that his transfer of funds to one of his legal representatives had been blocked. The accused submitted that the Chamber should delay proceedings to allow him time to apply for the funds to be cleared and for that application to be processed. The Appeals Chamber held that this did not constitute good cause for delay in those proceedings.¹⁰ The Trial Chamber further notes another decision by the *Krajišnik* Appeals Chamber determining a request by the accused for an extension of time to file a reply to the Prosecution's response to his appeal brief. In dismissing that request, the Appeals Chamber considered with disapproval the fact that the accused, despite having full information, had

⁸ Decision on Motion by Momčilo Perišić for Access to Confidential Materials in the *Radovan Karadžić* Case, 14 October 2008, para. 5.

⁹ *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, Decision on Mr Krajišnik's Motion to Reschedule the Deadline for Submission of Mr. Dershowitz's Supplementary Brief, 27 March 2008 ("First *Krajišnik* Decision").

¹⁰ First *Krajišnik* Decision, p. 2.

waited nine days of a 15-day period before indicating any potential concerns about the briefing schedule.¹¹

B. Protective measures

14. The Trial Chamber notes that Article 20(1) of the Statute requires that proceedings be conducted with full respect for the rights of the accused, and due regard for the protection of victims and witnesses. Further, Article 21(2) of the Statute entitles the accused to a fair and public hearing, subject to Article 22, which requires the Tribunal to provide in its Rules for the protection of victims and witnesses, including the conduct of *in camera* proceedings and the protection of identity. As has been well-observed in previous Tribunal jurisprudence, these Articles reflect the duty of the Trial Chamber to balance the right of the accused to a fair trial, the rights of victims and witnesses to protection, and the right of the public to access information.¹²

C. Trial-related protective measures under Rule 75

15. Rule 75(A) of the Rules permits a Trial Chamber to “order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused”. Under Rule 75(B), these may include measures to prevent disclosure to the public and the media of identifying information about witnesses or victims, including voice and image distortion and the assignment of a pseudonym, as well as closed session pursuant to Rule 79.

16. By operation of Rule 75(F)(i), “[o]nce protective measures have ordered in respect of a victim or witness in any proceedings before the Tribunal ... [they] shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal”. The measures subsist unless and until they are rescinded, varied, or augmented on the application of a party to the appropriate Judge or Trial Chamber, according to the procedure set out in Rule 75(G). The Trial Chamber notes that the assignment to a witness of a different pseudonym to that used in previous proceedings, while a variation of sorts, has been held to be an administrative—rather than a substantive—alteration of a previously granted measure, and is thus covered under Rule 75(F).¹³

¹¹ *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, Decision on Krajišnik Motion for Extension to File a Reply, 13 May 2008, p. 3.

¹² See, e.g., *Prosecution v. Tadić*, Case IT-94-1-T, Decision on the Prosecutor’s Motion Requesting Protective Measures for Witness L, 14 November 1995, para. 11; *Prosecution v. Tadić*, Case IT-94-1-T, Decision on the Prosecutor’s Motion Requesting Protective Measures for Witness R, 31 July 1996 (“*Tadić* Decision on Witness R”), p. 4; *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-PT, Decision on Motion by Prosecution for Protective Measures, 3 July 2000 (“*First Brđanin* Decision”), para. 7.

¹³ See, e.g., *Prosecutor v. Lukić and Lukić*, Case No. IT-98-32/1-PT, Decision on Prosecution’s Motion for Order on Protective Measures (“*Lukić* Decision”), para. 8.

D. Delayed disclosure under Rule 69

17. Ordinarily, it is incumbent upon the Prosecution under Rule 66(A)(i) of the Rules to disclose to the accused, within thirty days of the initial appearance, copies of the supporting material that accompanied the indictment when confirmation was sought. A similar requirement applies where an indictment is amended pursuant to Rule 50. Rule 66(A)(ii) of the Rules further obligates the Prosecution to produce copies of the statements and transcripts of all witnesses whom the Prosecution intends to call to testify at trial. However, these disclosure requirements are not absolute. In particular, Rule 69(A) provides that “in exceptional circumstances”, a Trial Chamber may order non-disclosure to the accused of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal.

18. This raises the challenge of striking the correct balance between the rights of the accused and the safety of victims and witnesses. While protective measures under Rule 75 concern restriction of disclosure *to the public*, Rule 69 contemplates restriction of disclosure of witness identification information *to the accused himself*, which is a more severe constraint as it may affect the ability of the accused to make ready his defence. The Trial Chamber notes that under Rule 69(C) and subject to Rule 75, “the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for the preparation of the defence”. This Rule enables the Trial Chamber to meet its duty under Article 21(4)(b) to ensure that the accused has adequate time and facilities to prepare for trial.

19. Several Trial Chambers, notably the Pre-Trial Chamber in *Prosecutor v. Brđanin and Talić*, have expounded upon what is required to justify an application of Rule 69(A).¹⁴ In particular, the Prosecution must establish “exceptional circumstances”, that is, something more than the prevailing conditions in the former Yugoslavia by themselves.¹⁵ This Trial Chamber considers it established, following the test as originally set out in *Prosecutor v. Brđanin and Talić*, that the following factors are relevant to a determination of “exceptional circumstances” warranting delay of the identification of a witness to the accused:

- a. *Objective likelihood of interference resulting from disclosure to the accused.* The Prosecution must establish that there is a likelihood that the particular witness will

¹⁴ See First *Brđanin* Decision, paras. 24–38; *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-PT, Decision on Second Motion by Prosecution for Protective Measures, 27 October 2000 (“Second *Brđanin* Decision”), para. 12–23; *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Decision on Third Motion by Prosecution for Protective Measures, 8 November 2000 (“Third *Brđanin* Decision”), para. 13; *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Prosecution’s Motion for Order of Protection, 1 August 2006, p. 5.

¹⁵ First *Brđanin* Decision, para. 11.

be interfered with or intimidated once their identity is made known *to the accused* and his defence team, notwithstanding the obligations on the accused and his defence team in relation to disclosure to third parties. It is not sufficient to show that the witness is put at risk of interference resulting from disclosure of his identity to the public or the media.¹⁶ The likelihood of interference must be *objective*: while the witness may personally feel that he or she may be at risk, any subjective fears expressed by the witness “are *not in themselves* sufficient to establish any real *likelihood* that they may be in danger or at risk”.¹⁷ In order to warrant an interference with the rights of the accused, those fears must be well-founded in fact.

- b. *Specific rather than general basis for request.* There must be “specific evidence of such a risk relating to particular witnesses”, rather than an indeterminate risk relating to witnesses in general.¹⁸ The Trial Chamber must be satisfied that the Prosecution’s request is made in order to protect individual victims and witnesses in the particular trial, rather than generally to encourage potential witnesses to come forward and testify, thus making it easier to bring prosecutions against other persons in the future.¹⁹ The Trial Chamber in *Prosecutor v. Brđanin and Talić* considered that allowing a request based on this latter justification would tilt the balance too far in favour of expediency for future prosecutions at the expense of a fair trial for the accused.²⁰
- c. *Length of time before the trial at which disclosure to the accused must take place.*²¹ Trial Chambers have considered that “the greater the length of time between the disclosure of identity and the time when the witness is to give evidence, the greater the potential for interference with that witness”.²² Nevertheless, the appropriate length of time has been held to be that before the trial, not the giving of testimony.²³ A reasonable time will depend upon the nature of the evidence that each witness will give; for example, a witness giving evidence that directly implicates the accused as

¹⁶ Second *Brđanin* Decision, para. 22; Third *Brđanin* Decision, para. 16.

¹⁷ First *Brđanin* Decision, para. 26; *see also* Second *Brđanin* Decision, para. 19; *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Decision on Prosecution’s Twelfth Motion for Protective Measures for Victims and Witnesses, 12 December 2002 (“Fourth *Brđanin* Decision”), para. 8.

¹⁸ First *Brđanin* Decision, para. 28.

¹⁹ First *Brđanin* Decision, para. 29.

²⁰ First *Brđanin* Decision, para. 30–31.

²¹ First *Brđanin* Decision, para. 33; Second *Brđanin* Decision, para. 16.

²² First *Brđanin* Decision, para. 24, 28; Second *Brđanin* Decision, para. 18; Third *Brđanin* Decision, para. 13.

²³ First *Brđanin* Decision, para. 33.

having superior authority or aiding and abetting may require greater protection than a witness giving evidence which does not directly implicate the accused.²⁴

20. The Trial Chamber notes that, when weighing the relative interests at stake, it must be cognisant of the fact that under Art 20(1) of the Statute, “the balance dictates clearly in favour of an accused’s right to the identity of witnesses which the Prosecution intends to rely upon”.²⁵ While “due regard” must also be given to protection of victims and witnesses, this is a secondary consideration.²⁶

21. A second issue in relation to Rule 69 is whether delayed disclosure granted in a prior proceeding is a protective measure which should be automatically applied *mutatis mutandis* in subsequent proceedings for the purposes of Rule 75(F)(i), or whether it is a different breed of measure related to disclosure rather than trial proceedings, which must be granted anew in each case. In the case of *Prosecutor v. Brđanin*, the Appeals Chamber concluded that the better approach is to treat delayed disclosure as a protective measure which, once granted, continues in subsequent proceedings. The Appeals Chamber held: “The meaning of the expression ‘*mutatis mutandis*’ itself requires a flexible application of the principle enshrined in this rule and suggests the same kinds of protection given to a witness in one case should be automatically extended to this witness in a latter case, regardless of whether this is literally ‘continuation’”.²⁷ This Trial Chamber will follow the Appeals Chamber’s interpretation of the principle.²⁸

III. Discussion

A. Multiplicity of submissions

22. The Trial Chamber, while making no specific finding as to this matter, records here its concern that it appears, from the piecemeal manner in which the issue has been approached, that the Prosecution has not addressed with adequate diligence its solemn obligation to ensure the protection of witnesses. The Chamber acknowledges that, because of various time limits relating to the Prosecution’s disclosure obligations, it may not have been possible for the Prosecution to consolidate all its submissions regarding protective measures. Nonetheless, the Chamber suggests

²⁴ First *Brđanin* Decision, para. 34; Third *Brđanin* Decision, para. 15.

²⁵ *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Provisional Protective Measures Pursuant to Rule 69, 19 February 2002, para. 32.

²⁶ First *Brđanin* Decision, para. 20; Second *Brđanin* Decision, para. 18; Third *Brđanin* Decision, para. 13.

²⁷ *Prosecutor v. Brđanin*, Case No. IT-99-36-A, Decision on Mićo Stanišić’s Motion for Access to All Confidential Materials in the *Brđanin* Case, 24 January 2007, para. 17.

²⁸ While neither the Tribunal Statute or the Rules dictate a principle of precedent, it is established practice for Trial Chambers to follow the decisions of Appeals Chambers, especially on points of law. See *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 March 2000, para. 113.

that the issue of witness protection has not been dealt with in a sufficiently comprehensive manner, and emphasises to the Prosecution the importance of this obligation, in respect of which the Prosecution's efforts should be at their zenith.

B. Extension of time to respond

23. The Chamber does not find that the requested extension of time in the Accused Motion for Extension is warranted, and accordingly the deadline for the submission of a response to the Prosecution Motion by the Accused was 6 October 2008.²⁹

24. More generally, the Trial Chamber notes with disapproval the untimeliness of the Accused's responses to two of the Prosecution's submissions. With respect to his First Motion for Clarification, the Accused waited 21 days before responding, and with respect to his Motion for Extension, he waited 15 days after he had been made aware of the existence and contents of the Prosecution Motion before requesting more time to respond to it. The Prosecution voluntarily responded to both these submissions despite their tardiness. The Chamber reiterates to the Accused that choosing to proceed *pro se* is no justification for the late filing of submissions, nor for habitual requests for extension of time.

C. Continuation of protective measures previously ordered under Rule 75

25. The Trial Chamber considers that the Rule 75(B) protective measures relating to trial procedure and public disclosure notified in the submissions are subject to Rule 75(F)(i), and will therefore, for the avoidance of doubt, note their continuation in the present proceedings. The assignment of new pseudonyms to witnesses previously granted pseudonyms is encompassed in this continuation, as the Trial Chamber considers this to be simply an administrative means of ensuring that the substance of protective measures previously granted continues in the instant case, so that the safety of those witnesses may be best protected.³⁰

D. Delayed disclosure

26. The Trial Chamber notes its decision³¹ in this case of 2 September 2008, by which it provided an exception to disclosure ordered from the Prosecution under Rule 66(A)(i), and allowed

²⁹ Decision on Motion by Momčilo Perišić for Access to Confidential Materials in the *Radovan Karadžić* Case, 14 October 2008, para. 14.

³⁰ See, e.g., *Lukić* Decision, para. 8.

³¹ Decision on Prosecution Motion for Non-Disclosure, 2 September 2008, para. 10.

the Prosecution to redact confidential information for witnesses who have already been granted delayed disclosure or for whom the Prosecution intends to apply for delayed disclosure.

(i) First Prosecution Notification: continuation of delayed disclosure under Rule 75

27. Following the Supplement to First Prosecution Notification, the Trial Chamber is satisfied that all four witnesses for whom delayed disclosure is notified in the First Prosecution Notification, and who are described in the Confidential *Ex Parte* Annex thereto, have been granted delayed disclosure, as well as other protective measures, in previous proceedings before the Tribunal.

28. The Prosecution asserts that there have been, to its knowledge, no changes to the personal circumstances of any of the witnesses since they were originally granted the protective measures. In keeping with the practice adopted by other Trial Chambers and in accordance with jurisprudence from the Appeals Chamber, this Trial Chamber will note the application of Rule 75(F) to the previous grants allowing delayed disclosure of the identity and unredacted statements of these witnesses to the Accused in these proceedings.

(ii) Prosecution Motion: request to grant delayed disclosure under Rule 69

29. The witness for whom delayed disclosure is requested in the Prosecution Motion and the Prosecution Response and Further Motion, and who is described in the Confidential *Ex Parte* Annex to the Prosecution Motion, has been granted other protective measures in previous proceedings before the Tribunal, but has not in those previous proceedings been granted delayed disclosure. The Prosecution reports that it has been unable to contact the witness despite repeated efforts.³² The Prosecution suggests that by delaying disclosure to the Accused of the witness' identity until the Prosecution has made contact with the witness or for a further period of 30 days, whichever is shorter, the Chamber would allow the Prosecution more time to make contact with the witness and discuss any changes in his circumstances.³³

30. The Trial Chamber in *Prosecutor v. Tadić* held that the balance between conflicting interests must be struck depending upon the facts of each case.³⁴ This Trial Chamber determines, as did the Trial Chamber in *Prosecutor v. Brđanin and Talić*,³⁵ that the following factual considerations are relevant in deciding whether a request under Rule 69(A) should be granted:

³² Prosecution Motion, para. 4; Prosecution Response and Further Motion, paras. 6–7.

³³ Prosecution Motion, para. 4.

³⁴ *Tadić* Decision on Witness R, p. 4.

³⁵ Fourth *Brđanin* Decision, para. 9.

- a. the identity of the witness;
- b. the nationality and ethnicity of the witness;
- c. the role, duties performed, and positions occupied by the witness during the course of the conflict;
- d. the nature of the evidence that the witness will give before this Trial Chamber; and
- e. the events upon which the witness will testify in relation to the Accused before this Trial Chamber.

31. In the Confidential *Ex Parte* Annex to the Prosecution Motion, the Prosecution sets out the reasons underlying its request for delayed disclosure of this witness' identity. Having carefully considered these reasons and taking into account the legal and factual elements relevant in the application of Rule 69(A) as set out above, the Trial Chamber is satisfied that the Prosecution has met its burden in the instant request of establishing exceptional circumstances warranting delayed disclosure of the witness' identity to the Accused for a further 30 days. As disclosure is only delayed temporarily, and a redacted version of the witness' statement has already been provided to the Accused,³⁶ the Chamber is satisfied that the granting of this protective measure will not unduly prejudice the Accused's right to a fair trial. The measure requested achieves the appropriate balance between preserving the rights of the Accused and ensuring that the potential risks facing the witness are addressed. In addition, the Trial Chamber considers that both the Prosecution Motion and the Prosecution Response and Further Motion were properly filed confidentially.

(iii) Second Prosecution Notification: continuation of delayed disclosure under Rule 75

32. The Trial Chamber notes that the protective measure previously granted in *Prosecutor v. Krajišnik* to the witness for whom delayed disclosure is requested in the Second Prosecution Notification allowed the Prosecution to delay disclosure of the identity and statements of the witness to the Accused until 30 days before the witness was to testify.³⁷ In line with persuasive Tribunal jurisprudence as noted above, the Trial Chamber considers that the appropriate length of time to delay is that before the anticipated commencement of the trial, not before the giving of

³⁶ Prosecution Motion, paras. 3, 8.

³⁷ *Prosecutor v. Krajišnik*, Case No. IT-00-39, Decision on the Prosecution's Motion for Protective Measures for a Sensitive Source Witness, 11 December 2003, p. 7.

testimony.³⁸ The Trial Chamber will therefore vary *ex proprio motu* the previously granted measure to reflect this principle.

33. In respect of the Accused's request in his Second Motion for Clarification that the Trial Chamber order the Prosecution to disclose the pseudonym used by the witness in the previous case, so that the Accused may access the public testimony and orders made concerning that witness, the Prosecution responds that such disclosure may prematurely reveal the identity of the witness, and will regardless be of no use to the Accused.³⁹ The Trial Chamber considers that, as the witness is subject to a previous grant of delayed disclosure of identity, it is not necessary to order disclosure of such further information. Further, according to the Prosecution, the witness' testimony from previous proceedings forms part of the supporting material for the Prosecution's "Motion to Amend the First Amended Indictment" filed on 22 September 2008;⁴⁰ therefore, pursuant to the Prosecution's disclosure obligations under Rules 50 and 66(A)(i), the Accused had received a copy of that testimony in B/C/S by 29 October 2008.⁴¹ To enable the Accused to best prepare his case, the Chamber will order the Prosecution to disclose, 30 days before the commencement of the trial, the previous pseudonym applied to the witness, along with other identifying information required to be provided pursuant to Rule 69(C).

IV. Disposition

34. Accordingly, the Trial Chamber, pursuant to Articles 20, 21, and 22 of the Statute of the Tribunal and Rules 54, 66, 69, 75, and 127 of the Rules of Procedure and Evidence of the Tribunal, hereby ORDERS as follows:

- a. As notified in the First Prosecution Notification, the continuation in these proceedings of previously granted protective measures is NOTED, with appropriate variations, as follows:
 - i. In all proceedings before the Tribunal and in discussions among the parties, the 31 witnesses listed in the First Prosecution Notification shall be identified by the following pseudonyms: KDZ01, KDZ02, KDZ03, KDZ04,

³⁸ First *Brđanin* Decision, para. 33.

³⁹ Prosecution Response to Second Accused Motion for Clarification, para. 2.

⁴⁰ Second Prosecution Notification, para. 1.

⁴¹ Following undertakings by the Prosecution at the Status Conference on 28 October 2008, the Trial Chamber issued an Order on Provision of Supporting Material for Motion to Amend Indictment requiring the Prosecution to file a notice of its provision to the Accused of the relevant supporting material in B/C/S upon fulfilling that obligation. On 29 October the Prosecution filed a "Notice of Provision of Supporting Material for the Proposed Second Amended Indictment" notifying the Trial Chamber that full disclosure had taken place.

KDZ05, KDZ06, KDZ07, KDZ08, KDZ09, KDZ10, KDZ11, KDZ12, KDZ13, KDZ14, KDZ15, KDZ16, KDZ17, KDZ18, KDZ19, KDZ20, KDZ21, KDZ22, KDZ23, KDZ24, KDZ25, KDZ26, KDZ27, KDZ28, KDZ29, KDZ30, and KDZ31.

- ii. The following witnesses shall give evidence in closed session: KDZ24, KDZ25, KDZ26, KDZ27, and KDZ31.
 - iii. The following witnesses shall give their testimony with the use of image distortion: KDZ04, KDZ05, KDZ06, KDZ07, KDZ08, KDZ09, KDZ10, KDZ11, KDZ12, KDZ13, KDZ14, KDZ15, KDZ16, KDZ17, KDZ18, KDZ19, KDZ20, KDZ21, KDZ22, KDZ23, KDZ28, KDZ29, and KDZ30.
 - iv. The following witnesses shall give their testimony with the use of voice distortion: KDZ16, KDZ17, KDZ18, KDZ19, KDZ20, KDZ21, KDZ22, KDZ23, KDZ28, KDZ29, and KDZ30.
 - v. The Prosecution may withhold from the Accused, at the present time, the identity and statements of witnesses KDZ28, KDZ29, KDZ30, and KDZ31 for whom delayed disclosure has been requested. However, the Prosecution shall provide to the Defence, by no later than 30 days prior to the anticipated commencement of the trial, the identity and confidential unredacted statements of each of these witnesses.
- b. As requested in the Prosecution Motion and the Prosecution Response and Further Motion, the continuation in these proceedings of previously granted protective measures is NOTED, with appropriate variations, and further measures are GRANTED, as follows:
- i. The witness described in the Prosecution Motion and Confidential *Ex Parte* Annex shall be identified by the pseudonym KDZ32 in all proceedings before the Tribunal and in discussions among the parties.
 - ii. Witness KDZ32 shall give evidence in closed session.
 - iii. The Prosecution may withhold from the Accused, at the present time, the identity of witness KDZ32. However, the Prosecution shall provide to the Defence, after a period of no more than 30 days from the date of this

Decision, the identity and confidential unredacted statements of witness KDZ32.

c. The Accused is INFORMED that, should he have reason to do so, he may apply within seven days of receiving this Decision in B/C/S to have the ruling in paragraph 34(b)(iii) set aside.

d. As notified in the Second Prosecution Notification, the continuation in these proceedings of previously granted protective measures is NOTED, with appropriate variations, as follows:

i. The witness described in the Second Prosecution Notification and Confidential *Ex Parte* Appendix shall be identified by the pseudonym KDZ33 in all proceedings before the Tribunal and in discussions among the parties.

ii. The Prosecution may withhold from the Accused, at the present time, the identity of witness KDZ33. However, the Prosecution shall provide to the Defence, no later than 30 days before the anticipated commencement of the trial, the identity and confidential unredacted statements of witness KDZ33, as well as the pseudonym applied to the witness in previous proceedings.

e. As notified in the Third Prosecution Notification, the continuation in these proceedings of previously granted protective measures is NOTED, with appropriate variations, as follows:

i. In all proceedings before the Tribunal and in discussions among the parties, the 64 witnesses for whom different pseudonyms are requested shall be identified by the following pseudonyms: KDZ34, KDZ35, KDZ36, KDZ37, KDZ38, KDZ39, KDZ40, KDZ41, KDZ42, KDZ43, KDZ44, KDZ45, KDZ46, KDZ47, KDZ48, KDZ49, KDZ50, KDZ51, KDZ52, KDZ53, KDZ54, KDZ55, KDZ56, KDZ57, KDZ58, KDZ59, KDZ60, KDZ61, KDZ62, KDZ63, KDZ64, KDZ65, KDZ66, KDZ67, KDZ68, KDZ69, KDZ70, KDZ71, KDZ72, KDZ73, KDZ74, KDZ75, KDZ76, KDZ77, KDZ78, KDZ79, KDZ80, KDZ81, KDZ82, KDZ83, KDZ84, KDZ85, KDZ86, KDZ87, KDZ88, KDZ89, KDZ90, KDZ91, KDZ92, KDZ93, KDZ94, KDZ95, KDZ96, and KDZ97.

- ii. The two witnesses described in paragraph 5(b) of the Third Prosecution Notification shall give their testimony with the use of image distortion.
- f. Representatives of the public shall not photograph, video-record, or sketch the witnesses while they are on the premises of the Tribunal.
- g. The names, whereabouts, and other identifying information concerning the witnesses shall be sealed and not included in any public record of the Tribunal. To the extent that the names and other identifying information concerning the witnesses are contained in existing public documents of the Tribunal, that information shall be expunged from those documents.
- h. All hearings considering the issue of protective measures of the witnesses shall be held in closed session, and edited records and transcripts of the session(s) shall be released to the public and the media only after review by the Prosecution in consultation with the Victims and Witnesses Section.
- i. As a general protective measure for the purpose of disclosure to the Accused, the Prosecution may redact from the statements, affidavits, and formal statements of victims, witnesses, or potential witnesses:
 - i. any information that discloses, or might lead to the disclosure of, the current whereabouts of the maker of any such document and/or his or her family;
 - ii. any information contained within such documents that discloses, or might lead to the disclosure of, the current whereabouts of individuals named within them who have made statements that the Prosecution has already disclosed or that it intends to disclose; and
 - iii. the personal identification number or passport number of victims, witnesses, or potential witnesses.
- j. If the Accused is aware or becomes aware of the current whereabouts of a victim, witness, or potential witness identified by the Prosecution, this information shall not be disclosed to the public (including the media), except to the limited extent reasonably necessary for the preparation and presentation of the case (as discussed below), and the Accused shall not approach a victim, witness, or potential witness identified by the Prosecution without prior written notice to the Prosecution, in such

time and circumstances as will allow the Prosecution to take steps as may be necessary and appropriate to protect the security and privacy of the victim, witness, or potential witness. When contacting a victim, witness, or potential witness identified by the Prosecution, the Accused must identify himself.

- k. To the extent reasonably necessary to allow the Accused to prepare for and participate in these proceedings and present a defence, the Accused may seek to obtain from the Prosecution the current whereabouts of a victim, witness, or potential witness.
- l. The Accused shall not disclose to the public any confidential information of the witnesses (including but not limited to the names, identifying information, and whereabouts of any victim, witness, or potential witness), except to the limited extent that such disclosure is directly and specifically necessary for the preparation and presentation of the case. If the Accused finds it directly and specifically necessary to make disclosures pursuant to this limited purpose, he shall inform each person among the public to whom non-public material or information is shown or disclosed, that such person is not to copy, reproduce, or publicise such material or information, and is not to show, disclose, or convey it to any other person. If provided with the original or any copy or duplicate of such material or information, such person shall return it to the Accused when continued possession of the material or information is no longer necessary for the preparation and presentation of the case.
- m. The Accused shall maintain all confidential materials pertaining to protected victims, witnesses, or potential witnesses on a confidential basis and shall destroy them or return them to the Registry following the close of the proceedings.
- n. **Except as provided for by subsection (l) above, any person, including the Accused, who knowingly and wilfully discloses the identifying information of any protected victim, witness, or potential witness, or any other information sufficient to identify these individuals, shall be in violation of this Order, and may be subject to prosecution for contempt of the Tribunal pursuant to Rule 77 of the Rules.**
- o. All provisions of this Decision shall apply equally to the Prosecution, the Accused, and the public.

- p. For the purposes of this decision, the “public” means all persons, including corporations; governments and organs/departments thereof; organisations; entities; associations; groups; the Accused’s family members, friends, and associates; accused and defence counsel in other proceedings before the Tribunal; and the media. However, for the purposes of this Decision, the “public” does not mean Judges of the Tribunal; staff of the Registry and the Office of the Prosecutor; the *Amici Curiae* (where applicable); or the Accused and his Defence team (if any).
- q. The Accused Motion for Extension is DENIED.
- r. The Second Accused Motion for Clarification is DENIED.

35. The Chamber hereby INSTRUCTS the Registry to take all necessary measures to implement this Decision.

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



Judge Patrick Robinson
Presiding

Dated this thirtieth day of October 2008
At The Hague
The Netherlands

[Seal of the Tribunal]