



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: 26 May 2009
Original: English

IN THE TRIAL CHAMBER

Before: Judge Iain Bonomy, Presiding
Judge Christoph Flügge
Judge Michèle Picard

Registrar: Mr. John Hocking

Decision of: 26 May 2009

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON MOTION FOR AND NOTIFICATIONS OF PROTECTIVE MEASURES

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

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 confidential “Prosecution Notification of Protective Measures Currently in Force for Witnesses KDZ155, KDZ182, KDZ185, KDZ304 and KDZ450 and Motion for Protective Measures for Witnesses KDZ112, KDZ196 and KDZ259 pursuant to Rule 70”, filed on 30 March 2009 (“Notification and Motion”), and the confidential “Prosecution’s Notification of Protective Measures Currently in Force for KDZ240”, filed on 8 May 2009 (“Notification on KDZ240”), and hereby issues this decision thereon.

I. Submissions

A. Notification and Motion

1. In the Notification and Motion, the Office of the Prosecutor (“Prosecution”), pursuant to Rule 75(F) of the Rules of Procedure and Evidence of the Tribunal (“Rules”), notifies the Chamber of the continuation of various “protective measures” granted in other proceedings to five witnesses, namely KDZ155, KDZ182, KDZ185, KDZ304, and KDZ450, whom it intends to call at trial.¹

2. The Prosecution explains that “protective measures” were granted by the *Perišić* Trial Chamber for witnesses KDZ182, KDZ304, and KDZ450 as follows:

- a. The witnesses shall be referred to by pseudonyms during their testimony, and in all public Tribunal documents.
- b. The names, addresses, whereabouts, and/or other identifying information concerning the witnesses shall be placed under seal and shall not be included in any public record of the Tribunal.
- c. With respect to the witnesses’ interview statements:
 - The interview statements shall not be disclosed to the public; and
 - The use by the defence or the accused of the interview statements shall be restricted solely to the preparation of the Accused’s defence.
- d. With respect to the witnesses’ expected testimony:
 - The witnesses shall testify in closed session;
 - The cross-examination of the witnesses shall be restricted to matters contained in their examination-in-chief;

¹ Notification and Motion, paras. 1–6, 8.

- A representative of the Rule 70 provider shall be allowed to be present during the testimony of the witnesses, in order to intervene should matters of national security arise; and
- The testimony of the witnesses shall not be disclosed to parties in other cases.²

3. According to the Prosecution, the *Galić* Trial Chamber granted witness KDZ185 “protective measures” identical in substance to those granted by the *Perišić* Trial Chamber, with the additional condition that any identifying documents or statements disclosed by the Prosecution to the accused shall be returned to the Prosecution upon conclusion of the proceedings.³

4. The Prosecution also states in the Notification and Motion that the *Popović et al.* Trial Chamber granted witness KDZ155 various disclosure and trial-related protective measures, all of which continue to have effect in the present case.⁴

5. The Prosecution further requests a number of Rule 70 conditions pursuant to Rule 70(B) of the Rules for witnesses KDZ112, KDZ196, and KDZ259, who are nationals of the Rule 70 provider.⁵ The Prosecution submits that it conducted interviews with these three witnesses on a confidential basis, pursuant to Rule 70(B), and that these interviews were recorded by authorities of the Rule 70 provider (“Interview Statements”).⁶

6. The Prosecution states that it has sought permission from the Rule 70 provider to disclose the Interview Statements to the Accused, and that the Rule 70 provider has consented to the disclosure of the Interview Statements to the Accused on the condition that the following Rule 70 conditions be granted:

- Non-disclosure of the identity of the witnesses, and the use of pseudonyms;
- Non-disclosure of the Interview Statements to persons, organisations or entities outside the Tribunal; and
- Use of the Interview Statements restricted solely to the preparation of the Accused’s defence.⁷

² Notification and Motion, para. 3; *see also Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-PT, Confidential Decision on Prosecution’s Rule 70 Motion for Protective Measures for Witnesses MP-072, MP-408, MP-409, MP-433 and MP-424, 4 June 2008 (“*Perišić* Decision”).

³ Notification and Motion, para. 4; *see also Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Confidential Decision on Prosecutor’s Request for Protective measures in respect of Witnesses W and Y, 7 June 2002 (“*Galić* Decision”); *Perišić* Decision.

⁴ Notification and Motion, paras. 5–6; *see also Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Confidential Decision on Prosecution’s Motion for Order of Protection of Two Prosecution Witnesses for the Month of October, 25 October 2006 (“*Popović* Decision”).

⁵ Notification and Motion, paras. 11–12, 20.

⁶ Notification and Motion, para. 9.

⁷ Notification and Motion, paras. 10–11.

7. Similarly, the Prosecution states that it has sought permission from the Rule 70 provider to present the three witnesses' evidence before the Chamber, and that the Rule 70 provider has consented to the presentation of their evidence at trial, on the condition that the following Rule 70 conditions be granted:

- a. Closed session;
- b. Non-disclosure of the identity of the witnesses;
- c. Restriction of cross-examination to matters contained in the examination-in-chief;
- d. The presence during the hearing of a representative of the Rule 70 provider who may intervene should matters of national security arise; and
- e. Non-disclosure of the witnesses' testimony to parties in other cases.⁸

8. The Accused responded orally to the Prosecution's Notification and Motion during the Status Conference held on 6 May 2009,⁹ and stated that

...if according to Rule 70 in any case consent was obtained from the country from which these documents originate, there is no need for me to apply for additional permit. . .If it is being granted in one particular instance, then it should be applied to this case as well. Before the OTP discloses either the material or the witness for whom certain measures are being requested, they should provide this consent; and after that, they should apply for the measures to be introduced. . .¹⁰

The Accused added that

...so far it has not happened that the Defence disclose something that was protected. If in any case the measures are consented to by a government with the limitations of confidentiality, we're always ready to respect that, to respect the measures required by any government concerned and to respect confidentiality. . .¹¹

B. Notification on KDZ240

9. In the Notification on KDZ240, the Prosecution, pursuant to Rule 75(F) of the Rules, notifies the Trial Chamber of the continuation of various "protective measures" for witness KDZ240 which were originally granted in the *Brđanin* case, and were subsequently confirmed by the *Krajišnik* Trial Chamber, and more recently by the *Stanišić and Župljanin* Trial Chamber.¹²

⁸ Notification and Motion, paras. 10–12.

⁹ Status Conference, T. 211 (6 May 2009).

¹⁰ Status Conference, T. 209 (6 May 2009).

¹¹ Status Conference, T. 210 (6 May 2009).

¹² Notification on KDZ240, paras. 1–6, 8; *see also Prosecutor v. Stanišić and Župljanin*, Case No. IT-08-91-PT, Confidential Decision on Prosecution's Motion for Protective Measures in Respect of a Member of a Humanitarian Organisation, 16 October 2008 ("*Stanišić and Župljanin* Decision"); *Prosecutor v. Brđanin, et al.*, Case No. IT-99-36-PT, Decision on Prosecution's Motion for Protective Measures (Members of a Humanitarian Organization), 14 January 2002; *Prosecutor v. Brđanin, et al.*, Case No. IT-99-36-PT, Decision on "Prosecution's Consolidated Submissions Regarding Two Motions Filed with Respect to a Humanitarian Organisation Scheduling Order" of 25

10. According to the Prosecution, the “protective measures” currently in force for KDZ240, and most recently confirmed by the *Stanišić and Župljanin* Trial Chamber, are the following:

- a. In the event that the witness is required to testify in person during the trial in this case, the witness shall be heard in closed session pursuant to Rules 75(B)(ii) and 79 with attendance by counsel for the humanitarian organisation to assist, if so required, the witness and the Chamber regarding questions of confidentiality that may arise during the course of the testimony;
- b. Pursuant to Rule 75(B)(i)(a), the witness’s name, address and other identifying information, including his association (past or present) with the humanitarian organisation shall not appear in any record of the Tribunal open to the public, and the transcripts of the witness’s testimony in this case shall be placed and maintained under seal;
- c. This notification and all other pleadings and proceedings relating to the application for protective measures for the witness shall remain permanently under seal, and the humanitarian organisation shall not be identified in any index that lists the sealed documents or proceedings;
- d. The parties, subject to the proviso in sub-paragraph (h) below, shall not disclose to anyone, including other witnesses or potential witnesses in this case, the fact that:
 - The witness supplied information to the Prosecution;
 - The witness testified in closed session; or
 - The Prosecution intends to call or called this witness to appear;
- e. The witness, when giving evidence, shall be referred to by a pseudonym and shall not disclose his employment or current domicile, or the identity of other persons who are, or were, employees or staff members of the humanitarian organisation (unless the humanitarian organisation consents to such disclosure), or the identity of persons who were otherwise involved in the execution of the mandate of the humanitarian organisation;
- f. The words “member of a humanitarian organisation” shall be used whenever reference is made to the witness by the parties and by the Trial Chamber in a decision rendered pursuant to Rule 79(B) of the Rules, or in any other decision or public judgement rendered in this case, and no information identifying the witness shall appear in those documents;
- g. Upon disclosure of the witness’s statements and transcripts of his prior evidence before the Tribunal to the accused, the accused is prohibited, subject to the proviso in sub-paragraph (h) below, from disclosing the statements or any of their contents to the media or to any third party, and shall be prohibited from disclosing to the

January 2002, 27 February 2002; *Prosecutor v. Brdanin*, Case No. IT-99-36-T, Decision on Prosecution’s Twenty-Sixth Motion for Protective Measures (Witness BT 19), 25 August 2003; *Prosecutor v. Krajišnik*, Case No. IT-00-39-PT, Withdrawal of Prosecution’s Motion for Protective Measures of 3 May 2002, 6 January 2004; *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, Notification of Further Protective Measures Relating to KRAJ 583, 30 September 2004.

- media or to any third party the fact that the humanitarian organisation and the witness have provided any information to the Prosecution in respect of this case;
- h. In the event the accused believes it necessary to disclose the identity of the witness out of court to a witness or potential witness, he shall apply to the Trial Chamber, with no notice to the Prosecution, but with notice to the humanitarian organisation, which shall be entitled to appear in respect of the application. In assessing the accused's application, it will be considered whether the accused has exhausted other means of obtaining the information and whether the need to disclose the identity relates to facts at issue and not to collateral issues;
- i. In the event the accused believes that during its examination of other witnesses at trial he needs to disclose the identity of the witness, he shall apply to the Trial Chamber and if the application is granted:
- The questioning shall occur in closed session; and
 - The questions shall be phrased so as not to disclose that the witness is a staff of the humanitarian organisation or that the witness provided information to the Prosecution or testified at trial.
- j. In the event that there is closed session testimony of a third-party witness that refers to the humanitarian organisation or any of its employees, the Prosecution may make a request to the Trial Chamber for the relevant portions of the transcripts of the third party witness testimony (with the identity of the third party witness redacted) to be provided to the humanitarian organisation. The Chamber will grant this application and determine which portions of the relevant transcripts must be disclosed. In all cases, such transcripts will be provided on the condition that the humanitarian organisation designates a person to receive the transcripts under seal and that the humanitarian organisation itself undertakes to treat the transcripts with the utmost confidentiality and that, at no time, will be transcripts be made available to unauthorised persons or to the public;
- k. On a case-by-case basis, the Chamber will entertain a request by the witness to have the transcript of his evidence disclosed to an official of the humanitarian organisation. At the time of making the request, the witness shall specify the name of the person he wishes the transcripts to be provided to. Such transcript will be provided on the condition that the humanitarian organisation undertakes to treat the transcript with the utmost confidentiality and that, at no time, will the transcript be made available to unauthorised persons or to the public;
- l. Upon disclosure to the accused of documents provided by the humanitarian organisation pursuant to Rule 70 ("the humanitarian organisation documents"), the accused is prohibited, subject to the provisions of sub-paragraph (m) below, from disclosing the documents or any of their contents to the media or to any third party, and shall be prohibited from disclosing to the media or to any third-party the fact that the humanitarian organisation has provided any information to Prosecution in respect to this case; and
- m. In the event the accused believes it necessary to disclose any of the humanitarian organisation documents or any of their contents, it shall apply to the Chamber, with no notice to the Prosecution, but with notice to the humanitarian organisation, which shall be entitled to appear in respect of the application. In assessing the accused's

application, it will be considered whether the accused has exhausted other means of obtaining the information and whether the need to disclose the identity relates to facts in issue and not to collateral issues; and

- n. In the event that an application is made to the Chamber to have the transcript of the witness's testimony made available to any other Trial Chamber or for any other purpose authorised by the Rules, such disclosure requires the consent of the humanitarian organisation and the witness.¹³

II. Applicable Law

11. The Chamber notes that Article 20(1) of the Statute of the Tribunal ("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 cases, 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.¹⁴

12. 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.

13. By operation of Rule 75(F)(i), "[o]nce protective measures have been 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).

14. Rule 70 provides, in relevant part, as follows:

(B) If the Prosecutor is in possession of information which has been provided to the Prosecutor on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial

¹³ Notification on KDZ240, para. 8; *see also Stanišić and Župljanin* Decision.

¹⁴ *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, p. 4; *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-PT, Decision on Motion by Prosecution for Protective Measures, 3 July 2000, para. 7.

information and shall in any event not be given in evidence without prior disclosure to the accused.

(C) If, after obtaining the consent of the person or entity providing information under this Rule, the Prosecutor elects to present as evidence any testimony, document or other material so provided, the Trial Chamber, notwithstanding Rule 98, may not order either party to produce additional evidence received from the person or entity providing the initial information [. . .]

(D) If the Prosecutor calls a witness to introduce in evidence any information provided under this Rule, the Trial Chamber may not compel that witness to answer any question relating to the information or its origin, if the witness declines to answer on grounds of confidentiality.

[. . .]

(G) Nothing in paragraph (C) or (D) above shall affect a Trial Chamber's power under Rule 89 (D) to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

15. Thus, when material is disclosed by one party to another, conditions stipulated by the Rule 70 provider may be applied without the involvement of the Trial Chamber, and without its knowledge. However, when the question arises of tendering that material into evidence in a manner which involves a departure from the normal arrangements in court, then it is for the Chamber to decide whether it is appropriate, having regard to the need to ensure that the trial is fair, to allow the evidence to be presented in accordance with the conditions stipulated.

16. Rule 89 states in relevant part, that

(C) A Chamber may admit any relevant evidence which it deems to have probative value.

(D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

[. . .]

17. The Appeals Chamber has held that under Rules 70(G) and 89(D) of the Rules, a Trial Chamber may assess the conditions placed upon proposed Rule 70 witness testimony and determine, without hearing that testimony, that it may not be admitted on the basis that the Rule 70 conditions would result in substantial unfairness to the trial, which outweighs that testimony's probative value.¹⁵ The Appeals Chamber has further concluded that

[w]hile Rule 70(C) and (D) of the Rules refers to certain restrictions on a Trial Chamber in hearing a witness testify to confidential material provided by a Rule 70 provider, those restrictions apply only after the Trial Chamber has determined that the Rule 70 witness

¹⁵ *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-AR73.1, Decision on Interlocutory Appeal against Second Decision Precluding the Prosecution from Adding Wesley Clark to its Rule 65 *ter* Witness List, 20 April 2007 (“*Milutinović et al. Appeals Decision*”), para. 18.

testimony “elected” to be presented by a party at trial is admissible under Rule 89 of the Rules. In making that determination, a Trial Chamber is entitled under Rule 70(G) of the Rules to consider whether the Rule 70 restrictions stipulated with respect to that witness testimony would undermine the need to ensure a fair trial and substantially outweigh the testimony’s probative value such as to lead to exclusion of that testimony.¹⁶

18. Similarly, the Trial Chamber in the *Milutinović et al.* case held that

once having been furnished with Rule 70 material and the decision having been made by the party to use the material in a trial-related way that involves the Chamber (*e.g.*, redacted disclosure, restrictions upon examination, admitting evidence under seal), it is the obligation of the party to make the appropriate Rule 70 application to the Chamber in each case in order to give the Chamber the opportunity to determine whether the Rule 70 conditions are consistent with the accused’s right to a fair trial pursuant to Rule 70(G). In this way, there is no such thing as an existing Rule 70 “protective measure” that continues from case to case, and the Trial Chamber must decide these issues anew in each case.¹⁷

II. Discussion

A. Notification and Motion

a) KDZ155

19. The Trial Chamber has read the relevant filings concerning the measures notified by the Prosecution in its Notification and Motion, which are already in place in the *Popović et al.* case for witness KDZ155, and which relate to trial procedure and public disclosure, and has found that these are protective measures falling under Rule 75(B), and therefore subject to Rule 75(F)(i).¹⁸ The Chamber will therefore, for the avoidance of doubt, note their continuation in the present proceedings.

b) KDZ182, KDZ185, KDZ304, and KDZ450

20. Regarding the Prosecution’s notification of continuation of various “protective measures” granted in other proceedings to witnesses KDZ182, KDZ185, KDZ304, and KDZ450, in relation to their actually giving testimony in court, the Chamber considers that this notification is based, at least in part, on an erroneous interpretation of Rule 75(F)(i) as applying to Rule 70 conditions.¹⁹ The Chamber considers there to be a fundamental distinction between measures imposed to ensure the safety and protection of victims and witnesses, usually falling under Rules 75 and 79, and

¹⁶ *Ibid.*

¹⁷ *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Second Decision on Prosecution Motion for Leave to Amend its Rule 65ter Witness List to Add Wesley Clark, 16 February 2007 (“*Milutinović et al. Decision*”), para. 24.

¹⁸ Notification and Motion, paras. 5–6; *Popović Decision*.

¹⁹ Status Conference, T. 206–208 (6 May 2009).

conditions to apply to the disclosure of evidence and to the giving of testimony by certain witnesses, that are mandated by Rule 70 providers.²⁰

21. As the pre-trial Judge explained at the Status Conference held on 6 May 2009,

Protective measures appear to us to be measures designed to protect witnesses and victims. And when . . . a party seeks protective measures, the party is normally expected to justify them. There has to be a reason for them. And . . . obviously the appropriate rule is Rule 75. On the other hand, there are circumstances in which states seek to protect material, and to that the rule that applies is Rule 70. And the criteria and the requirements are quite different, and indeed there may be no reason to justify or explain why a certain condition has been attached to material. However, if the party seeks to introduce that material into court as evidence, then the Court will have a say on whether the condition can continue to apply and the evidence be admitted, and the Court may well refuse to admit the evidence if the condition is inconsistent with the requirements of a fair trial. Now, it seems to the Trial Chamber that these two entirely separate concepts are confused in this motion, and the motion gives no real indication that the measures which you ask us to note as already in place were actually measures justified under Rule 75. Now, if they were, then this Chamber is bound to accept them. The additional measures that you seek appear on the face of it to have nothing to do with Rule 75. They appear to be measures designed to protect the material itself at the instance of the state provider, and that's something that is not an appropriate exercise of the power of the Chamber under Rule 75.²¹

22. Counsel for the Prosecution correctly stated at the above mentioned Status Conference²² that some other Trial Chambers have taken a more liberal approach by applying Rule 75(F)(i) to Rule 70 conditions, and thus considering that such conditions, as granted in previous proceedings, continue to apply *mutatis mutandis* to the proceedings before them.²³ However, this Chamber considers that the view originally formed by the Trial Chamber in the *Milutinović et al.* case that Rule 70 measures are not subject to the automatic continuation provisions of Rule 75, is correct.²⁴ The Appeals Chamber stated that the Trial Chamber is entitled “under Rule 70(G) of the Rules to consider whether the Rule 70 restrictions stipulated with respect to . . . witness testimony would undermine the need to ensure a fair trial and substantially outweigh the testimony’s probative value such as to lead to exclusion of that testimony”.²⁵ While the relationship between Rules 70 and 75 was not specifically addressed, the position stated by the Appeals Chamber is consistent with the views expressed by the *Milutinović et al.* Trial Chamber.

²⁰ See *Milutinović et al.* Decision, para. 24; *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Confidential Decision on Prosecution Motion for Reconsideration of Decision on Fifth Prosecution Motion for Protective Measures, 21 June 2006, para. 13.

²¹ Status Conference, T. 205–206 (6 May 2009).

²² Status Conference, T. 206–207 (6 May 2009); see also Notification on KDZ240, footnote 5.

²³ See *inter alia* *Stanišić and Župljanin* Decision; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-PT, Order for Witness Protection Measures pursuant to Rules 70 and 75 of the Rules, 13 April 2006; *Prosecutor v. Martić*, Case No. IT-95-11-T, Decision on Prosecution’s Second Motion for Protective Measures with Confidential Annexes A, C and E, and Confidential and *Ex-Parte* Annexes B, D and F, 13 January 2006.

²⁴ *Milutinović et al.* Decision, para. 24; see also *Milutinović et al.* Appeals Decision.

²⁵ *Milutinović et al.* Appeals Decision, para. 18.

23. As stated above, Rule 75(B) protective measures already in place in other proceedings are subject to Rule 75(F)(i). However, the continuation in the present proceedings of “protective measures” already in place, and notified by the Prosecution, will not apply *ipso facto* if the measures so notified were in fact Rule 70 conditions, rather than protective measures falling under Rule 75. The Chamber recognises the prerogative of the Rule 70 provider to invoke Rule 70 at its discretion. Thus, a Rule 70 provider may provide information upon a confidential basis to a party, and expect those conditions to apply, not only to a particular case, but to all cases in which the party may want to use the material. That is a matter to be dealt with between the Rule 70 provider and the party.²⁶ However, where the party elects to present evidence subject to a Rule 70 condition which requires departure from the usual arrangements that apply at a public hearing in court, it is then the obligation of the party to make the appropriate Rule 70 application to the Chamber in order to give the Chamber the opportunity to determine whether the Rule 70 condition is consistent with the accused’s right to a fair trial pursuant to Rule 70(G).²⁷ The Trial Chamber cannot assess, on the basis of the information made available to it at this point, whether the measures granted by other Chambers to witnesses KDZ182, KDZ185, KDZ304, and KDZ450 fall within the scope of Rule 75, or whether they are Rule 70 conditions that have nothing to do with ensuring the protection of those witnesses.²⁸ Consequently, the Chamber will invite the Prosecution to file another motion making it clear whether the measures being notified fall under Rule 75 and, if they do not, re-applying for the Rule 70 conditions which relate to the presentation of evidence in court, to be applied in the present proceedings, and explaining why that should be so.

c) KDZ112, KDZ196, and KDZ259

24. The Prosecution is requesting the Chamber to grant various “protective measures” for witnesses KDZ112, KDZ196, and KDZ259 pursuant to a request by the Rule 70 provider under Rule 70(B). The Prosecution alleges that the conditions requested by the Rule 70 provider may be granted by the Chamber under Rule 70, as various Chambers have “routinely” used their discretion in applying similar conditions to those sought by the Rule 70 provider, and the conditions sought would not impede a fair trial.²⁹

²⁶ See *Milutinović et al.* Decision, para. 24.

²⁷ See para. 15 above.

²⁸ See *Perišić* Decision; *Galić* Decision.

²⁹ Notification and Motion, paras. 13–19.

25. Rule 70 is the basis for co-operation of States, organisations, and individuals with the Tribunal, as it encourages them to share sensitive information on a confidential basis.³⁰ It also recognises the need of States for safeguards with respect to certain State interests, while allowing them to fulfil their co-operation obligations under Article 29 of the Statute.³¹ In this way, States share sensitive information with the Tribunal, and the Rules guarantee that the confidentiality of the information they offer and of the information's sources is protected.³²

26. As set out in paragraph 23 above, the Chamber recognises the prerogative of the Rule 70 provider to invoke Rule 70 at its discretion. However, when the Chamber is faced with a Rule 70 application for conditions relating to the presentation of evidence in court, it is then for the Chamber to determine whether the Rule 70 conditions requested are consistent with the accused's right to a fair trial pursuant to Rule 70(G).³³ Consequently, when faced with a condition which would unfairly impact upon the trial, the Chamber is under an obligation under Rule 70(G) to exclude the evidence.³⁴

27. The Trial Chamber notes that the conditions falling under sections a, b, and c of paragraph 6 above, are conditions applied by the Rule 70 provider to the disclosure of KDZ112, KDZ196, and KDZ259's Interview Statements. Based upon the submissions of the Prosecution, the Chamber is satisfied that these witnesses have provided information to the Prosecution on a confidential basis pursuant to Rule 70(B), and that the requirements of Rule 70 have been satisfied. The Chamber therefore notes the application of the conditions specified by the Rule 70 provider, as set out in paragraph 6 above, and to that extent it will grant the application.

28. However, the other conditions specified in paragraph 7 above are sought to be applied when the evidence of these witnesses is presented in court. The Chamber considers that such a departure from the normal arrangements in court requires to be justified. The Prosecution should therefore make an appropriate motion for the application of these conditions to the presentation of the evidence of these witnesses when their evidence is presented; the Accused will then have an opportunity to respond. In that connection, issues may arise as to whether the Rule 70 conditions attached to the disclosure of the Interview Statements should continue to apply when the witnesses give evidence. It is the Chamber itself that is best placed (with its knowledge of the issues in the

³⁰ *Prosecutor v Slobodan Milošević*, Case No. IT-02-54-AR108bis & AR73.3, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2002 ("*Milošević Decision*"), paras. 9, 19.

³¹ *Milutinović et al.* Appeals Decision, para. 18.

³² *Milošević Decision*, para. 19.

³³ See para. 14 above.

³⁴ See *Milutinović et al.* Appeals Decision, para. 18; *Milutinović et al.* Decision, para. 26.

trial) to determine whether the normal in-court arrangements should be varied to allow the evidence to be presented.

B. Notification on KDZ240

29. The same considerations as outlined in paragraphs 20–23 above apply to the Prosecution’s Notification on KDZ240, and the Chamber will therefore invite the Prosecution to file a motion re-applying for any trial-related Rule 70 conditions concerning witness KDZ240 that it seeks to apply in these proceedings.

IV. Disposition

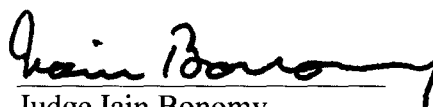
30. Accordingly, the Trial Chamber, pursuant to Articles 20, 21, and 22 of the Statute, and Rules 54, 69, 70, and 75 of the Rules, hereby:

- a. **NOTES**, the continuation in these proceedings of the protective measures granted to KDZ155 by the *Popović* Trial Chamber, as notified in the Notification and Motion.
- b. **DENIES** the Notification and Motion in all other respects in so far as it relates to witnesses KDZ182, KDZ185, KDZ304, and KDZ450, without prejudice, and **INVITES** the Prosecution to file another motion re-applying for Rule 70 conditions concerning these witnesses.
- c. **GRANTS** the Notification and Motion in part, in so far as it relates to witnesses KDZ112, KDZ196, and KDZ259, and **ORDERS** that:
 - i. Witnesses KDZ112, KDZ196, and KDZ259 shall be referred to by these pseudonyms during their testimony and in all public Tribunal documents;
 - ii. The names, addresses, whereabouts, and/or any other identifying information concerning witnesses KDZ112, KDZ196, and KDZ259 shall be placed under seal and shall not be included in any public records of the Tribunal;
 - iii. The Interview Statements of witnesses KDZ112, KDZ196, and KDZ259 shall not be disclosed to the public; and
 - iv. The use by the Accused of the Interview Statements shall be restricted solely for the preparation of his defence.

- d. **DENIES** the Notification and Motion in all other respects in so far as it relates to witnesses KDZ112, KDZ196, and KDZ259, without prejudice, and **INVITES** the Prosecution to file an appropriate motion requesting the Chamber to grant Rule 70 conditions for these witnesses.
- e. **DENIES** the Notification on KDZ240 without prejudice, and **INVITES** the Prosecution to file another motion re-applying for Rule 70 conditions concerning this witness.
- f. 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 (as defined in paragraph 25 of the Chamber’s “Decision on Motions for Disclosure of Rule 68 Material and Reconsideration of Decision on Adequate Facilities”, issued on 10 March 2009).

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

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


Judge Iain Bony
Pre-Trial Judge

Done this twenty-sixth day of May 2009
At The Hague
The Netherlands

[Seal of the Tribunal]