



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: 5 June 2009  
Original: English

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**IN THE TRIAL CHAMBER**

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

**Registrar:** Mr. John Hocking

**Decision of:** 5 June 2009

**PROSECUTOR**

v.

**RADOVAN KARADŽIĆ**

***PUBLIC***

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**DECISION ON PROSECUTION'S MOTION FOR  
DELAYED DISCLOSURE FOR KDZ456, KDZ493, KDZ531 AND KDZ532,  
AND VARIATION OF PROTECTIVE MEASURES FOR KDZ489**

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**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 “Prosecution’s Motion for Delayed Disclosure for KDZ456, KDZ493, KDZ531 and KDZ532 and Variation of Protective Measures for KDZ489”, filed on 8 May 2009 (“Motion”), and hereby issues this decision thereon.

### **I. Submissions of Parties**

1. In the Motion, the Office of the Prosecutor (“Prosecution”) requests the grant of the protective measures of assignment of a pseudonym, testimony in closed-session, and delayed disclosure until 30 days prior to the witnesses’ testimony, for witnesses identified as KDZ456, KDZ493, KDZ531, and KDZ532, and seeks to rescind the protective measures currently in place for witness KDZ489.<sup>1</sup> The Prosecution files the Motion pursuant to Articles 20, 21, and 22 of the Statute of the Tribunal (“Statute”), and Rules 69, 75, and 79 of the Tribunal’s Rules of Procedure and Evidence (“Rules”), and sets forth the grounds for the relief requested in five confidential and *ex parte* appendices attached to the Motion.

2. The Prosecution explains that, due to the sensitive nature of the evidence KDZ456 has provided to the Prosecution, and the personal circumstances of the witness, the witness is particularly vulnerable to threats and intimidation.<sup>2</sup> Similarly, KDZ531’s co-operation with the Prosecution in the past has led to reprisals against the witness’s family, and due to the witness’s family situation, this witness is also particularly vulnerable to threats and intimidation.<sup>3</sup> The Prosecution further explains that KDZ493 has been subjected to certain reprisals in the past due to the witness’s co-operation with the Prosecution, and adds that the witness’s evidence is potentially incriminating for persons still living in the area in which the witness currently resides.<sup>4</sup> The Prosecution adds that KDZ532 suffered reprisals “at the hands of prominent members in the overarching joint criminal enterprise alleged by the Prosecution” during the Indictment period, and that the witness’s evidence will potentially incriminate persons still living in the same area in which the witness currently resides.<sup>5</sup> Finally, the Prosecution concludes with respect to the four witnesses

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<sup>1</sup> Motion, paras. 1, 18.

<sup>2</sup> Motion, para. 10.

<sup>3</sup> Motion, para. 12.

<sup>4</sup> Motion, para. 11.

<sup>5</sup> Motion, para. 13.

that serious concerns exist for the security of the witnesses and their families if it becomes known that they will give evidence before the Tribunal.<sup>6</sup>

3. The Prosecution further explains that it seeks delayed disclosure to the Accused of the identity of witnesses KDZ456, KDZ493, KDZ531, and KDZ532 “because disclosure of their identity to the Accused, and his legal associates, increases the risk that their cooperation with the Tribunal will become known to third parties”, and adds that the need for the witnesses to testify in closed session and to have a pseudonym is justified “on the basis that it may be possible for a third party to discern the identity of the witnesses from the nature of the testimony they are expected to provide at trial”.<sup>7</sup>

4. With respect to witness KDZ489, the Prosecution explains that the witness testified in closed session with a pseudonym in another case, and that the disclosure of the witness’s identity was delayed in such case. The Prosecution has been in recent contact with the witness who has advised them that he is willing to testify without protective measures, and does not require the delayed disclosure of his identity to the Accused.<sup>8</sup>

5. On 11 May 2009, the Accused filed its “Response to Motion for Delayed Disclosure” (“Response”), in which it opposes the Motion in part.<sup>9</sup> The Accused does not oppose the removal of delayed disclosure of the identity of KDZ489.<sup>10</sup> However, he opposes delayed disclosure of the identities of witnesses KDZ456, KDZ493, KDZ531, and KDZ532, as such delayed disclosure will prevent him from adequately preparing for trial, and will cause him “great prejudice”.<sup>11</sup> The Accused further asserts that “there has not been the slightest breach of the confidentiality of information on his part”,<sup>12</sup> and adds that given his track record of obedience to the Tribunal’s orders, there is no reason to delay disclosure of the identity of the witnesses to him.<sup>13</sup>

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<sup>6</sup> Motion, paras. 10–13, 16.

<sup>7</sup> Motion, para. 17.

<sup>8</sup> Motion, para. 14.

<sup>9</sup> Response, paras. 2–3.

<sup>10</sup> Response, para. 2.

<sup>11</sup> Response, paras. 3, 6.

<sup>12</sup> Response, para. 4.

<sup>13</sup> Response, para. 5.

## II. Applicable Law

### A. Protective measures

6. The 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 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.<sup>14</sup>

### B. Trial-related protective measures under Rule 75

7. 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, such as voice and image distortion and the assignment of a pseudonym, as well as closed session pursuant to Rule 79.

8. 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).

### C. Delayed disclosure under Rule 69

9. 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

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<sup>14</sup> 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.

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.

10. 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 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.

11. Several Trial Chambers, notably the Pre-Trial Chamber in *Brđanin and Talić*, have expounded upon what is required to justify the application of Rule 69(A).<sup>15</sup> In particular, the Prosecution must establish “exceptional circumstances”, that is, something more than the prevailing conditions in the former Yugoslavia by themselves.<sup>16</sup> This Trial Chamber considers it established, following the test as originally set out in *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 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.<sup>17</sup> The likelihood of interference must be *objective*: while the witness may personally feel that he or she may be at risk, any subjective fears

<sup>15</sup> 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.

<sup>16</sup> First *Brđanin* Decision, para. 11.

<sup>17</sup> Second *Brđanin* Decision, para. 22; Third *Brđanin* Decision, para. 16.

expressed by the witness “are *not in themselves* sufficient to establish any real *likelihood* that they may be in danger or at risk”.<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup> The Trial Chamber in *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.<sup>21</sup>
- c. *Length of time before the trial at which disclosure to the accused must take place.*<sup>22</sup> 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”.<sup>23</sup> 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 having superior authority or aiding and abetting may require greater protection than a witness giving evidence which does not directly implicate the accused.<sup>24</sup>

12. The Chamber notes that, when weighing the relative interests at stake, it must be cognisant of the fact that under Article 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”.<sup>25</sup> While

<sup>18</sup> 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.

<sup>19</sup> First *Brđanin* Decision, para. 28.

<sup>20</sup> First *Brđanin* Decision, para. 29.

<sup>21</sup> First *Brđanin* Decision, para. 30–31.

<sup>22</sup> First *Brđanin* Decision, para. 33; Second *Brđanin* Decision, para. 16.

<sup>23</sup> First *Brđanin* Decision, para. 24, 28; Second *Brđanin* Decision, para. 18; Third *Brđanin* Decision, para. 13.

<sup>24</sup> First *Brđanin* Decision, para. 34; Third *Brđanin* Decision, para. 15.

<sup>25</sup> *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.

“due regard” must also be given to protection of victims and witnesses, this is a secondary consideration.<sup>26</sup>

### III. Discussion

13. The Chamber notes that in his Response the Accused did not oppose the requested protective measures of assignment of a pseudonym and testimony in closed-session for witnesses KDZ456, KDZ493, KDZ531, and KDZ532. Furthermore, the Chamber is of the view that the Prosecution has demonstrated, as set out in the confidential *ex parte* appendices to the Motion, the existence of a real risk to the safety and security of witnesses KDZ456, KDZ493, KDZ531, and KDZ532 and the witnesses’ families should it become publicly known that the witnesses have testified before the Tribunal in the instant proceedings. The Chamber therefore considers that the protective measures of use of a pseudonym and testimony in closed-session are appropriate and necessary to safeguard the privacy and protection of the prospective witnesses concerned and their families, and finds that such measures are consistent with the rights of the Accused in the present case.

14. With respect to the Prosecution’s request for delayed disclosure to the Accused of the identity of witnesses KDZ456, KDZ493, KDZ531, and KDZ532 until 30 days before their testimony, this Chamber recalls that the Trial Chamber in *Tadić* held that the balance between conflicting interests must be struck depending upon the facts of each case.<sup>27</sup> The Trial Chamber determines, as did the Chamber in *Brđanin and Talić*,<sup>28</sup> that the following factual considerations are relevant in deciding whether a request under Rule 69(A) should be granted:

- 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.<sup>29</sup>

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<sup>26</sup> First *Brđanin* Decision, para. 20; Second *Brđanin* Decision, para. 18; Third *Brđanin* Decision, para. 13.

<sup>27</sup> *Tadić* Decision on Witness R, p. 4.

<sup>28</sup> Fourth *Brđanin* Decision, para. 9.

<sup>29</sup> See Decision on Protective Measures for Witnesses, 30 October 2008, para. 30.

15. The Chamber notes that the Accused is opposed to the delayed disclosure of the identities of witnesses KDZ456, KDZ493, KDZ531, and KDZ532, and is aware of the balance that needs to exist between preserving the rights of the Accused and ensuring that the potential risks facing the witnesses are addressed. Nevertheless, the Chamber recognises the concerns expressed by the Prosecution in respect of the risk that the witnesses' cooperation with the Tribunal might become known to third parties if the witnesses' identity is disclosed to the Accused. Thus, having carefully considered the reasons underlying the Prosecution's request for delayed disclosure of the identities of witnesses KDZ456, KDZ493, KDZ531 and KDZ532—as set out in the confidential *ex parte* appendices to the Motion—, and taking into account the factual considerations relevant in the application of Rule 69(A)—as set out in paragraph 14 above—, the Chamber is satisfied that the Prosecution has met its burden in the instant request of establishing exceptional circumstances warranting delayed disclosure of the witnesses' identity to the Accused until 30 days prior to the witnesses' testimony. The Chamber considers that the Prosecution has demonstrated the risk that the four witnesses will be interfered with or intimidated once their identity is made known to the Accused. The Chamber is also satisfied that the granting of this protective measure will not unduly prejudice the Accused's right to a fair trial. However, it invites the Prosecution to schedule the testimony of these witnesses early in the presentation of its case, so as to maintain the appropriate balance between preserving the rights of the Accused and ensuring that the potential risks facing the witnesses are addressed.

16. Regarding the Prosecution's request to rescind the protective measures currently in place for witness KDZ489, the Chamber accepts that the facts that justified the order of protective measures for the witness in the first proceedings no longer exist, and that he is consequently willing to testify without protective measures in this case.

#### **IV. Disposition**

17. Accordingly, the Trial Chamber, pursuant to Articles 20, 21, and 22 of the Statute of the Tribunal and Rules 54, 69, and 75 of the Rules, hereby **GRANTS** the Motion, and

- a. **ORDERS**, with respect to witnesses KDZ456, KDZ493, KDZ531, and KDZ532, as follows:
  - i. Witnesses KDZ456, KDZ493, KDZ531, and KDZ532 shall be identified by these pseudonyms in all proceedings before the Tribunal, in discussions among the parties, and in all public Tribunal documents;

- ii. Witnesses KDZ456, KDZ493, KDZ531, and KDZ532 shall testify in closed session;
- iii. The Prosecution may withhold from the Accused the identity and any material identifying KDZ456, KDZ493, KDZ531, and KDZ532, until 30 days prior to the date of the expected testimony of the witness;
- iv. Representatives of the public shall not photograph, video-record, or sketch witnesses KDZ456, KDZ493, KDZ531, and KDZ532 while they are on the premises of the Tribunal;
- v. The names, whereabouts, and other identifying information concerning witnesses KDZ456, KDZ493, KDZ531, and KDZ532 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;
- vi. All hearings concerning the issue of protective measures of witnesses KDZ456, KDZ493, KDZ531, and KDZ532 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;
- vii. 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 witnesses KDZ456, KDZ493, KDZ531, and KDZ532;
- viii. If the Accused is aware or becomes aware of the current whereabouts of witnesses KDZ456, KDZ493, KDZ531, and KDZ532, 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 witnesses KDZ456, KDZ493, KDZ531, and KDZ532 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 witnesses KDZ456, KDZ493,

KDZ531, and KDZ532. When contacting witnesses KDZ456, KDZ493, KDZ531, and KDZ532, the Accused must identify himself;

- ix. The Accused shall not disclose to the public any confidential information of witnesses KDZ456, KDZ493, KDZ531, and KDZ532 (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;
- x. The Accused shall maintain all confidential materials pertaining to witnesses KDZ456, KDZ493, KDZ531, and KDZ532 on a confidential basis, and shall destroy them or return them to the Registry following the close of the proceedings;
- xi. Except as provided for by subsection (ix) above, any person, including the Accused, who knowingly and wilfully discloses the identifying information of witnesses KDZ456, KDZ493, KDZ531, and KDZ532, 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;
- xii. All provisions of this Decision shall apply equally to the Prosecution, the Accused, and the public;
- xiii. 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).

- b. **INVITES** the Prosecution to make all necessary efforts to present the evidence of witnesses KDZ456, KDZ493, KDZ531, and KDZ532 during the early stages of the Prosecution's case.
- c. **RESCINDS** the protective measures previously granted to witness KDZ489, for the purposes of these proceedings.
- d. **INSTRUCTS** the Registry to take all necessary measures to implement this Decision.

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

Judge Iain Bony  
Presiding

Dated this fifth day of June 2009  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**