



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-T
Date: 25 March 2010
Original: English

IN THE TRIAL CHAMBER III

Before: Judge O-Gon Kwon, Presiding Judge
Judge Howard Morrison
Judge Melville Baird
Judge Flavia Lattanzi, Reserve Judge

Registrar: Mr. John Hocking

Decision of: 25 March 2010

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S MOTION FOR MODIFICATION OF
PROTECTIVE MEASURES: WITNESSES KDZ490 AND KDZ492**

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Appointed Counsel

Mr. Richard Harvey

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 Accused’s “Motion for Modification of Delayed Disclosure: Witnesses KDZ490 and KDZ492”, filed on 2 March 2010 (“Motion”), and hereby renders its decision thereon.

I. Submissions of Parties

1. Witnesses KDZ490 and KDZ492 (“Witnesses”) were granted a number of protective measures by a Trial Chamber in another case before this Tribunal, including that of delayed disclosure of their identities and statements to the accused in that case until 21 and 30 days, respectively, prior to their testimony. In the Motion, the Accused seeks the modification of the orders granting this delayed disclosure (“Orders”), and requests the Chamber to order the disclosure of the Witnesses’ identities and statements to him pursuant to Rule 66(B) of the Tribunal’s Rules of Procedure and Evidence (“Rules”), as items material to the preparation of his defence.¹

2. Apparently on the assumption that this Trial Chamber issued the decisions granting protective measures to the Witnesses, the Accused states that the Orders were made *ex parte*, and that he has never been informed of the reasons for them. He further adds that “there has not been a single incident of breach of protective measures or threats to witnesses in his case”, and that “this circumstance alone is reason for reconsideration of the Trial Chamber’s decision based upon an *ex parte* submission”.² The Accused also claims that disclosure of the identities and statements of the Witnesses is necessary because, according to the Office of the Prosecutor (“Prosecution”)’s Pre-Trial Brief, the first witness scheduled to testify for the Prosecution in the present case will testify about events in Sanski Most municipality, and it appears that the Witnesses have information concerning events in the same municipality.³ Thus, the Accused adds, disclosure is necessary for him to have “a full picture of events within that municipality before commencing his cross examination” of the Prosecution’s first witness.⁴

3. On 9 March 2010, the Prosecution filed the “Prosecution’s Response to Karadžić Motion for Modification of Delayed Disclosure: Witnesses KDZ490 and KDZ492” (“Response”) opposing the Motion.⁵ The Prosecution acknowledges the Chamber’s power to vary the delayed disclosure measures granted to the Witnesses, but states that any variation to protective measures put in place

¹ Motion, paras. 1, 9.

² Motion, para. 2.

³ Motion, para. 3.

⁴ Motion, para. 4.

⁵ Response, para. 1.

for sensitive witnesses should still be consistent with the spirit of the protective measures regime under Rule 75 of the Rules.⁶ It argues that, in this particular case, the timing of delayed disclosure must be determined on a case-by-case basis.⁷

4. In a confidential and *ex parte* Appendix to the Response, the Prosecution provides a brief explanation of the circumstances surrounding the original grant of the protective measures in place for the Witnesses, which they continue to enjoy pursuant to Rule 75(F)(i) of the Rules, as well as the current circumstances of the Witnesses, which it states have not substantially changed since the measures were granted.⁸ The Prosecution then argues that the Trial Chamber granting the Orders determined that the designated period of time between disclosure and testimony was appropriate to the specific circumstances of the Witnesses, and that the reasons provided by the Accused in the Motion do not justify any variation of the measures put in place “pursuant to objectively established genuine fears”.⁹

5. The Prosecution adds that the terms of delayed disclosure are “not necessarily premised on a concern about the trustworthiness of the defence (or accused)” but rather “based on concerns about those who may be contacted by the defence in the course of their investigations regarding the witness”.¹⁰ Finally, the Prosecution states that the Accused’s claim that the identities of and material relating to the Witnesses must be disclosed to him because their testimony relates to events in Sanski Most municipality is inconsistent with the Tribunal’s practice. Thus, “in almost all cases where delayed disclosure measures have been in place, the general subject-matter of the delayed disclosure witness will inevitably be related to the subject-matter of preceding witnesses”.¹¹

II. Applicable Law

6. 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) 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

⁶ Response, paras. 3–4.

⁷ Response, para. 4.

⁸ Response, confidential and *ex parte* Appendix.

⁹ Response, paras. 2, 5, 10–11.

¹⁰ Response, para. 6.

¹¹ Response, para. 12.

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

7. Ordinarily, it is incumbent upon the Prosecution under Rule 66(A)(i) of the Rules to disclose to the accused, within 30 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. Furthermore, under Rule 66(B), “the Prosecutor shall, on request, permit the defence to inspect any books, documents, photographs and tangible objects in the Prosecutor’s custody or control” which: (i) are material to the preparation of the defence, or (ii) are intended for use by the Prosecution as evidence at trial, or (iii) were obtained from or belonged to the accused. 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.¹³

8. As this Chamber has stated on prior occasions, these provisions raise 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 result in restriction on *public* access to information about the relevant witnesses, Rule 69 contemplates the restriction of *an accused’s* access to witness identification information until shortly before the witnesses testify, 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) of the Statute to ensure that the accused has adequate time and facilities to prepare for trial.¹⁴

¹² See Decision on Prosecution’s Motion for Delayed Disclosure for KDZ456, KDZ493, KDZ531 and KDZ532 and Variation of Protective Measures for KDZ489, 5 June 2009 (“Decision on Delayed Disclosure”), para. 6 citing *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 Decision on Delayed Disclosure, para. 9.

¹⁴ See Decision on Delayed Disclosure, para. 10.

9. Several Trial Chambers have expounded upon what is required to justify the application of Rule 69(A).¹⁵ In particular, the Prosecution must establish “exceptional circumstances”, that is, something more than the prevailing conditions in the former Yugoslavia by themselves.¹⁶ There are several factors which have been considered relevant to a determination of “exceptional circumstances” warranting delay of the identification of a witness to the accused, such as the objective likelihood of interference resulting from disclosure to the accused;¹⁷ whether there is a specific rather than a general basis for the request;¹⁸ and the length of time before the trial at which disclosure to the accused must take place.¹⁹

10. When weighing the relative interests at stake, a Trial Chamber seized of a request for delayed disclosure 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”.²⁰ While “due regard” must also be given to protection of victims and witnesses, this is a secondary consideration.²¹

11. By virtue of Rule 75(F)(i) of the Rules, “[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”. In that regard, the Appeals Chamber has held that “delayed disclosure” orders are protective measures to which Rule 75(F) applies.²² Thus, the protective 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). Before determining an application under Rule 75(G)(ii), Rule 75(I) requires the Chamber to obtain all relevant information from the first proceedings and consult with any judge who ordered the protective measures in those

¹⁵ 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”), paras. 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.

¹⁶ First *Brđanin* Decision, para. 11.

¹⁷ First *Brđanin* Decision, para. 26; Second *Brđanin* Decision, paras. 19, 22; Third *Brđanin* Decision, para. 16.; see also *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 See First *Brđanin* Decision, paras. 28–31.

¹⁹ See First *Brđanin* Decision, paras. 24, 28, 33–34; Second *Brđanin* Decision, paras. 16, 18; Third *Brđanin* Decision, paras. 13, 15.

²⁰ *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.

²¹ First *Brđanin* Decision, para. 20; Second *Brđanin* Decision, para. 18; Third *Brđanin* Decision, para. 13.

²² *Prosecutor v. Krajišnić*, Case No. IT-00-39-A, Decision on “Motion by Mićo Stanišić for Access to all Confidential Materials in the Krajišnić Case”, 21 February 2007, para. 6; *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.

proceedings.²³ In addition, Rule 75(J) requires that the Chamber ensure, through the Registry's Victims and Witnesses Section ("VWS"), that the witness has given consent to the rescission or variation of the relevant protective measures.

III. Discussion

12. As stated above, the delayed disclosure of the Witnesses' identities and statements to the Accused has been carried over to this case from a previous proceeding, and this Chamber has noted its continuation in accordance with the Appeals Chamber's jurisprudence on the issue. The Accused's Motion must therefore be considered as an application pursuant to Rule 75(G). Given that there is no Chamber currently seised of the case in which the relevant protective measures were granted, this Chamber is properly seised of the matter under Rule 75(G)(ii) of the Rules.

13. In accordance with Rule 75(I), the Chamber has consulted with a Judge who was a member of the Chamber that originally granted the protective measures to the Witnesses. The Chamber also requested the VWS, pursuant to Rule 75(J), to contact the Witnesses to enquire whether they consent to the rescission or variation of the delayed disclosure measures currently in place. Neither of the Witnesses gave such consent.

14. The Chamber has carefully considered the arguments raised by the Accused in favour of modifying the terms of the Orders, taking into consideration that he is not in possession of any information about the Witnesses or the basis upon which the Orders were issued, and has therefore been unable to provide any reasons specific to the Witnesses, or their circumstances, for his request.

15. Keeping in mind the balance that needs to be struck between preserving the rights of the Accused and ensuring that the potential risks facing the Witnesses are addressed, the Chamber has read the original submissions in which delayed disclosure of their identities was requested. The Chamber has also carefully reviewed the Orders themselves, and notes that the Chamber making them took into consideration various factors, such as the identity of the Witnesses, their nationalities and ethnicities, their places of residence, the nature of their proposed evidence, as well as their role, and the duties they performed and positions they occupied during the course of the conflict in Bosnia and Herzegovina. Furthermore, the Chamber has analysed the arguments raised by the Prosecution in its Response, and in particular those contained in the confidential and *ex parte* Appendix and, in that regard, it is satisfied that the sensitive circumstances surrounding the

²³ Rule 75(G)(ii) provides that "[a] party to the second proceeding seeking to rescind, vary, or augment protective measures ordered in the first proceedings must apply: [. . .] (ii) if no Chamber remains seised of the first proceedings, to the Chamber seised of the second proceedings."

Witnesses have not changed since the original grant of protective measures. Finally, it has also taken into account the views expressed by the Judge who was involved in the original grant of protective measures, and the comments of the Witnesses themselves to the VWS.

16. In light of all these factors, the Chamber is satisfied that delayed disclosure of the Witnesses' identities to the Accused until 21 and 30 days prior to their respective testimonies remains justified in this particular case.

17. Additionally, the Chamber has considered the Accused's argument that disclosure of the Witnesses' identities and statements should be ordered by the Chamber pursuant to Rule 66(B), as they are material to the preparation of his defence. The Chamber recalls its finding that the expression "material to the preparation of the defence" denotes a lower standard than "relevance", and that, for the purposes of Rule 66(B), the Accused is entitled to make requests, and receive materials, that fall within a broader category.²⁴ However, Rule 66(B) cannot be applied in a manner that circumvents the protective measures regime established in the Rules, and Rule 69(C) ensures that the identity of a delayed disclosure witness is provided to the accused in sufficient time to allow adequate preparation for trial, which must include the preparation of the defence.

18. Moreover, Rule 66(B) material will continue to be disclosed to the Accused throughout the proceedings, and it cannot be expected that the Accused will have reviewed *all* such material before the presentation of evidence begins. As the trial progresses, however, and in particular when the Accused is provided with the identities and statements of the Witnesses, should he discover new areas of relevant questioning that he would wish to put to a witness already brought by the Prosecution, he may apply to the Chamber for the recall of that witness for further cross-examination. This request should clearly demonstrate good cause for the relief sought, including the reasons why the Accused considers he needs the witness to be recalled, with specific reference to the nature of the new information and how it is relevant to the particular witness.

19. For these reasons, the Chamber is satisfied that the continuation of the delayed disclosure protective measures for the Witnesses in this particular case will not unduly prejudice the Accused's right to a fair trial, in spite of the fact that the Witnesses' expected testimony relates to events in Sanski Most municipality, which will also be the subject of the Prosecution's first witness's expected evidence. However, and once again repeating its position on the matter, the Chamber invites the Prosecution to schedule the Witnesses' testimony as early as possible in the


²⁴ See Decision on the Accused's Motion for Postponement of Trial, 26 February 2010, para. 36.

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.

IV. Disposition

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

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



Judge O-Gon Kwon
Presiding

Dated this twenty-fifth day of March 2010
At The Hague
The Netherlands

[Seal of the Tribunal]