



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: 7 December 2011

Original: English

IN THE TRIAL CHAMBER

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

Registrar: Mr. John Hocking

Decision of: 7 December 2011

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S MOTION FOR MODIFICATION OF
DELAYED DISCLOSURE: WITNESS KDZ320**

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

Standby 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”) remains seised of the part of the Accused’s “Motion for Modification of Delayed Disclosure: Witnesses KDZ320, KDZ456, KDZ523, and KDZ532”, filed on 31 August 2011 (“Motion”) that pertains to witness KDZ320, and hereby issues its decision thereon.

I. Background and Submissions

1. On 1 August 2006 and 19 February 2007, KDZ320 was granted the protective measures of pseudonym, image distortion, and delayed disclosure by the Trial Chamber hearing the *Popović et al.* (“*Popović*”) case.¹ On 24 July 2009, the Chamber noted the continuation of these protective measures in these proceedings.²

2. In the Motion, the Accused requested in relevant parts that the Chamber modify the delayed disclosure order which provides that the identity of witness KDZ320 and the statements he gave to the Office of the Prosecutor (“Prosecution”) not be disclosed to the Accused until 30 days before he gives evidence.³ The Accused further requested that KDZ320’s identity and statement be disclosed 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.⁴

3. On 5 September 2011, the Prosecution filed its “Prosecution Response to Motion for Modification of Delayed Disclosure: Witnesses KDZ320, KDZ456, KDZ523, and KDZ532” (“Response”) requesting the Chamber to dismiss the Motion,⁵ and arguing that delayed disclosure orders are a form of protective measures which continue to have effect *mutatis mutandis* in subsequent proceedings at the Tribunal.⁶ With respect to KDZ320, the Prosecution explained that the witness had not consented to the variation of his protective measures and that the Motion had failed to identify any exceptional circumstances under Rule 75(J) of the Rules that would justify the requested modification absent his consent.⁷ Furthermore, it argued that the specific circumstances of KDZ320 which originally justified granting protective measures have not changed and that the continuation of the delayed disclosure of his identity and

¹ See Prosecution’s Fourth Notification of Protective Measures for Witnesses Currently in Force, 17 June 2009, confidential and *ex parte* Appendix B, p. 2.

² See Decision on Protective Measures for Witnesses, 24 June 2009, paras. 22, 30(d), Annex B.

³ Motion, paras. 1, 10.

⁴ Motion, paras. 1, 10.

⁵ Response, paras. 1, 11.

⁶ Response, para. 5.

⁷ Response, paras. 1, 8.

statements to the Accused in this case is justified.⁸ Additionally, according to the Prosecution, the Motion failed to demonstrate that a miscarriage of justice would ensue if the protective measures of KDZ320 are not modified, given that the Accused would have ample time to review the statements of the witness and prepare for cross-examination within 30 days of the disclosure of the material to him.⁹

4. On 23 September 2011, the Chamber issued its “Decision on Accused’s Motion for Modification of Delayed Disclosure: Witnesses KDZ320, KDZ456, KDZ523, and KDZ532” (“Decision on Modification of Delayed Disclosure”) denying the Motion with respect to KDZ320.¹⁰ The Chamber noted that the delayed disclosure of KDZ320’s identity and statements to the Accused had been carried over to this case from the *Popović* case, of which the Appeals Chamber is currently seised, and that therefore the Chamber did not have the power to rescind or vary the protective measures currently in place for the witness, in accordance with Rule 75(G) of the Tribunal’s Rules of Procedure and Evidence (“Rules”).¹¹

5. On 27 September 2011, the Accused filed the “Motion by Radovan Karadžić for Modification of Delayed Disclosure Decision” (“Second Motion”), submitting first that the Appeals Chamber should refer the issue of the modification of KDZ320’s delayed disclosure back to the Chamber as the question of whether an order of delayed disclosure made pursuant to Rule 69 ought to apply to a subsequent case is best determined by the Trial Chamber hearing that subsequent case.¹² The Accused thus requested the Appeals Chamber to overturn its jurisprudence holding that delayed disclosure orders apply *mutatis mutandis* in subsequent proceedings, and added that the practice of the Tribunal has provided cogent reasons for doing so.¹³ The Accused further stated that, should the Appeals Chamber wish to decide the matter itself, it should order the immediate disclosure of the identity and prior statements of KDZ320.¹⁴

6. On 30 September 2011, the Prosecution filed its “Prosecution’s Response to Motion by Radovan Karadžić for Modification of Delayed Disclosure Decision”, with confidential and *ex parte* Appendices A and B (“Response to Second Motion”), not opposing the Accused’s request that the Appeals Chamber refer the issue of the modification of KDZ320’s delayed disclosure

⁸ Response, para. 9.

⁹ Response, para. 10.

¹⁰ Decision on Modification of Delayed Disclosure, para. 24(b).

¹¹ Decision on Modification of Delayed Disclosure, para. 11.

¹² Second Motion, paras. 7, 8.

¹³ Second Motion, paras. 9, 12.

¹⁴ Second Motion, para. 17.

back to this Chamber for determination,¹⁵ but requesting that the Second Motion be dismissed in the event that the Appeals Chamber chose to rule on it itself.¹⁶

7. On 23 November 2011, the Appeals Chamber issued the “Decision on Motion by Radovan Karadžić for Modification of Delayed Disclosure Decision” (“Appeals Chamber Decision”). The Appeals Chamber first found that the Accused failed to show cogent reasons why the Appeals Chamber should depart from its jurisprudence in the present case.¹⁷ It then stated that, even though the Accused had correctly applied to the Appeals Chamber as the Chamber seised of the *Popović* case, pursuant to Rule 75(G), the rule does not prohibit the Appeals Chamber from referring the matter back to the Chamber of the second proceedings.¹⁸ The Appeals Chamber then proceeded to refer the matter back to this Chamber for reasons of judicial consistency and economy, and stating that, given that delayed disclosure directly impacts on the Accused’s ability to adequately prepare his defence, due to this Chamber’s “organic familiarity” with the case it is best placed to properly address whether and to what extent the protective measures of delayed disclosure should be varied with respect to KDZ320.¹⁹

8. On 24 November 2011, the Accused informed the Chamber that he would not be filing any further pleadings in relation to the delayed disclosure in place for KDZ320 as a result of the Appeals Chamber Decision, but requested that it consider his submissions in the Second Motion.²⁰

II. Discussion

9. The Chamber has outlined before the law applicable to delayed disclosure to the Accused, and will not repeat it in this Decision, but refers to the relevant paragraphs of the Decision on Modification of Delayed Disclosure.²¹

10. The Chamber recalls that, 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 proceedings. Furthermore, Rule 75(J) requires that the Chamber ensure, through the Registry’s Victims and Witnesses

¹⁵ Response to Second Motion, paras. 1, 8.

¹⁶ Response to Second Motion, paras. 2, 8. *See also* Response to Second Motion, paras. 3–7.

¹⁷ Appeals Chamber Decision, p. 1.

¹⁸ Appeals Chamber Decision, p. 2.

¹⁹ Appeals Chamber Decision, p. 2.

²⁰ Hearing, T. 21911 (24 November 2011).

²¹ *See* Decision on Modification of Delayed Disclosure, paras. 7–9 referring to 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”), paras. 9–12 and Decision on Motion for Modification of Protective Measures: Witnesses KDZ490 and KDZ492, 25 March 2010, paras. 7–10.

Section (“VWS”), that the witness has given consent to the rescission of the relevant protective measures.

11. Upon the request of the Chamber, the VWS contacted KDZ320, and informed the Chamber on 29 November 2011 that KDZ320 has consented to the variation of the protective measure of delayed disclosure of his identity and witness statements *vis-à-vis* the Accused, as long as such protective measure remains in place in any future proceedings before the Tribunal in which the witness is called to testify.²² Additionally, the Chamber consulted with Judge Carmel Agius, who was the Presiding Judge in the *Popović* case, which granted the protective measures to KDZ320. Given the witness’s consent, Judge Agius has expressed his view that he does not oppose the modification of the protective measure of delayed disclosure with respect to KDZ320.

12. The Chamber has on many occasions stated that non-disclosure to an accused pursuant to Rule 69(A) of the Rules is an extraordinary measure which should only be ordered in exceptional circumstances.²³ Thus, keeping in mind the balance that needs to be struck between preserving the rights of the Accused and ensuring that the potential risks facing KDZ320 are addressed, the Chamber has reviewed the original submissions in the *Popović* case in which protective measures for KDZ320 were requested, as well as the decision granting such measures. In light of the position taken by the witness himself, and taking into account the fact that Judge Agius has not opposed the modification of the protective measure of delayed disclosure with respect to KDZ320, the Chamber is satisfied that the variation of the protective measure of delayed disclosure currently in place for KDZ320 as granted by the *Popović* Trial Chamber is appropriate in the present case.

13. The Chamber notes that KDZ320 is not included in the Prosecution’s list of witnesses for January and February 2012 so the Chamber expects him to testify at the earliest in March 2012.²⁴ In order to give the Accused sufficient time to review the material disclosed as a result of this Decision and to prepare for his cross-examination of KDZ320, the Chamber invites the Prosecution not to schedule the witness’s testimony before that date.

²² The Chamber notes that in the Response, the Prosecution stated that KDZ320 had not consented to the variation of his protective measures; Response, para. 8.

²³ See *inter alia* Decision on Delayed Disclosure, para. 9; Decision on Modification of Delayed Disclosure, para. 8.

²⁴ Prosecution’s Submission of Order of Witnesses for January and February 2012 with Appendix A, 1 December 2011, Appendix A.

III. Disposition

14. Accordingly, the Chamber, pursuant to Rules 54 and 75 of the Rules, hereby **GRANTS** the Motion and:

- a) **RESCINDS** the protective measure of delayed disclosure currently in place for KDZ320, for the purpose of this case; and
- b) **ORDERS** the Prosecution to immediately disclose to the Accused the identity and all material related to KDZ320.

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



Judge O-Gon Kwon
Presiding

Dated this seventh day of December 2011
At The Hague
The Netherlands

[Seal of the Tribunal]