



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: 12 October 2012

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: 12 October 2012

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON MOTION FOR PROTECTIVE MEASURES
FOR WITNESS KW456**

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”) is seised of the Accused’s “Motion for Protective Measures for Witness KW-456”, filed publicly with confidential annex on 8 October 2012 (“Motion”), and hereby issues its decision thereon.

I. Background and Submissions

1. On 24 September 2012, the Accused filed the “Notice of Request for Protective Measures for Witnesses KW-285, KW-341, and KW-456” (“Notice”) in which he informed the Chamber that witnesses KW285, KW341, and KW456 would ask for the protective measures of pseudonym, image distortion, and voice distortion when they testify in October 2012,¹ and requested that they be given an opportunity to orally provide the reasons for which they are seeking protective measures prior to giving testimony.²

2. On 2 October 2012, the Chamber issued the “Order in Relation to Accused’s Notice of Request of Protective Measures for Witnesses” (“Order”), denying the request in the Notice and ordering the Accused to file timely and substantiated motions requesting protective measures for any witness on his Rule 65 *ter* witness list “who he is aware wishes to request protective measures, sufficiently in advance to allow the Prosecution to respond and the Chamber to issue a decision on the said requests prior to the witness’s testimony”.³ On 9 October 2012, the Chamber issued the “Addendum to Order in Relation to Accused’s Notice of Request of Protective Measures for Witnesses Issued on 8 October 2012” (“Addendum”), which reiterated that “substantiated and timely written submissions” should be filed by the Accused with respect to protective measures but noted that the Chamber “does not take issue with the manner in which the Accused titles his requests for protective measures”.⁴

3. In the Motion, the Accused requests that an order be issued pursuant to Rule 75 of the Tribunal’s Rules of Procedure and Evidence (“Rules”) granting witness KW456 (“Witness”) the protective measures of pseudonym, image distortion, and voice distortion.⁵ The Accused attaches, in confidential Annex A, a “factual declaration” from his case manager who spoke to the Witness on the telephone and which, in the Accused’s submission, “indicates that the welfare of the witness and his/her family is at risk if his/her identity were made public”

¹ Notice, para. 1.

² Notice, para. 5.

³ Order, p. 3.

⁴ Addendum, p. 3.

⁵ Motion, para. 1.

(“Declaration”).⁶ The Witness expresses concerns for his property, the employment of his children, and his health as reasons for requesting protective measures.⁷ The Accused further requests that the protective measures sought, only be granted at the commencement of the Witness’s testimony to allow the Witness to be proofed by the Accused at the United Nations Detention Unit (“UNDU”) since the Registry does not allow protected witnesses to be interviewed there.⁸

4. On 10 October 2012, the Prosecution filed publicly with confidential appendix the “Prosecution Response to Karadžić’s Motion for Protective Measures for Witness KW-456” (“Response”). The Prosecution opposes the Motion on the grounds that the information provided by the Accused “is an insufficient basis for the Chamber to assess whether there exists an objectively grounded risk to the security of the Witness or that of his family”.⁹ The Prosecution also objects to postponing the granting of protective measures until the commencement of the Witness’s testimony.¹⁰ The Prosecution notes in that regard that there are alternative means to proof the witness avoiding the need for the Witness to physically go to the UNDU and jeopardise the protective measures in the event they are granted.¹¹

5. The Prosecution in Confidential Appendix A provides more detail as to why the security concerns and health condition referred to by the Accused in the Motion are “insufficiently specific and substantiated”.¹² The Prosecution points to the lack of information about the expected consequences for the Witness or his family of testifying in open session or documentation which would substantiate those claims.¹³

6. On 12 October 2012, the Accused’s legal adviser informed the Chamber by e-mail that the Witness had asked the Accused to file a request for leave to reply to the Response and that given the time constraints before the Witness’s testimony, the Accused intended to file the request for leave to reply and the reply jointly. The Chamber responded *via* e-mail on the same day that the Chamber would consider this request. Later on 12 October 2012, the Accused filed the Accused’s “Request for leave to reply: Motion for Protective Measures for Witness KW-456” with confidential annex B (“Reply”). In the Reply, the Accused submits that following receipt of the Response, his case manager contacted the Witness who provided “further

⁶ Motion, para. 3, confidential annex A.

⁷ Motion, confidential annex A.

⁸ Motion, para. 5.

⁹ Response, para. 1.

¹⁰ Response, para. 2 citing Addendum, p. 3.

¹¹ Response, para. 2.

¹² Response, confidential appendix A.

¹³ Response, confidential appendix A.

information to substantiate his request for protective measures”.¹⁴ The additional un-translated material is attached to the Reply and summarised in confidential annex B (“Additional Material”).¹⁵

II. Applicable Law

7. Article 20(1) of the Tribunal’s Statute (“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”. 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 clearly been established in previous Tribunal cases, these Articles reflect the duty of Trial Chambers 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 to information.¹⁶

8. Rule 75(A) of the Tribunal’s 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) of the Rules, 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 the presentation of testimony in private or closed session pursuant to Rule 79 of the Rules.

III. Discussion

9. As a preliminary matter, the Chamber considers that it is in the interests of justice to grant the Accused’s request for leave to reply pursuant to Rule 126 *bis* of the Rules and to take into consideration the Reply in its assessment of the Motion.

10. As the Chamber has noted on previous occasions, the party requesting protective measures must demonstrate the existence of an objectively grounded risk to the security or

¹⁴ Reply, para. 2.

¹⁵ Reply, para. 4, confidential annex B.

¹⁶ See Decision on Motion for and Notifications of Protective Measures, 26 May 2009, para. 11, citing *Prosecution v. Tadić*, Case No. IT-94-1-T, Decision on Prosecutor’s Motion Requesting Protective Measures for Witness L, 14 November 1995, para. 11; *Prosecutor v. Tadić*, Case No. 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.

welfare of the witness or the witness' family, should it become publicly known that he or she testified before the Tribunal.¹⁷

11. Having reviewed the Declaration and the summary of the Additional Material, the Chamber finds that the Accused has failed to provide sufficient information to determine whether the Witness or his family would face an objectively grounded risk to their security or welfare should the Witness testify in open session. Nothing in the Declaration or summary of the Additional Material, which remains very general, indicates an objective threat to the Witness's security or welfare or that of his family. Protective measures may not be granted on the basis of broad statements on hypothetical concerns of a witness without further explanation and/or specific material in support. The Chamber is therefore not satisfied, on the basis of the information before it, that there is an objectively grounded risk to the security or welfare of the Witness or that of his family.

12. While the request to postpone the granting of protective measures is moot for the purpose of this decision, the Chamber wishes to record its general position in relation to this request. The Chamber will categorically not entertain such requests. In situations in which the Chamber deems that protective measures are necessary to safeguard the security of a witness, that witness should enjoy the full scope of protection put in place by the Tribunal's Registry for protected witnesses upon travelling to The Hague. To decide otherwise would render the measures ineffective.

¹⁷ See Decision on Prosecution's Motion for Protective Measures for Witness KDZ487, 24 November 2009, para. 13, citing *Prosecution v. Martić*, Case No. IT-95-11-T, Decision on Defence Motion for Protective Measures for Witnesses MM-096, MM-116 and MM-90, 18 August 2006, pp. 2-3; *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-T, Decision on Prosecution's Additional Motion for Protective Measures of Sensitive Witnesses, 25 October 2005, para. 5.

IV. Disposition

13. Accordingly, the Chamber, pursuant to Articles 20, 21, and 22 of the Statute, and Rules 75 of the Rules, hereby **GRANTS** the Accused's request for leave to reply to the Response and **DENIES** the Motion.

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



Judge O-Gon Kwon
Presiding

Dated this twelfth day of October 2012
At The Hague
The Netherlands

[Seal of the Tribunal]