



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: 14 February 2013

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: 14 February 2013

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S MOTION FOR PROTECTIVE MEASURES
FOR WITNESS KW392**

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 KW392” filed publicly with a Confidential Annex on 4 February 2013 (“Motion”), and hereby issues its decision thereon.

I. Background and Submissions

1. 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 KW392 (“Witness”) the protective measures of pseudonym and image distortion.¹

2. In support, the Accused attaches as Confidential Annex A to the Motion a declaration from his case manager (“Declaration”), who spoke to the Witness on 30 January 2013.² The Declaration states that the Witness is under investigation, and was contacted in 2008 and 2012, by the War Crimes Chamber of the Court of Bosnia and Herzegovina (“War Crimes Chamber” and “BiH”, respectively).³ The Accused argues that the non-disclosure of his identity is necessary to ensure that his testimony in this case will not be used against him.⁴ The Accused states that this will ensure “that his liberty and security is not adversely affected by his appearing as a defence witness”.⁵ The Witness fears that if it is publicly known that he testified at the Tribunal as a defence witness it would increase the likelihood that he would be indicted before the War Crimes Chamber.⁶ In the Motion, the Accused argues that although Rule 90(E) of the Rules may prevent the Witness’s testimony from being used against him at the Tribunal, there is no certainty that this rule is binding on national courts.⁷ The Declaration states that the Witness will only testify under conditions which prevent his testimony from being used against him in BiH and if “it is not known that he gave testimony as a defence witness”.⁸

3. In the “Prosecution Response to Karadžić’s Motion for Protective Measures for Witness KW392”, filed publicly with a Confidential Appendix on 6 February 2013 (“Response”), the Office

¹ Motion, para. 1.

² Declaration, para. 2.

³ Motion, para. 3; Declaration, para. 3.

⁴ Motion, para. 3; Declaration, para. 4.

⁵ Motion, para. 3.

⁶ Declaration, para. 4.

⁷ Motion, para. 4, referring to *Prosecutor v. Perišić*, Case No. IT-04-81-T, Decision on Prosecution Motion for an Advance Ruling on the Scope of Permissible Cross-Examination, 12 June 2009 (“*Perišić* Decision”), para. 21.

⁸ Declaration, para. 5.

of the Prosecutor (“Prosecution”) opposes the Motion.⁹ The Prosecution argues that the information provided by the Accused is an insufficient basis for the Chamber to assess whether an objectively grounded risk to the security of the Witness exists and that no information has been provided that indicates that the Witness has ever been subject to any threat or harassment.¹⁰ Furthermore, the Prosecution submits that no explanation has been given as to how his testimony in open session could adversely affect his security.¹¹

4. The Prosecution further contends that while the safeguards provided to the Witness under Rule 90(E) of the Rules may prove an “ineffective guarantor of a witness’s right vis-à-vis another jurisdiction”,¹² this does not prevent the Witness from requesting private session during his testimony when the circumstances require it to avoid the possible violation of his right against self-incrimination.¹³

II. Applicable Law

5. 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”. 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.¹⁴

6. 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”. Pursuant to 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.

⁹ Response, para. 1.

¹⁰ Response, para. 1; Confidential Appendix, para. 3.

¹¹ Response, Confidential Appendix, para. 3.

¹² Response, para. 3, referring to *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Reasons for Decision Granting Protective Measures to Witness Željko Sačić, 20 September 2010, para. 13; *Perišić* Decision, para. 21.

¹³ Response, para. 3.

¹⁴ 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 the 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, para. 5; *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-PT, Decision on Motion by Prosecution for Protective Measures, 3 July 2000, para. 7.

III. Discussion

7. As the Chamber has noted previously, the party requesting protective measures must demonstrate the existence of an objectively grounded risk to the security or welfare of the witness or the witness' family, should it become publicly known that he or she testified before the Tribunal.¹⁵ While the Witness contends that his testimony may increase the likelihood that he would be indicted by the War Crimes Chamber and that his testimony before the Chamber may be used against him,¹⁶ this is both speculative and unrelated to any risk to his security or welfare. 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 should he testify in open session.

IV. Disposition

8. Accordingly, the Chamber, pursuant to Articles 20, 21, and 22 of the Statute, and Rules 54 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 fourteenth day of February 2013
At The Hague
The Netherlands

[Seal of the Tribunal]

¹⁵ 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.

¹⁶ Motion, para. 3; Declaration, paras. 2, 4.