



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: 8 January 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: 8 January 2013

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S MOTION FOR PROTECTIVE MEASURES
FOR WITNESS KW402**

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 KW402” filed publicly with Confidential Annex on 11 December 2012 (“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 KW402 (“Witness”) the protective measures of pseudonym, image distortion, and voice 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 three occasions in November 2012.² In the Declaration, the Witness explains that his customers are almost all Muslims, predominately from Sarajevo, and that he travels there two or three times a week. The Witness is “concerned that his professional relationships and career will be disrupted [...] [and] his family’s survival would be jeopardized” should he testify without protective measures.³ The Declaration further states that because the trial is being broadcast on television in Bosnia and Herzegovina (“BiH”) there is a strong likelihood that people would recognise and harass him during his travels.⁴ Moreover it indicates that the Witness will only give evidence if all the protective measures sought are granted.⁵ On this basis, the Accused submits that the welfare of the Witness is at risk if his identity were to be made public and that image distortion alone is not a sufficient protective measure because his customers know him by name.⁶

3. In the “Prosecution Response to Karadžić’s Motion for Protective Measures for Witness KW402”, filed publicly with Confidential Appendix on 12 December 2012 (“Response”), the Office of the Prosecutor (“Prosecution”) opposes the Motion in part. The Prosecution argues that the requested protective measures of pseudonym and voice distortion are excessive and that image distortion would sufficiently address the Witness’s concerns.⁷ It submits that the Accused’s position that the Witness’s customers know him by name is insufficient to justify the protective

¹ Motion, paras. 1–2.

² Motion, Confidential Annex A, paras. 1–3, 6.

³ Motion, Confidential Annex A, para. 4.

⁴ Motion, Confidential Annex, para. 5.

⁵ Motion, Confidential Annex A, paras. 3, 6.

⁶ Motion, para. 3.

⁷ Response, para. 1.

measure of a pseudonym.⁸ In relation thereto, it argues that there is no information in the Motion as to who the Witness is in contact with, whether these individuals know the role of the Witness with the Army of Republika Srpska (“VRS”) during the conflict, or whether the Witness has experienced any threats or difficulties when visiting customers in Sarajevo because of his ethnicity or VRS background.⁹ The Prosecution further contends that in a recent decision by this Chamber related to Miladin Trifunović similar circumstances arose where it was determined that there was an “objectively grounded risk to the security or welfare of the Witness should he be recognised through images circulated by the media” and as a result “the granting of the protective measure of image distortion” was necessary and appropriate.¹⁰

II. Applicable Law

4. 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.¹¹

5. 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.

⁸ Response, Confidential Appendix, para. 4.

⁹ Response, Confidential Appendix, para. 4.

¹⁰ Response, Confidential Appendix, paras. 5–6, citing Decision on Accused’s Motion for Protective Measures for Miladin Trifunović, 15 December 2012.

¹¹ 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

6. 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.¹²

7. The Chamber recalls that it is essential that the trial should not only be fair, but should also be perceived as such.¹³ It is therefore important that the proceedings are open to the public, and that protective measures are only granted in cases where the witness provides an objective basis for the necessity of such a measure. In this instance, the Declaration states that because the trial is being broadcast on television in BiH there is a strong likelihood that the Witness would be recognised and harassed during his travels in the Federation and that he would lose the majority of his customers jeopardising his family's survival.¹⁴ Having considered the circumstances of the Witness, including his frequent travels to Sarajevo and his concern for his welfare given the public profile and media coverage of this case, the Chamber is satisfied that there is an objectively grounded risk to his security or welfare should he be recognised through images circulated by the media. Taking into consideration that the protective measure of image distortion does not significantly affect the public nature of the trial, the Chamber is satisfied that the granting of the protective measure of image distortion for the Witness under Rule 75 of the Rules is necessary and appropriate to ensure the security of the Witness.

8. In regard to the assignment of a pseudonym, and the use of voice distortion, the Chamber is not satisfied, in light of the information before it, that the circumstances described in the Declaration warrant granting these additional protective measures.

¹² 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.

¹³ See *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Second Decision on Prosecution Motion for Leave to Amend its Rule 65 *ter* Witness List to Add Wesley Clark, 16 February 2007, para. 30.

¹⁴ Motion, Confidential Annex, para. 5.

IV. Disposition

9. Accordingly, the Chamber, pursuant to Articles 20, 21, and 22 of the Statute, and Rules 54 and 75 of the Rules, hereby:

- a) **GRANTS**, in part, the Motion;
- b) **ORDERS** that KW402 testify with image distortion;
- c) **INSTRUCTS** the Registry to take all necessary measures to implement this Decision;
and
- d) **DENIES** the remainder of the Motion.

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



Judge O-Gon Kwon
Presiding

Dated this eighth day of January 2013
At The Hague
The Netherlands

[Seal of the Tribunal]