



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: 17 April 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: **17 April 2013**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON REQUEST FOR CLOSED SESSION
FOR YASUSHI AKASHI**

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 “Request of Witness Yasushi Akashi for Closed Session”, filed confidentially by the Accused on 10 April 2013 (“Request”), and hereby issues its decision thereon.

I. Background and Submissions

1. In the Request, the Accused conveys a request from witness Yasushi Akashi (“Witness”) that his testimony, scheduled for 24 April 2013, be given in closed session.¹ In support, the Accused includes a communication from the Witness to the Accused’s defence team, in which the Witness states that his request to testify in closed session is “not based on any specific security concerns”, but rather it “stems from his negative experiences with media reportage which has frequently distorted the true intent of his statements”.² The Witness further states that in order for him to make “full and honest expressions of his views”, it is highly desirable that his testimony be heard in closed session.³

2. In the “Prosecution Response to Request for Protective Measures: Witness Yasushi Akashi”, filed confidentially on 15 April 2013 (“Response”),⁴ the Office of the Prosecutor (“Prosecution”) opposes the Request.⁵ The Prosecution first argues that the Accused has failed to file the Request in a timely manner to allow the Chamber to make an informed decision thereon, and therefore argues that the Chamber is not properly seised of the Request.⁶ Moreover, the Prosecution submits that: (1) the Accused has not provided any factual basis for granting closed session under Rule 79(A)(i) of the Tribunal’s Rules of Procedure and Evidence (“Rules”); (2) the Witness has made clear that his request for testifying in closed session is not based on security concerns, as encompassed by Rule 79(A)(ii); and (3) the reasons provided by the Witness to support his request to testify in closed session are “too vague to support the particularly restrictive protective measure of closed session testimony” in order to protect the interests of justice as encompassed under Rule 79(A)(iii).⁷ Finally, the Prosecution argues that the Witness has already testified in open session before another Chamber at the Tribunal and the Accused has failed to

¹ Request, para. 1.

² Request, para. 2.

³ Request, para. 2.

⁴ On 11 April 2013, the Chamber instructed the Prosecution to file an expedited response to the Request, by 15 April 2013. T. 37067–37068 (11 April 2013) (private session).

⁵ Response, paras. 1, 9.

⁶ Response, para. 2.

⁷ Response, paras. 4–7.

show any change in circumstances from this prior testimony to justify granting the Witness protective measures in the present case.⁸

II. Applicable Law

3. 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.⁹

4. 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". 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. Under Rule 79, a Trial Chamber may order closed session proceedings for reasons of: (i) public order or morality; (ii) safety, security, or non-disclosure of the identity of a victim or witness as provided in Rule 75; or (iii) the protection of the interests of justice.

III. Discussion

5. As a preliminary matter, in relation to whether the Request was filed in a timely manner, the Chamber recalls its order that the Accused 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 prior to the witness's testimony.¹⁰ The Chamber notes that the

⁸ Response, para. 8.

⁹ See Decision on Motion for and Notifications of Protective Measures, 26 May 2009, para. 11, citing *Prosecutor 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. 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.

¹⁰ Order in Relation to Accused's Notice of Request of Protective Measures for Witnesses, 2 October 2012, p. 3; Addendum to Order in Relation to Accused's Notice of Request of Protective Measures for Witnesses Issued on 8 October 2012, 9 October 2012, p. 3.

Accused filed the Request only 14 days prior to the Witness's scheduled testimony of 24 April 2013.¹¹ As a result, the Prosecution did not have the full 14-day period to respond to the Request pursuant to Rule 126 *bis* of the Rules; rather the Chamber requested an expedited response from the Prosecution in order to rule on the Request prior to the Witness's scheduled testimony.¹² In this case, the Chamber considers that the Request was not filed sufficiently in advance of the Witness's testimony; however, on an exceptional basis, the Chamber will consider the merits of the Request.

6. As the Chamber has noted on previous occasions, it is clearly established in the Tribunal's jurisprudence that pursuant to Rule 75 of the Rules 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's family, should it become publicly known that the witness testified before the Tribunal.¹³ The Chamber notes that in the Request, the Witness states that his wish to testify in closed session is not based on any specific security concerns.¹⁴ The Chamber therefore considers that based on the information before it, there is not an objectively grounded risk to the security or welfare of the Witness or that of his family should it become publicly known that he testified before the Tribunal.

7. Moreover, the Chamber considers that the primary reason provided by the Witness for his request to testify in closed session, namely negative experiences with media reporting which "frequently distorted the true intent of his statements", is too vague to support ordering such an extraordinary measure as closed session testimony as provided for under Rule 79 of the Rules. The Chamber further considers that the Witness's additional reason to testify in closed session in order to "enable him to make full and honest expressions of his views" constitutes an insufficient basis upon which to grant the Request. Therefore the Chamber considers that the reasons provided by the Witness in the Request do not justify ordering that he testify in closed session to safeguard public order, morality, and the interests of justice pursuant to Rule 79 of the Rules.

¹¹ See Request, para. 1.

¹² See *supra* footnote 4.

¹³ 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-090, 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.

¹⁴ See Request, para. 2.

8. Finally, the Chamber notes that the Witness testified in open session in a prior case at the Tribunal¹⁵ and the Chamber considers that there has been no change in the Witness's circumstances since his prior testimony to justify his request to testify in closed session in the present proceedings.

IV. Disposition

9. Accordingly, the Chamber, pursuant to Articles 20, 21, and 22 of the Statute, and Rules 54, 75, and 79 of the Rules, hereby **DENIES** the Request.

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



Judge O-Gon Kwon
Presiding

Dated this seventeenth day of April 2013
At The Hague
The Netherlands

[Seal of the Tribunal]

¹⁵ See *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, Oral ruling, T. 21608–21612 (15 September 2009) (closed session); Hearing, T. 21617–21678 (15 September 2009); T. 21681–21775 (16 September 2009). See also *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, Confidential, Reasons for Decision to Deny Protective Measures to Witness Akashi, 30 October 2009.