



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: 25 February 2015
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: 25 February 2015

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**PUBLIC REDACTED VERSION OF “DECISION ON PROSECUTION’S MOTION FOR
PROTECTIVE MEASURES FOR WITNESS KDZ487” ISSUED ON 24 NOVEMBER 2009**

Office of the Prosecutor

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused

Mr. Radovan Karadžić

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 “Prosecution’s Motion for Protective Measures for Witness KDZ487”, filed confidentially on 15 October 2009 (“Motion”), and hereby issues this decision thereon.

I. Background and Submissions

1. [REDACTED]¹ [REDACTED]² [REDACTED]³
2. [REDACTED]⁴ [REDACTED]⁵ [REDACTED]⁶
3. On 27 October 2009, the Accused filed his confidential “Response to Prosecution’s Motion for Protective Measures for Witness KDZ-487” (“Response”), in which he objects to the Motion, and states that KDZ487 should testify in open session and without a pseudonym, and that, alternatively, his testimony should be excluded.⁷ The Accused acknowledges that the Chamber cannot ignore the conditions imposed by the UN. However, the Accused submits, it is for the Chamber to decide whether to exclude KDZ487’s testimony under those conditions.⁸ In the present case, his right to a public and fair trial would be violated if KDZ487’s testimony was heard entirely in closed session.⁹ The Accused adds that testimony in closed session is “the most extreme protective measure”, which should only be granted in limited instances, and he states that the Prosecution has provided insufficient justification for the Chamber to allow KDZ487 to testify in closed session.¹⁰ Additionally, by alleging that KDZ487 has testified in open session in the *Slobodan Milošević* case, “which was televised live across the former Yugoslavia” and “is the most highly publicised trial in the former Yugoslavia”, the Accused argues that “it is difficult to imagine why a closed session is all-of-a-sudden necessary for this witness”,¹¹ as most of his proposed testimony is already in the public domain.¹²

¹ [REDACTED]

² [REDACTED]

³ [REDACTED]

⁴ [REDACTED]

⁵ [REDACTED]

⁶ [REDACTED]

⁷ Response, para. 14.

⁸ Response, para. 3.

⁹ Response, paras. 5–7, 12.

¹⁰ Response, paras. 5–6, 8.

¹¹ Response, para. 9.

¹² Response, para. 11.

4. Upon obtaining leave from the Chamber,¹³ the Prosecution filed its “Prosecution’s Reply to ‘Response to Prosecution’s Motion for Protective Measures for Witness KDZ487’” on 2 November 2009 (“Reply”), arguing that, “[i]n determining if protective measures should be granted under Rule 75 of the Rules, the Trial Chamber must consider whether the measures are justified by a genuine fear for the safety of the witness, which must be objectively established or justified”.¹⁴ According to the Prosecution, such considerations are irrelevant when determining whether trial-related conditions should be granted pursuant to Rule 70 of the Rules, as the Chamber “need only consider whether the trial-related conditions sought result in substantial unfairness to the trial, and if they do, whether this outweighs the testimony’s probative value”.¹⁵ The Prosecution further states that a Rule 70 provider does not need to supply specific justification or basis to a Trial Chamber or the parties for the conditions it seeks to impose on the witness’s evidence, and that Rule 70 merely requires that the information is provided to the Prosecutor on a confidential basis.¹⁶

II. Applicable Law

5. Article 20(1) of the 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. Further, 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 been well-observed in previous Tribunal cases, these Articles reflect the duty of the Trial Chamber 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.¹⁷

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”. Under Rule 75(B), these may include measures to prevent disclosure to the

¹³ Decision on Prosecution Request for Leave to Reply to “Response to Prosecution’s Motion for Protective Measures for Witness KDZ487”, 30 October 2009. *See also* confidential Prosecution Request for Leave to Reply to “Response to Prosecution’s Motion for Protective Measures for Witness KDZ487”, 29 October 2009.

¹⁴ Reply, para. 4.

¹⁵ Reply, para. 5.

¹⁶ Reply, para. 6.

¹⁷ *See* Decision on Motion for and Notifications of Protective Measures, 26 May 2009 (“Decision on Protective Measures”), para. 11, citing *Prosecution v. Tadić*, Case No. IT-94-1-T, Decision on Prosecution’s Motion Requesting Protective Measures for Witness I, 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.

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 closed session pursuant to Rule 79.

7. Rule 70 provides, in relevant part, as follows:

(B) If the Prosecutor is in possession of information which has been provided to the Prosecutor on a confidential basis and which has been used solely for the purpose of generating new evidence, that initial information and its origin shall not be disclosed by the Prosecutor without the consent of the person or entity providing the initial information and shall in any event not be given in evidence without prior disclosure to the accused.

(C) If, after obtaining the consent of the person or entity providing information under this Rule, the Prosecutor elects to present as evidence any testimony, document or other material so provided, the Trial Chamber, notwithstanding Rule 98, may not order either party to produce additional evidence received from the person or entity providing the initial information. . .

(D) If the Prosecutor calls a witness to introduce in evidence any information provided under this Rule, the Trial Chamber may not compel that witness to answer any question relating to the information or its origin, if the witness declines to answer on grounds of confidentiality.

[...]

(G) Nothing in paragraph (C) or (D) above shall affect a Trial Chamber's power under Rule 89 (D) to exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

8. As previously stated by the Chamber, when material is disclosed to the Prosecution subject to Rule 70 conditions, these conditions may be applied without the involvement or knowledge of the Trial Chamber. However, when the question arises of tendering that material into evidence in a manner which involves a departure from the normal arrangements in court, then it is for the Chamber to decide whether it is appropriate, having regard to the need to ensure that the trial is fair, to allow the evidence to be presented in accordance with the conditions stipulated.¹⁸

9. Rule 89 states, in relevant part, that:

(C) A Chamber may admit any relevant evidence which it deems to have probative value.

(D) A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

10. The Appeals Chamber has held that, under Rules 70(G) and 89(D) of the Rules, a Trial Chamber may assess the conditions placed upon proposed Rule 70 witness testimony and determine, without hearing that testimony, that it may not be admitted on the basis that the

¹⁸ Decision on Protective Measures, para. 15.

Rule 70 conditions would result “in substantial unfairness to the trial, which outweighs that testimony’s probative value”.¹⁹ The Appeals Chamber has further concluded that:

[w]hile Rule 70(C) and (D) of the Rules refers to certain restrictions on a Trial Chamber in hearing a witness testify to confidential material provided by a Rule 70 provider, those restrictions apply only after the Trial Chamber has determined that the Rule 70 witness testimony “elected” to be presented by a party at trial is admissible under Rule 89 of the Rules. In making that determination, a Trial Chamber is entitled under Rule 70(G) of the Rules to consider whether the Rule 70 restrictions stipulated with respect to that witness testimony would undermine the need to ensure a fair trial and substantially outweigh the testimony’s probative value such as to lead to exclusion of that testimony.²⁰

III. Discussion

11. [REDACTED]²¹ [REDACTED]²² [REDACTED]²³ [REDACTED]²⁴

12. [REDACTED]²⁵

13. [REDACTED]²⁶ [REDACTED]

14. The Prosecution states in the Motion that, should the Chamber not consider the Motion to be an application for protective measures pursuant to Rule 75 of the Rules, it should nevertheless be considered a request for trial-related conditions pursuant to Rule 70, on the basis that the Rule 70 provider, i.e. the UN, has conditioned its approval of KDZ487 testifying in these proceedings to the granting of such conditions.²⁷ Indeed, the Chamber considers this can only be an application for Rule 70 conditions, and will treat it as such in the remainder of this Decision.

15. Rule 70 is the basis for co-operation of States, organisations, and individuals with the Tribunal, as it encourages them to share sensitive information on a confidential basis.²⁸ Through the application of this Rule it is thus guaranteed that the confidentiality of the information they offer, and of the information’s sources, is protected.²⁹ As set out in its previous decisions

¹⁹ Decision on Protective Measures, para. 17, citing *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-AR73.1, Decision on Interlocutory Appeal against Second Decision Precluding the Prosecution from Adding Wesley Clark to its Rule 65 *ter* Witness List, 20 April 2007 (“Appeal on *Milutinović et al.* Decision”), para. 18.

²⁰ Appeal on *Milutinović et al.* Decision, para. 18.

²¹ [REDACTED]

²² [REDACTED]

²³ [REDACTED]

²⁴ [REDACTED]

²⁵ [REDACTED]

²⁶ [REDACTED]

²⁷ Motion, paras. 2–3.

²⁸ *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR108bis & AR73.3, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2002 (“*Milošević* Decision”), paras. 9, 19.

²⁹ *Milošević* Decision, para. 19.

concerning the application of Rule 70, the Chamber recognises the prerogative of the Rule 70 provider to invoke Rule 70 at its discretion. Thus, a Rule 70 provider may provide information upon a confidential basis to a party, and expect those conditions to apply, not only to a particular case, but to all cases in which the party may want to use the material. These are generally matters to be dealt with between the Rule 70 provider and the party.³⁰ However, the person or entity providing material in terms of Rule 70 may require, as a condition of consenting to the disclosure of that material, that the Chamber should by order impose certain conditions under Rule 70. In the present case, the Rule 70 provider has conditioned KDZ487 providing testimony on the granting of a pseudonym to the witness and permitting the witness to testify in closed session.

16. Upon a preliminary review of KDZ487's expected testimony,³¹ the Chamber is satisfied of its relevance to the Indictment, and considers it to have probative value. The Chamber is also satisfied that the UN has permitted KDZ487 to provide information to the Prosecution on a confidential basis pursuant to Rule 70(B) and (C) of the Rules, and that the requirements of Rule 70 have been satisfied.

17. [REDACTED]³² [REDACTED]³³ [REDACTED]

18. The Chamber recalls that it is essential that the trial should not only be fair but be seen to be fair.³⁴ As such, it is of crucial importance that the proceedings are open to the public, and the measure of closed session is used exceptionally. The Chamber is of the view that the overall circumstances surrounding KDZ487 do not justify the extraordinary level of protection that testimony in closed session affords. Thus, allowing KDZ487 to testify in closed session would, in the present case, and particularly since KDZ487's previous testimony is in the public domain, result in substantial unfairness to the Accused, and that such unfairness outweighs the probative value of KDZ487's expected testimony.

³⁰ See Decision on Protective Measures, para. 23; see also *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. 24.

³¹ See confidential Prosecution Notification of Admission of Written Evidence pursuant to Rule 92 *ter* with Appendix A – Witness KDZ487, 16 October 2009.

³² [REDACTED]

³³ [REDACTED]

³⁴ See *Milutinović et al.* Decision, para. 30.

IV. Disposition

19. Accordingly, the Trial Chamber, pursuant to Articles 20, 21, and 22 of the Statute, and Rules 54, 69, 70, and 75 of the Rules, hereby **DENIES** the Motion.

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



Judge O-Gon Kwon
Presiding

Dated this twenty-fifth day of February 2015
At The Hague
The Netherlands

[Seal of the Tribunal]