



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-PT

Date: 2 July 2009

Original: English

IN THE TRIAL CHAMBER

Before: Judge Iain Bonomy, Presiding
Judge Christoph Flügge
Judge Michèle Picard

Registrar: Mr. John Hocking

Decision of: 2 July 2009

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON PROSECUTION'S MOTION FOR PROTECTIVE MEASURES FOR
WITNESSES KDZ182, KDZ185, KDZ304, AND KDZ450 PURSUANT TO RULE 70**

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 confidential “Prosecution Motion for Protective Measures for Witnesses KDZ182, KDZ185, KDZ304 and KDZ450 pursuant to Rule 70”, filed on 11 June 2009 (“Motion”), and hereby issues this decision thereon.

I. Submissions

1. On 30 March 2009, the Office of the Prosecutor (“Prosecution”) filed the confidential “Prosecution Notification of Protective Measures Currently in Force for Witnesses KDZ155, KDZ182, KDZ185, KDZ304 and KDZ450 and Motion for Protective Measures for Witnesses KDZ112, KDZ196 and KDZ259 pursuant to Rule 70” (“Notification and Motion”), notifying the Trial Chamber, pursuant to Rule 75(F)(i) of the Rules of Procedure and Evidence of the Tribunal (“Rules”), of the continuation of various protective measures for witnesses KDZ155, KDZ182, KDZ185, KDZ304, and KDZ450, which were originally granted in other cases.¹
2. On 26 May 2009, the Chamber issued its confidential “Decision on Motion for and Notifications of Protective Measures” (“Decision on Protective Measures”) noting the continuation in these proceedings, pursuant to Rule 75(F)(i), of protective measures granted to KDZ155 by another Chamber, but denying the Notification and Motion in all other respects in so far as it relates to KDZ182, KDZ185, KDZ304, and KDZ450, without prejudice, and inviting the Prosecution to clarify whether the measures being notified with respect to these four witnesses fell under Rule 70 or Rule 75 of the Rules and, if it is the former, re-applying for the Rule 70 conditions which relate to the presentation of the witnesses’ evidence in court to be granted in the present proceedings.²
3. Upon the Chamber’s invitation, the Prosecution filed the Motion clarifying that the conditions requested for KDZ182, KDZ185, KDZ304, and KDZ450, who are nationals of the Rule 70 provider, are in fact conditions requested by the Rule 70 provider, and requesting the Chamber to grant a number of conditions pursuant to Rule 70(B) of the Rules.³ The Prosecution submits that it conducted interviews with these four witnesses on a confidential basis, pursuant to Rule 70(B), and that these interviews were recorded by authorities of the Rule 70 provider (“Interview Statements”).⁴ The Prosecution states that it has sought permission from the Rule 70 provider to

¹ Notification and Motion, para. 30(a).

² Decision on Protective Measures, paras. 23, 30(a)–(c).

³ Motion, paras. 1, 6.

⁴ Motion, para. 2.

disclose the Interview Statements to the Accused, and that the Rule 70 provider has consented to such disclosure on the condition that the following Rule 70 conditions be imposed by the Chamber:

- a. Non-disclosure of the identity of the witnesses, and the use of pseudonyms;
- b. Non-disclosure of the Interview Statements to persons, organisations or entities outside the Tribunal; and
- c. Use of the Interview Statements restricted solely to the preparation of the Accused's defence.⁵

4. To support its claim, the Prosecution explains that witnesses KDZ182, KDZ185, KDZ304, and KDZ450 have previously testified before the Tribunal, with protective measures granted at the request of the Prosecution, in light of the concerns of the Rule 70 provider.⁶ Finally, the Prosecution refers to the arguments raised in its Notification and Motion, setting out the basis for the granting by the Chamber of the requested conditions, and supporting its contention that the Interview Statements satisfy the requirements of Rule 70 of the Rules.⁷

5. During the Rule 65ter meeting held on 15 June 2009, the Motion was discussed, and the pre-trial Judge clarified to the Prosecution that measures related to the disclosure of witnesses' testimony, and which do not affect the conduct of the trial, do not require the involvement of the Chamber and can be resolved by the parties. The pre-trial Judge emphasised that it is sufficient for the Prosecution to inform the Accused, upon disclosure of the material, that the material is subject to Rule 70 conditions. However, the Prosecution explained that the Motion was filed as a request by the Rule 70 provider, and assured the pre-trial Judge that it will inform the Rule 70 provider of the proper procedure for future reference.⁸

6. The Chamber further notes that the Accused did not respond to the Motion.

II. Applicable Law

7. 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. 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

⁵ Motion, para. 4.

⁶ Motion, paras. 2, 3.

⁷ Motion, para. 5.

⁸ Rule 65ter meeting, T. 101–102 (15 June 2009).

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.⁹

8. Rule 70 of the Rules 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.

[...]

III. Discussion

9. 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.¹⁰ The Rules therefore guarantee that the confidentiality of the information they offer, and of the information's sources, is protected.¹¹ As set out in previous decisions, 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.¹² However, the person or entity providing material in terms of Rule 70 may require as a condition of consenting to

⁹ 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; *Prosecution 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.

¹⁰ *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.

¹¹ *Milošević Decision*, para. 19.

¹² 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.

the disclosure of that material that the Chamber should by order impose certain conditions under Rule 70.

10. In the present case, the Chamber has noted the concerns expressed by the Rule 70 provider, and its subsequent request for an order granting conditions relating to the confidentiality of the information provided by witnesses KDZ182, KDZ185, KDZ304, and KDZ450.¹³ Based upon the submissions of the Prosecution, the Chamber is satisfied that KDZ182, KDZ185, KDZ304, and KDZ450 have provided information to the Prosecution on a confidential basis pursuant to Rule 70(B), that the requirements of Rule 70 have been satisfied, and that the order sought is appropriate.

IV. Disposition

11. Accordingly, the Trial Chamber, pursuant to Articles 20, 21, and 22 of the Statute, and Rules 54 and 70 of the Rules, hereby **GRANTS** the Motion and **ORDERS** that:

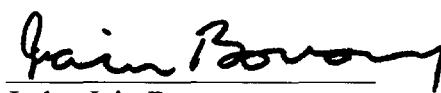
- i. Witnesses KDZ182, KDZ185, KDZ304, and KDZ450 shall be referred to by these pseudonyms during their testimony, and in all public Tribunal documents;
- ii. The names, addresses, whereabouts, and/or other identifying information concerning witnesses KDZ182, KDZ185, KDZ304, and KDZ450 shall be placed under seal and shall not be included in any public records of the Tribunal;
- iii. The Interview Statements of witnesses KDZ182, KDZ185, KDZ304, and KDZ450 shall not be disclosed to the public;
- iv. The use by the Accused of the Interview Statements shall be restricted solely for the preparation of his defence; and
- v. For the purposes of this decision, the “public” means all persons, including corporations; governments and organs/departments thereof; organisations; entities; associations; groups; the Accused’s family members, friends, and associates; accused and defence counsel in other proceedings before the Tribunal; and the media. However, for the purposes of this Decision, the “public” does not mean Judges of the Tribunal; staff of the Registry and the Office of the Prosecutor; the Amici Curiae (where applicable); or the Accused and his Defence team (as defined in paragraph 25 of the

¹³ See Motion, para. 3; Rule 65ter meeting, T. 101–103 (15 June 2009).

Chamber's "Decision on Motions for Disclosure of Rule 68 Material and Reconsideration of Decision on Adequate Facilities", issued on 10 March 2009).

12. The Chamber hereby **INSTRUCTS** the Registry to take all necessary measures to implement this Decision.

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



Judge Iain Bony
Pre-Trial Judge

Done this second day of July 2009
At The Hague
The Netherlands

[Seal of the Tribunal]