



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 September 2010

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 September 2010

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**REASONS FOR TRIAL CHAMBER'S DECISION ON DEFENCE REQUEST FOR
CERTIFICATION TO APPEAL: MODIFICATION OF
PROTECTIVE MEASURES FOR KDZ088**

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”) hereby provides its reasons for its decision on the oral request for certification to appeal the Trial Chamber’s decision on the Accused’s Motion for Modification of Protective Measures: Witness KDZ088 (“Motion for Modification”), issued orally on 6 September 2010 (“Decision”).

I. Background and Submissions

1. Witness KDZ088 was granted the protective measures of pseudonym and closed session in the *Krajišnik* case and, by virtue of Rule 75 (F) of the Tribunal’s Rule of Procedure and Evidence (“Rules”), these protective measures continue to have effect in the present proceedings. On 30 August 2010, the Accused filed the Motion for Modification, in which he requested the Chamber to ask KDZ088 before he began his testimony whether he wished to maintain the protective measures in place for him. The Prosecution filed its response to the Motion for Modification on 2 September 2010, stating that the circumstances requiring the protective measures had not changed.¹ It noted that it had contacted KDZ088 on 1 September 2010, and that KDZ088 continued to have concerns about his safety and that of his family. An investigator’s report to that effect was provided. The Chamber also notes that on receipt of the Motion for Modification, and in accordance with Rule 75(J) of the Rules, the Chamber consulted Judge Orić, the presiding Judge on the *Krajišnik* case, as to his views on any possible variation to KDZ088’s protective measures.

2. In the Decision, the Chamber stated that it saw no reason for it to ask KDZ088 in court whether he wished to maintain the protective measures in force for him, and, if so, the reasons for their maintenance, because the Prosecution had already consulted him shortly before his first appearance in court, and had provided the witness’s reasons for wanting the protective measures to continue in the investigator’s report. The Chamber considered that, as the witness had not consented to any variation of the protective measures, and that, as required by Rule 75(J) of the Rules, there were no exceptional circumstances that would justify a variation. The Chamber further noted that Judge Orić opposed any modification of KDZ088’s protective measures.²

3. Immediately following the delivery of the Decision, Mr. Peter Robinson, one of the Accused’s legal advisors, requested certification to appeal the aspect of the Decision in which the Chamber declined to inquire of KDZ088 in court as to whether he wished to maintain the

¹ Prosecution Response to Motion for Modification of Protective Measures: Witness KDZ088 with Confidential Appendices A-C and Confidential and *Ex Parte* Appendix D, 2 September 2010.

protective measures in force for him (“Request for Certification”).³ Mr. Robinson submitted that KDZ088 has been unavailable to the Accused and to the Chamber, with the consequence that the only information the Chamber had was that provided by the Prosecution. He argued that, “we think that it substantially and significantly affects the fairness of the trial that a witness can be given protective measures or protective measures can be continued without the opportunity of either the Accused or the Chamber to determine for itself whether objective reasons for those protective measures continue or even if the witness wants those protective measures to continue when asked in court by the Chamber, as opposed to the Prosecutor.”⁴ He further argued that an immediate resolution of the issue by the Appeals Chamber is necessary “because it’s going to be a recurring one”; KDZ088 is the first of several witnesses with “protective measures concerning their testimony”, and “it would be far better for the Appeals Chamber to have decided the issue at the outset rather than have recurring issues which may ultimately be found to be erroneous and under appeal from a final judgement.”⁵

4. The Prosecution opposed the Request for Certification, stating that “this is a continuing attempt by the Defence to somehow establish a new regime, after many, many years of an established practice, with respect to protective measures, a practice which has been followed by the Chamber in this case.”⁶

5. After adjourning to consider the matter, the Chamber issued the Decision denying the Request for Certification, noting that written reasons would follow.⁷ At the end of KDZ088’s testimony, prior to the issuance of these written reasons, Mr. Robinson once again requested that the Chamber or the Tribunal’s Victims and Witnesses Section ask KDZ088 whether he would like the protective measures to remain in force.⁸ On being asked by the presiding Judge, KDZ088 confirmed that he wished the protective measures to continue.⁹

II. Applicable Law

6. As the Chamber has noted in previous decisions, according to the Rules, decisions on motions other than preliminary motions challenging jurisdiction are without interlocutory appeal

² Hearing, T. 6235 (6 September 2010) (private session).

³ Hearing, T. 6238 (6 September 2010).

⁴ Hearing, T. 6238-6239 (6 September 2010).

⁵ Hearing T. 6239 (6 September 2010).

⁶ Hearing, T. 6240 (6 September 2010).

⁷ Hearing, T. 6240 (6 September 2010).

⁸ Hearing, T. 6671 (13 September 2010) (closed session).

⁹ Hearing, T. 6671 (13 September 2010) (closed session).

save with certification by the Trial Chamber.¹⁰ Under Rule 73(B), a Trial Chamber may grant certification to appeal if the decision “involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.” This test therefore contains two “prongs”, both of which must be satisfied in order for the Trial Chamber to exercise its discretion to grant certification to appeal.

III. Discussion

7. The Chamber denied the Request for Certification because the first prong was not met. In the Decision, the Chamber determined that it was unnecessary to hear personally from KDZ088 about his circumstances as he had very recently been consulted about them by the Prosecution, and the outcome of that consultation was provided to the Chamber and the Accused. Furthermore, in making its own assessment of whether the witness’s protective measures should be varied, the Chamber also had before it the considerations taken into account by the *Krajišnik* Trial Chamber, and the views of the presiding Judge of that Chamber, in accordance with Rule 75. In making the Request for Certification, Mr. Robinson argued that the Chamber would be unable to “determine for itself” whether, objectively, there was justification for the continuance of the protective measures or if the witness did, in fact, want those protective measures to continue. The Chamber considers, however, that the information available to it constituted an appropriate basis upon which it could make such a determination. Furthermore, Mr. Robinson appeared to be indicating that information additional to, or different from, that provided by the Prosecution would have been forthcoming, or KDZ088 could have consented to a change to the protective measures, if inquiries were made in court. Mr. Robinson did not, however, substantiate this assertion and the Chamber can see no basis for it.¹¹ Therefore, the Chamber is not convinced that the fair and expeditious conduct of the proceedings or outcome of the trial is significantly affected by the Chamber’s decision not to inquire about KDZ088’s circumstances in court before determining whether it should vary his protective measures.

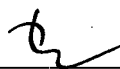
8. In light of the fact that the first prong is not met, it is unnecessary for the Chamber to consider the second; however, it will do so briefly. The Chamber’s Decision was limited solely to the circumstances of the testimony of KDZ088. Even if the Appeals Chamber were to find that the Chamber erred, such a finding at this stage would not materially advance the proceedings.

¹⁰ Rules 72 and 73 of the Rules.

IV. Disposition

9. Accordingly, the Trial Chamber, pursuant to Rules 54 and 75 of the Rules, hereby **CONFIRMS** its oral ruling for the reasons set out herein.

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



Judge O-Gon Kwon
Presiding

Dated this fourteenth day of September 2010
At The Hague
The Netherlands

[Seal of the Tribunal]

¹¹ The Chamber notes that this was confirmed when KDZ088 was later asked in court whether he thought his protective measures should continue and he stood by what he had said to the Prosecution, he answered affirmatively. *See* Hearing, T. 6671 (13 September 2010) (closed session).