



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: 1 November 2012

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: 1 November 2012

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S MOTIONS FOR PROTECTIVE MEASURES
FOR WITNESSES KW289, KW299, KW378, AND KW543**

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 KW-289” (“KW289 Motion”); “Motion for Protective Measures for Witness KW-299” (“KW299 Motion”); “Motion for Consideration of Protective Measures for Witness KW-378” (“KW378 Motion”); and “Motion for Protective Measures for Witness KW-543” (“KW543 Motion”); all filed publicly with confidential annexes on 12 October 2012 (together “Motions”), and hereby issues its decision thereon.

I. Submissions

1. In the Motions, the Accused outlines the security and welfare concerns of witnesses KW289, KW299, KW378, and KW543 (together “Witnesses”) in relation to testifying in public session in this case.¹ In the KW289 Motion, KW299 Motion, and KW543 Motion, the Accused requests that orders be issued pursuant to Rule 75 of the Tribunal’s Rules of Procedure and Evidence (“Rules”) granting witnesses KW289, KW299, and KW543 the protective measures of pseudonym, image distortion, and voice distortion.² In the KW378 Motion, the Accused states that he “declines to make such a motion” but moves that the Chamber consider KW378’s request for the protective measures of pseudonym, image distortion, and voice distortion.³

2. The Accused attaches, in confidential annexes to the Motions, declarations from his case manager who spoke to the Witnesses on the telephone and which, in the Accused’s submission, outline the Witnesses’ concerns for their welfare and security should they testify in public (together “Declarations”).⁴ The Witnesses express concerns regarding (1) their property; (2) their employment and the employment of their family members; (3) their psychological welfare; and (4) potential retaliation against family members as reasons for requesting protective measures.⁵ The Accused further requests that the protective measures only be granted at the commencement of each witness’s testimony to allow the witness to be proofed by the Accused

¹ For a more comprehensive background to the filing of the Motions, *see* 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.

² KW289 Motion, para. 3; KW299 Motion, para. 3; KW543 Motion, para. 3.

³ KW378 Motion, para. 3.

⁴ KW289 Motion, confidential annex A; KW299 Motion, confidential annex A; KW378 Motion, confidential annex A; KW543 Motion, confidential annex A.

⁵ KW289 Motion, confidential annex A; KW299 Motion, confidential annex A; KW378 Motion, confidential annex A; KW543 Motion, confidential annex A.

at the United Nations Detention Unit since the Registry does not allow protected witnesses to be interviewed there.⁶

3. On 16 October 2012, the Office of the Prosecutor (“Prosecution”) filed publicly with confidential appendices the “Prosecution Response to Motion for Protective Measures for Witness KW-289” (“KW289 Response”) and the “Prosecution Response to Karadžić’s Motion for Protective Measures for Witness KW-299” (“KW299 Response”). On 18 October 2012, the Prosecution filed publicly with confidential appendix the “Prosecution Response to Motion for Consideration of Protective Measures for Witness KW-378” (“KW378 Response”). On 22 October 2012, the Prosecution filed publicly with confidential appendix the “Prosecution Response to Karadžić’s Motion for Protective Measures for Witness KW-543” (“KW543 Response”).

4. The Prosecution opposes the Motions on the grounds that the information filed by the Accused provides an “insufficient basis for the Chamber to assess whether there exists an objectively grounded risk to the security” of the Witnesses or that of their families⁷ or does not demonstrate that such a risk exists.⁸ The Prosecution also objects to postponing the granting of protective measures until the commencement of the testimony of the Witnesses and cites to the “Decision on Motion for Protective Measures for Witness KW456”, issued by the Chamber on 12 October 2012 (“KW456 Decision”), in that regard.⁹

5. The Prosecution, in confidential appendices, provides more detail as to why the concerns referred to by the Accused in the Motions are “not sufficiently specific and substantiated”.¹⁰ The Prosecution points to the lack of information about the expected consequences for the Witnesses or their families of testifying in open session or documentation which would substantiate those claims.¹¹ For example, with respect to KW289, the Prosecution observes that the concerns of this witness are “wholly speculative and unsupported by facts”.¹²

6. On 18 October 2012, the Accused’s legal adviser submitted in court that with respect to witnesses for whom protective measures motions had been filed, the defence team intended to

⁶ KW543 Motion, para. 5; KW289 Motion, para. 5; KW299 Motion, para. 5; KW378 Motion, para. 5.

⁷ KW299 Response, para. 1; KW543 Response, para. 1.

⁸ KW289 Response, para. 1; KW378 Response, para. 1.

⁹ KW289 Response, para. 2; KW299 Response, para. 2; KW378 Response, para. 2; KW543 Response, para. 2.

¹⁰ KW289 Response, confidential appendix, para. 1; KW299 Response, confidential appendix, para. 1; KW378 Response, confidential appendix, para. 1; KW543 Response, confidential appendix, para. 1.

¹¹ KW289 Response, confidential appendix, paras. 2–5; KW299 Response, confidential appendix, paras. 2–3; KW378 Response, confidential appendix, para. 2; KW543 Response, confidential appendix, paras. 2–5.

¹² KW289 Response, confidential appendix, para. 4.

re-contact the witnesses after the Prosecution filed its responses to those motions.¹³ The Accused's legal adviser indicated that they would determine if the witness had any further information they would wish to provide to the Chamber in light of the Prosecution's responses and that the Accused would seek leave to reply so as to submit any such material for consideration by the Chamber.¹⁴

7. On 23 October 2012, the Accused filed the "Request for Leave to Reply: Motion for Protective Measures for Witness KW-289" ("Request for Leave to Reply") which was granted on the same day by the Chamber *via* email. On 25 October 2012, the Accused filed publicly with confidential annexes the "Reply Brief: Motion for Protective Measures for Witness KW-289" ("Reply") in which he provided medical records and additional documentation to support KW289's request for protective measures ("Additional Material").¹⁵

II. Applicable Law

8. 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.¹⁶

9. Rule 75(A) of the Tribunal's 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.

¹³ T. 29115 (18 October 2012).

¹⁴ T. 29115 (18 October 2012).

¹⁵ Reply, paras. 3, 6; English Translation of Medical Record: Motion for Protective Measures for Witness KW-289, confidential, 30 October 2012.

¹⁶ 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 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, 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.

III. Discussion

10. As a preliminary matter, the Chamber notes that the Request for Leave to Reply was filed on the last day of the seven day time limit imposed by Rule 126 *bis*. The Reply was filed on 25 October 2012 and medical documentation in relation thereto was filed on 30 October 2012.¹⁷ The Reply was therefore filed out of time. The Chamber will exceptionally consider the Reply but warns the Accused that the Chamber will not demonstrate such lenience in the future as the Registry has put in place a number of mechanisms at the Accused's disposal to file his submissions.

11. The Chamber reminds the Accused that it is his obligation to fully reflect the concerns of a witness in future protective measures motions at the time that those motions are filed. He cannot assume that he will be automatically granted leave to reply once the Prosecution has filed its response to such motions or that the witness will be given an opportunity to address the Chamber if the protective measures are denied.¹⁸ While leave to reply has been granted on an exceptional basis,¹⁹ it will not be the usual practice, particularly when the Prosecution response raises no new information which would warrant a reply.²⁰

12. As the Chamber has noted on previous occasions, 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 the witness testified before the Tribunal.²¹

13. Having reviewed the Declarations and the Additional Material, the Chamber finds that there is nothing which indicates an objective threat to the security or welfare of the Witnesses or their families which would arise from testifying publicly in this case. The Declarations and Additional Material indicate that the Witnesses or their families have fears or concerns relating to (1) property; (2) travel; (3) employment; and (4) health. These fears and concerns are expressed in broad or speculative terms and do not indicate any specific incidents or concrete

¹⁷ The Chamber notes that a courtesy copy of the Reply was sent to the Chamber and the Prosecution *via* email on 23 October 2012 and that a courtesy copy of the English translation of the medical documentation was distributed to the Chamber and the Prosecution *via* email on 25 October 2012.

¹⁸ T. 29126–29128 (18 October 2012); T. 29175–29176 (22 October 2012)

¹⁹ KW456 Decision, para. 9. *See also* Reply, para. 4.

²⁰ T. 29126–29128 (18 October 2012). The Chamber notes that on 21 October 2012 the Accused's legal adviser indicated *via* email that the Accused would not be seeking leave to reply to the KW299 Motion or the KW378 Motion.

²¹ *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.

examples of how testifying without protective measures would give rise to an objective threat to their security or welfare. While two of the Witnesses expressed some fear of potential retaliation against their family members, this is also purely speculative and not based on any specific event or incident which would rise to the level of an objective threat to their security or welfare.²² Similarly, while the Additional Material provided with respect to KW289 indicates health concerns which are linked to war time trauma, this does not in and of itself warrant the granting of protective measures. The Chamber is therefore not satisfied, on the basis of the information before it, that there is an objectively grounded risk to the security or welfare of the Witnesses or that of their families of testifying in open session.

14. The Chamber has already ruled that it “will categorically not entertain” requests to postpone the granting of protective measures.²³ That discussion will not be repeated here.

IV. Disposition

15. Accordingly, the Chamber, pursuant to Articles 20, 21, and 22 of the Statute, and Rules 75 of the Rules, hereby **DENIES** the Motions.

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



Judge O-Gon Kwon
Presiding

Dated this first day of November 2012
At The Hague
The Netherlands

[Seal of the Tribunal]

²² KW378 Motion, confidential annex A; KW543 Motion, confidential annex A.

²³ See KW456 Decision, para. 12. See also Pre-Defence Conference, T. 28827 (15 October 2012).