



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: 13 January 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: 13 January 2015

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**PUBLIC REDACTED VERSION OF 30 SEPTEMBER 2010 DECISION ON
PROSECUTION MOTION FOR FURTHER PROTECTIVE MEASURES FOR WITNESS
KDZ310 AND FOR HIS CONTACT DETAILS TO REMAIN *EX PARTE***

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 Motion for Further Protective Measures for Witness [REDACTED] (KDZ310) and for his Contact Details to Remain *Ex Parte*” filed confidentially on 27 September 2010, (“Motion”), and hereby issues its decision thereon.

I. Submissions and Background

1. The background to this Motion is somewhat lengthy and is set out in the Chamber’s “Decision on Prosecution Request for KDZ310’s Contact Details to Remain *Ex Parte*”, issued on 20 September 2010 (“First Decision”). For present purposes, the Chamber simply notes that the Office of the Prosecutor (“Prosecution”) is seeking to prevent the current address of [REDACTED] (KDZ310) (“Witness”) becoming known to the Accused. The Witness is the subject of a subpoena *ad testificandum* issued by the Chamber on 20 September 2010 on a confidential and *ex parte* basis. The Prosecution had requested the subpoena, and accompanying order to the State of current residence of the Witness, on an *ex parte* basis. This was apparently so that the Accused would not have access to the current address of the Witness, which is contained therein.

2. In its First Decision, the Chamber found that the Prosecution had not provided reasons why the address of the Witness should not be known to the Accused, apart from stating that the Witness has not given his consent to be interviewed by the Accused when asked by the Registry’s Victims and Witnesses Section. In an abundance of caution, the Chamber issued the subpoena and accompanying order on an *ex parte* basis, but ordered the Registry to reclassify them as *inter partes* filings on 27 September 2010, unless the Prosecution provided a compelling argument, prior to that date, for the Accused not to have access to them in full.¹ The Motion was thus filed in response to that order.

3. In the Motion, the Prosecution invokes Rule 75(A) to request that the Chamber grant the Witness “the protective measures of not disclosing his current address to the Accused” and that his contact details contained in the subpoena and accompanying order remain *ex parte*.² It further requested a stay of the effect of the Chamber’s First Decision, so that the subpoena and

¹ First Decision, para. 4.

² Motion, para. 2.

accompanying order would not be reclassified until such time as the Motion, and any subsequent appeal, is decided.³ The requested stay was granted by the Chamber on 27 September 2010.⁴

4. The Prosecution argues that the requested protective measures are appropriate to protect the Witness's "security and privacy concerns".⁵ It emphasises, again, that the Witness has not consented to his contact details being provided to the Accused, and attaches a declaration from one of its investigators, detailing a telephone conversation with the Witness during which the Witness expressed concerns about his and his family's security should his contact details be known to the Accused.⁶ It also notes that the Witness stated that disclosure of his contact details to the Accused would exacerbate the stress he already feels about giving evidence in this case.⁷ The Prosecution argues that the Witness's privacy rights and expectations should be taken into consideration in determining the Motion.⁸ It also asserts that no prejudice will be suffered by the Accused from granting the requested protective measures, because he has not asked for the Witness's contact details.⁹ Moreover, the protective measures sought are consistent, in the Prosecution's view, with a previous decision of the Chamber concerning the method by which Prosecution witnesses would be contacted to determine their willingness to be interviewed by the Accused or his representatives.¹⁰

5. The Prosecution further argues that release of the Witness's contact details to the Accused without his consent would have a negative effect on the administration of justice, because it may make the Witness even less willing to co-operate with the Tribunal. It also raises concerns about the precedent that would be set for any witness who is the subject of a subpoena, whose address would thus become known to the Accused.¹¹

6. The Accused filed a confidential "Response to Prosecution Motion for Further Protective Measures for Witness [REDACTED]" on 27 September 2010 ("Response"), opposing the Motion. He argues that the Prosecution has failed to provide a compelling reason to depart from the Chamber's ruling that he is entitled to know the whereabouts of the witnesses against him.¹² More specifically, he submits that the subjective fears of the Witness must be objectively

³ Motion, para. 2.

⁴ Order on *Ex Parte* Status of Subpoena *ad Testificandum*, 27 September 2010.

⁵ Motion, para. 11.

⁶ Motion, Appendix A.

⁷ Motion, para. 12.

⁸ Motion, para. 11.

⁹ Motion, para. 13.

¹⁰ Motion, para. 14.

¹¹ Motion, para. 16.

¹² Response, para. 3.

reasonable, and that this has not been demonstrated.¹³ He also submits that, in general, knowing the current whereabouts of a witness is important so that the Defence can fully investigate his or her credibility.¹⁴

7. In addition, the Accused notes that the Witness's address and telephone number are publicly available on the internet.

II. Applicable Law

8. Rule 75(A) of the Tribunal's Rules of Procedure and Evidence ("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 public and the media of identifying information about witnesses or victims, such as voice and image distortion and the assignment of a pseudonym, as well as closed session pursuant to Rule 79.

9. In addition, Rule 69(A) provides that "in exceptional circumstances" a Trial Chamber may order non-disclosure to the accused of the identity of a victim or witness who may be in danger or at risk until such person is brought under the protection of the Tribunal. As this Chamber has previously stated, this raises the challenge of striking the correct balance between the rights of the accused and the safety of victims and witnesses. While protective measures under Rule 75 concern restriction of disclosure *to the public*, Rule 69 contemplates restriction of disclosure of witness identification information *to the accused himself*, which is a more severe constraint as it may affect the ability of the accused to make ready his defence.¹⁵

III. Discussion

10. The Prosecution has filed the Motion pursuant to Rule 75(A), despite the fact that the measures requested are not concerned with disclosure to the public of the identity of the Witness, but rather concern disclosure to the Accused of identifying information about him, namely his current address. It would therefore be more appropriate to consider the Motion under Rule 69, which concerns disclosure of a witness's identity to the accused. Although Rule 69(C) makes clear that what is contemplated by the Rule is not permanent non-disclosure but rather non-disclosure of identity until a certain period prior to the trial, or the testimony of that witness, the Trial Chamber does not exclude the possibility of an order that the current

¹³ Response, paras. 3–4.

¹⁴ Response, para. 6.

¹⁵ Decision on Prosecution's Motion for Delayed Disclosure for KDZ456, KDZ493, KDZ531 and KDZ532, and Variation of Protective Measures for KDZ489, 5 June 2009, para. 10.

whereabouts of a particular witness should never be provided to the accused. In any event, a non-disclosure order under Rule 69 requires a showing of exceptional circumstances.¹⁶

11. Relevant to the Chamber's determination of the existence of "exceptional circumstances", the Prosecution must establish that there is a likelihood that the particular witness will be interfered with or intimidated once their identity is made known *to the accused* and his defence team, notwithstanding the obligations on the accused and his defence team in relation to disclosure to third parties. It is not sufficient to show that the witness is put at risk of interference resulting from disclosure of his identity to the public or the media.¹⁷ The likelihood of interference must be *objective*: while the witness may personally feel that he or she may be at risk, any subjective fears expressed by the witness "are *not in themselves* sufficient to establish any real *likelihood* that they may be in danger or at risk".¹⁸ In order to warrant an interference with the rights of the accused, those fears must be well-founded in fact.

12. The Chamber is not satisfied that the Prosecution has established that there is a real likelihood of danger to the Witness should his address be known to the Accused. While the Chamber is sympathetic to the expectations of the Witness, which may have been that his address would not be made available to the Accused, those expectations have been created by the Prosecution alone. This Chamber has previously rejected the Prosecution's argument that the Accused is not entitled to know the current whereabouts of its witnesses against him, and despite the Prosecution's suggestion to the contrary, it has never revisited that issue or determined that the Accused is only entitled to the addresses of those witnesses who give their consent to be interviewed by him. Rather, the Chamber simply modified the procedure for contacting Prosecution witnesses to determine their willingness to be interviewed by the Accused or his representatives, at the request of both parties, and stated that it was not satisfied that the Prosecution had demonstrated a "clear error of reasoning" in its previous decision that the Accused should be given the addresses of Prosecution witnesses.¹⁹

¹⁶ See Decision on Prosecution's Motion for Delayed Disclosure for KDZ456, KDZ493, KDZ531 and KDZ532, and Variation of Protective Measures for KDZ489, 5 June 2009, para. 11.

¹⁷ *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-PT, Decision on Second Motion by Prosecution for Protective Measures, 27 October 2000, para. 22; *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Decision on Third Motion by Prosecution for Protective Measures, 8 November 2000, para. 16.

¹⁸ *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-PT, Decision on Motion by Prosecution for Protective Measures, 3 July 2000, para. 26; see also *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-PT, Decision on Second Motion by Prosecution for Protective Measures, 27 October 2000, para. 19; *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Decision on Prosecution's Twelfth Motion for Protective Measures for Victims and Witnesses, 12 December 2002, para. 8.

¹⁹ Decision on Motion for Order for Contact with Prosecution Witnesses, 19 June 2009, para. 7; Decision on Motion for Reconsideration of Decision on Motion for Order for Contact with Prosecution Witnesses, 15 July 2009, para. 7.

IV. Disposition

13. Accordingly, the Trial Chamber, pursuant to Rules 54 and 69 of the Rules, hereby **DENIES** the Motion. The “Order on *Ex Parte* Status of Subpoena *ad Testificandum*”, issued on 27 September 2010, shall remain in effect until such time as any appeal against this Decision is decided, or until further order of the Trial Chamber.

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



Judge O-Gon Kwon
Presiding

Dated this thirteenth day of January 2015
At The Hague
The Netherlands

[Seal of the Tribunal]