



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: 16 March 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: 16 March 2015

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON ACCUSED'S MOTION FOR VARIATION OF PROTECTIVE MEASURES
FOR WITNESSES TESTIFYING IN CLOSED SESSION**

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 Accused’s “Motion for Variance of Protective Measures for Witnesses Testifying in Closed Session”, filed publicly on 22 January 2015 (“Motion”), and hereby issues its decision thereon.

I. Background and Submissions

1. In the Motion, the Accused requests that the Chamber, pursuant to Rules 73 and 75 of the Tribunal’s Rules of Procedure and Evidence (“Rules”), (i) order the Tribunal’s Victims and Witnesses Section (“VWS”) to contact 28 witnesses who testified in this case in closed session or whose evidence heard in closed session in previous proceedings was admitted pursuant to Rule 92 *bis* (“Witnesses”), to determine if they would consent to modifying their protective measures; (ii) order the VWS to report the results to the Chamber and parties; and (iii) modify the protective measures accordingly.¹ He argues that this is necessary to (i) promote the public nature of his trial; (ii) to respect his right to be heard; and (iii) protect the rights of witnesses to rely on protective measures granted to them.²

2. The Accused questions the legal basis for Chambers to refer to closed session testimony in a public judgement without affording the parties or the witness to be heard, particularly in situations where the protective measures have carried over from other cases.³

3. He further contends that although the Witnesses may have been concerned with giving testimony in an ongoing trial under media scrutiny, they may now consent to their testimony being referenced in a written judgment or pleading in a manner that does not identify them.⁴ If any of the Witnesses consent to the variation of their protective measures, the Accused suggests that the parties propose a public redacted version of the transcript of their testimony or “written evidence”.⁵ Even if any of the Witnesses do not consent, the Accused reserves the right to make further submissions on an individual basis setting forth why exceptional circumstances exist to modify their protective measures.⁶

¹ Motion, paras. 1, 11.

² Motion, para. 10.

³ Motion, paras. 4, 7–9.

⁴ Motion, para. 10.

⁵ Motion, para. 12.

⁶ Motion, para. 12.

4. On 4 February 2015, the Office of the Prosecutor (“Prosecution”) filed the “Prosecution Response to Motion for Variance of Protective Measures for Witnesses Testifying in Closed Session” (“Response”), opposing the Motion.⁷ The Prosecution argues that the Motion is speculative.⁸ The Prosecution contends that it (i) would produce, at best, a marginal benefit to the public nature of the proceedings; (ii) would create additional risks for the Witnesses; and (iii) would waste Tribunal resources given the significant expenditure of time and resources required by the VWS, the Parties, and the Chamber.⁹ Additionally, contrary to the Accused’s submission, the Prosecution argues that Rule 75(G) of the Rules expressly applies only to “a party” and that the Chamber’s reference to closed session evidence does not constitute a *de facto* modification of protective measures because the Chamber is not a party.¹⁰ The Prosecution thus contends that in weighing the burden on Tribunal resources against the “speculative and negligible benefits” of the Motion, the Chamber should deny it.¹¹

5. On 9 February 2015, the Deputy Registrar filed, pursuant to Rule 33(B) of the Rules, the “Deputy Registrar’s Submission regarding Motion for Variance of Protective Measures for Witnesses Testifying in Closed Session” (“Submission”). The Deputy Registrar states that the Registry does not possess information indicating that any of the Witnesses are likely to consent to the proposed variation of their protective measures.¹² Furthermore, she asks how the Witnesses could give their informed consent to vary protective measures before “a public redacted version of the transcript or written evidence” has been provided.¹³ The Deputy Registrar also submits that the VWS is likely to require at least six weeks to contact the Witnesses who will, in turn, likely need substantial time to review their evidence.¹⁴ The Deputy Registrar points to other potential complications and resources which could be required to complete this exercise.¹⁵

6. On 12 February 2015, the Accused filed the “Reply re: Motion for Variance of Protective Measures for Witnesses Testifying in Closed Session” (“Reply”).¹⁶ The Accused argues that the Chamber lacks the power to unilaterally disclose closed session testimony in its judgement and,

⁷ Response, paras. 1, 5, 9.

⁸ Response, para. 2.

⁹ Response, paras. 1–7.

¹⁰ Response, para. 8.

¹¹ Response, para. 5.

¹² Submission, para. 3.

¹³ Submission, para. 2.

¹⁴ Submission, para. 4, fn. 5.

¹⁵ Submission, para. 4, fn. 5.

¹⁶ On 11 February 2015, the Chamber’s Legal Officer informed the parties by e-mail that the Chamber granted the “Request for Leave to Reply: Motion for Variance of Protective Measures for Witnesses Testifying in Closed Session” of 10 February 2015 pursuant to Rule 126 *bis* of the Rules. On 10 February 2015, the Prosecution had informed the Chamber by e-mail that it would not respond.

therefore, the Chamber should entertain the Motion.¹⁷ He argues that the Prosecution in referring to Rule 75(G) of the Rules, which limits applications for modification of protective measures to a “party”, ignores the obligation on the Chamber to respect protective measures irrespective of whether a party has sought modification.¹⁸ The Accused also submits that the Chamber’s selective and unilateral disclosure of portions of closed session testimony in its judgement, without consulting the witnesses in question, could create a danger for these witnesses.¹⁹ The Accused submits that the VWS phone inquiry would take less than one day.²⁰ He further argues that if any of the Witnesses consent to the modification, it would be the responsibility of the party calling the witness to identify the portions of their testimony which could be made public and liaise with the witness in question.²¹

7. Finally, with respect to the Motion being speculative, the Accused explains that he did not think it was prudent for his Defence team to contact the Witnesses themselves but rather that it is more appropriate for the VWS to contact them.²²

II. Applicable Law

8. 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 witness.²³ 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.²⁴ 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 the victims and witnesses to protection, and the right of the public to information.²⁵

¹⁷ Reply, paras. 6–11, 13–14, 16, 22.

¹⁸ Reply, paras. 17–19.

¹⁹ Reply, para. 26.

²⁰ Reply, para. 27.

²¹ Reply, paras. 28–29.

²² Reply, para. 24.

²³ Decision on Accused’s Motion for Modification of Protective Measures: Witnesses KDZ490 and KDZ492, 25 March 2010 (“Motion on Modification”), para. 6.

²⁴ Motion on Modification, para. 6.

²⁵ Motion on Modification, para. 6, referencing 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. 6 citing *e.g.*, *Prosecution v. Tadić*, Case IT-94-1-T, Decision on the Prosecutor’s Motion Requesting Protective Measures for Witness L, 14 November 1995, para. 11; *Prosecution v. Tadić*, Case 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.

9. Rule 75(F)(i) of the Rules provides that protective measures that have been ordered with respect to a witness in any proceedings before the Tribunal (“first proceedings”) shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal (“second proceedings”). Rules 75(G) and 75(J) of the Rules provide the procedure pursuant to which protective measures may be varied.

III. Discussion

10. Under Rule 75(G) of the Rules, a chamber may, augment, vary, or rescind protective measures. Pursuant to Rule 75(J), in the absence of consent from the witness, a chamber may, *proprio motu* rescind, vary or augment protective measures on the basis of a compelling showing of exigent circumstances, or where a miscarriage of justice would otherwise result. The Chamber has previously rescinded protective measures due to exigent circumstances, when a witness through communicating publicly about the matters of her testimony had rendered her protective measures entirely ineffective.²⁶

11. In the present case, the Accused has not presented any information concerning whether the Witnesses would consent to vary their protective measures beyond his own speculation. He has also failed to show any exigent circumstances or that a miscarriage of justice would result if the Chamber did not vary the protective measures for the Witnesses. On the basis of the information before it, the Chamber is not in a position to vary the Witnesses’ protective measures. Furthermore, the Chamber is not satisfied that it is in the interests of justice, to order the VWS, to speculatively contact the Witnesses to provide such information.

12. With regard to the Accused’s argument that the Chamber *de facto* modifies the protective measure of closed session, when it references closed session testimony in its final judgement, the Chamber notes that in referring to closed session testimony, it does not modify the protective measures awarded to a witness. Rather, having conducted a thorough analysis of the said evidence, the Chamber may consider it appropriate and consistent with the closed session awarded to the witness to refer to certain parts of the said evidence in its public Judgement without compromising the said protective measure.

²⁶ See Public Redacted Version of “Decision on Accused’s Motion to Recall KDZ080 and for Rescission of Protective Measures” Issued on 3 July 2013, 12 March 2015, paras. 14, 16, 24.

IV. Disposition

13. Accordingly, the Chamber, pursuant to Articles 20, 21, and 22, of the Statute, and Rule 75 of the Rules, hereby **DENIES** the motion.

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



Judge O-Gon Kwon
Presiding

Dated this sixteenth day of March 2015
At The Hague
The Netherlands

[Seal of the Tribunal]