



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 August 2011

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 August 2011

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON THE ACCUSED'S APPLICATION FOR CERTIFICATION TO APPEAL
DECISION ON RECONSIDERATION OF PROTECTIVE MEASURES (KDZ531)**

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 “Application for Certification to Appeal Decision on Reconsideration”, filed on 4 July 2011 (“Application”), and hereby issues its decision thereon.

I. Background and Submissions

1. On 30 June 2011, having received material that had been the subject of delayed disclosure,¹ the Accused filed the “Motion for Reconsideration of Protective Measures for Witness KDZ531” (“Motion on KDZ531”), challenging the Pre-trial Chamber’s decision that granted KDZ531 the protective measures of closed session testimony and delayed disclosure of identity until 30 days before his testimony, and requesting that the Chamber hold a hearing in the presence of KDZ531 to determine whether he could testify with less stringent protective measures.² The Accused submitted that the Chamber should examine the original motion requesting the protective measures *de novo* and not under the “reconsideration” test, on the basis that the protective measures had been granted based on representations by the Office of the Prosecutor (“Prosecution”) made *ex parte* the Accused, and which the Accused had not had the opportunity to see or contest before then.³

2. Also on 30 June 2011, the Prosecution filed the “Prosecution’s Response to Karadžić’s Motion for Reconsideration of Protective Measures for Witness KDZ531 with Confidential Appendix A” (“Response”), arguing that the Motion on KDZ531 should be denied because the Accused had failed to meet the test for reconsideration, given that the Pre-trial Chamber had properly considered the information in relation to KDZ531’s request for protective measures and correctly applied the relevant protective measure rules.⁴

3. On 1 July 2011, the Chamber issued an oral decision ruling on the Motion on KDZ531 (“Impugned Decision”). Having first found that the Motion on KDZ531 was a motion for

¹ See Hearing, T. 15686–15687 (29 June 2011) (private session) where the Chamber granted the Accused access to the *ex parte* submissions in relation to the granting of protective measures to KDZ531. See also Motion to Reclassify *Ex Parte* Filings: Witnesses KDZ531 and KDZ555, 23 June 2011; Prosecution Response to Accused’s Motion to Reclassify *Ex Parte* Filings: Witnesses KDZ531 and KDZ555, 28 June 2011.

² Motion on KDZ531, paras. 5, 7. See Prosecution’s Motion for Delayed Disclosure for KDZ456, KDZ493, KDZ531 and KDZ532 and Variation of Protective Measures for KDZ489, 8 May 2009 where the Prosecution requested *inter alia* the granting of protective measures to KDZ531, and Decision on Prosecution’s Motion for Delayed Disclosure for KDZ456, KDZ493, KDZ531 and KDZ532, and Variation of Protective Measures for KDZ489, 5 June 2009 (“Protective Measures Decision”), where the Pre-trial Chamber granted KDZ531 the protective measures of closed session testimony and delayed disclosure of identity to the Accused until 30 days before his testimony.

³ Motion on KDZ531, paras. 2–3, 7.

⁴ Response, paras. 1, 4, 7.

reconsideration of the Protective Measures Decision,⁵ the Chamber denied it on the grounds that the Accused had not demonstrated that there was a clear error of reasoning in the Pre-trial Chamber's Protective Measures Decision and that, given the current concerns expressed by KDZ531, the Chamber was not satisfied that it was necessary to reconsider its decision, to prevent injustice.⁶

4. In his Application, the Accused seeks leave to appeal the Impugned Decision as an opportunity for the Appeals Chamber to provide guidance with respect to "the proper standard to be applied to motions for reconsideration of decisions based upon *ex parte* submissions".⁷ The Accused submits that this issue meets both criteria of Rule 73(B) of the Rules of Procedure and Evidence of the Tribunal ("Rules"),⁸ and appears to be an issue not previously decided at the *ad hoc* Tribunals.⁹ The Accused adds that there is a strong argument to be made that the Chamber erred in rejecting *de novo* consideration of a decision taken based upon *ex parte* information. Thus, a decision by the Appeals Chamber at this stage of the proceedings "may well prevent recurring errors by the Chamber".¹⁰

5. With respect to the test for certification under Rule 73(B), the Accused argues that the issue at stake significantly affects the fairness of his trial, given that the delayed disclosure of witnesses' identity directly impacts his right, envisaged in Article 21(4)(b) of the Tribunal's Statute ("Statute"), to adequate time and facilities for the preparation of his defence.¹¹ The Accused also submits that the protective measure of closed session directly impacts his right to a public trial as guaranteed under Article 20(4) of the Statute.¹² Furthermore, according to the Accused, there are ten additional witnesses on the Prosecution's witness list for whom delayed disclosure orders were issued on an *ex parte* basis, and he intends to file motions for the Chamber to reconsider the protective measure decisions for most of these witnesses. Thus, given that the issue will recur multiple times during the course of trial and that the Accused suffers cumulative prejudice from the application of the standard set out in the Impugned

⁵ Hearing, T. 15837 (1 July 2011).

⁶ Hearing, T. 15837–15838 (1 July 2011). The Chamber added: "[t]he Chamber recalls that in its decision of 5th of June, 2009, it found that the pseudonym and closed session were appropriate measures and were necessary to safe-guard the privacy and protection of KDZ531 and his family. It also found that such measures were consistent with the rights of the accused in the present case. In coming to this conclusion, the Chamber carefully examined all the information presented to it and weighed against the rights of the accused." See Hearing, T. 15837 (1 July 2011).

⁷ Application, para. 10.

⁸ Application, paras. 1, 4.

⁹ Application, para. 7.

¹⁰ Application, para. 7.

¹¹ Application, para. 5. The Accused adds that Trial Chambers at the Tribunal, including this Chamber, have granted certification to appeal with respect to issues which affect the right of an accused to adequate time and facilities for the preparation of his defence. See Application, para. 9.

Decision, he argues that an immediate resolution on the matter by the Appeals Chamber would materially advance the proceedings.¹³

6. On 8 July 2011, the Prosecution filed the “Prosecution’s Response to Application for Certification to Appeal Decision on Reconsideration” (“Response”) opposing the Application.¹⁴ The Prosecution submits that the issue raised by the Accused of whether the standard applied by the Chamber in the Impugned Decision is appropriate in respect of the reconsideration of decisions based on *ex parte* submissions does not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, nor would the immediate resolution by the Appeals Chamber of this issue materially advance, or have a practical impact on the conduct of, the proceedings.¹⁵

7. With respect to the first prong of the test for certification, the Prosecution submits that the Accused has failed to show any significant impact arising from the Chamber applying the usual reconsideration standard to the Accused’s challenges to protective measures in place for witnesses rather than a *de novo* review standard.¹⁶ Furthermore, according to the Prosecution, whether a reconsideration standard or a *de novo* review standard is applied by the Chamber to a motion for variation of protective measures of a witness subject to delayed disclosure, such a motion will necessarily be brought after the said disclosure has taken place.¹⁷ Regarding the second prong of the test, the Prosecution argues that the resolution of the issue by the Appeals Chamber at this stage will have no practical impact on the conduct of the proceedings because the Accused will have the opportunity to introduce relevant evidence or arguments in any future motion for reconsideration of protective measures and, should the Chamber consider it necessary to prevent injustice, the protective measures may then be varied.¹⁸

8. The Prosecution finally adds that, even if the Chamber finds that the requirements for certification under Rule 73(B) are met, it should exercise its discretion to deny the Application because the Impugned Decision is of limited significance to the proceedings and did not result in unfairness or prejudice to the Accused nor will it result in unfairness or prejudice going forward.¹⁹

¹² Application, para. 5.

¹³ Application, paras. 6, 8.

¹⁴ Response, para. 1.

¹⁵ Response, paras. 2, 10.

¹⁶ Response, para. 6.

¹⁷ Response, para. 8.

¹⁸ Response, para. 11.

¹⁹ Response, paras. 2, 14.

II. Applicable Law

9. Decisions on motions other than preliminary motions challenging jurisdiction are without interlocutory appeal save with certification by the Trial Chamber.²⁰ Under Rule 73(B) of the Rules, a Trial Chamber may grant certification to appeal if the said 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.”

10. This test therefore contains two “prongs”, both of which must be satisfied in order for the Chamber to exercise its discretion to grant certification to appeal. Thus, “even when an important point of law is raised [...], the effect of Rule 73(B) is to preclude certification unless the party seeking certification establishes that both conditions are satisfied”.²¹ A request for certification is therefore “not concerned with whether a decision was correctly reasoned or not.”²²

III. Discussion

11. With regard to the first limb of the test, the Chamber considers that the Accused has failed to show that the Impugned Decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. This Chamber has previously found that the protective measure of delayed disclosure to an accused under Rule 69 of the Rules is severe in nature and should only be granted under exceptional circumstances as it may affect the ability of the accused to have adequate time and facilities to prepare for trial guaranteed by Article 21(4)(b) of the Statute.²³ Similarly, with respect to closed session testimony, the Chamber has held that such protective measure, by preventing public dissemination of witness testimony, could have an impact in the Accused’s right to a public trial,

²⁰ See Rule 72(B), 73(C) of the Rules.

²¹ *Prosecutor v. Halilović*, Case No. IT-01-48-PT, Decision on Prosecution Request for Certification for Interlocutory Appeal of “Decision on Prosecutor’s Motion Seeking Leave to Amend the Indictment”, 12 January 2005, p. 1.

²² *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Lukić Motion for Reconsideration of Trial Chamber’s Decision on Motion for Admission of Documents from Bar Table and Decision on Defence Request for Extension of Time for Filing of Final Trial Briefs, 2 July 2008, para. 42; *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Decision on Defence Application for Certification of Interlocutory Appeal of Rule 98bis Decision, 14 June 2007, para. 4; *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Nikolić and Beara Motions for Certification of the Rule 92 quater Motion, 19 May 2008, para. 16; *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Motion for Certification of Rule 98 bis Decision, 15 April 2008, para. 8; *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for *Voir Dire* Proceeding, 20 June 2005, para. 4.

²³ See Protective Measures Decision, paras. 10, 15. For this reason, it is the Chamber’s duty to strike the correct balance between the rights of the accused and the safety of victims and witnesses. See Protective Measures Decision, paras. 10–12.

under some circumstances.²⁴ The Chamber therefore considers that the issue of granting protective measures to KDZ531 pertains directly to the fairness of the proceedings. Nevertheless, the Accused's basis for the Application is not the fact that the Pre-trial Chamber granted the protective measures in the first place but that this Chamber, in the Impugned Decision, applied the test for reconsideration in relation to the Pre-Trial Chamber's decision, instead of considering *de novo* whether or not to grant protective measures to KDZ531.

12. The Chamber agrees with the Accused that the test to be applied when considering a fresh application for protective measures and the standard which must be followed when reconsidering a decision are different in nature. However, the Chamber cannot see how the application of a different standard at this stage would affect the fair and expeditious conduct of the proceedings or the outcome of the trial. Consequently, the Chamber finds that the elements of the first prong of the test for certification have not been met.

13. With regard to the second limb of the test, the Chamber does not consider that the Accused has explained how these proceedings may be materially advanced by an immediate resolution by the Appeals Chamber of the question of whether decisions taken on the basis of *ex parte* submissions should be subject to the test for reconsideration or should guarantee *de novo* consideration by the Chamber. With respect to the Accused's submission that an immediate resolution by the Appeals Chamber would materially advance the proceedings in relation to ten additional witnesses on the Prosecution's witness list for whom delayed disclosure orders were issued on an *ex parte* basis, the Chamber notes that challenges to orders granting delayed disclosure would necessarily have to be made *after* the identities of the witnesses presently enjoying the protective measure are revealed to him. If the Accused chooses to exercise his right to challenge protective measures currently in place for certain Prosecution witnesses, the Chamber will, at that moment, take into consideration any new factors or arguments presented by the Accused and will determine whether a variation or a rescission of protective measures is justified to prevent injustice. The Accused suffers no prejudice from this approach. Consequently, the Chamber also finds that the second prong of the certification test is not met.

²⁴ See confidential Decision on Prosecution's Motion for Protective Measures for Witness KDZ487, 24 November 2009, para. 18; confidential Decision on the Prosecution Motion for Rule 70 Conditions for Three Witnesses, 30 November 2009 ("Decision on Three Witnesses"), para. 21. The Chamber has also found that any derogation from the public nature of a trial must be legitimate so that the protective measure of closed session is only used on an exceptional basis. See Decision on Three Witnesses, paras. 21, 23.

IV. Disposition

14. Accordingly, the Trial Chamber, pursuant to Rule 54 and 73(C) of the Rules, hereby **DENIES** the Application.

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



Judge O-Gon Kwon
Presiding

Dated this sixteenth day of August 2011
At The Hague
The Netherlands

[Seal of the Tribunal]