



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: 12 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: 12 March 2015

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**PUBLIC REDACTED VERSION OF “DECISION ON ACCUSED’S MOTION TO
RECALL KDZ080 AND FOR RESCISSION OF PROTECTIVE MEASURES”
ISSUED ON 3 JULY 2013**

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 to Recall Prosecution Witness KDZ080 and for Rescission of Protective Measures”, filed publicly with confidential annexes on 11 March 2013 (“Motion”), and hereby issues its decision thereon.

I. Background and Submissions

1. [REDACTED].¹
2. [REDACTED].² [REDACTED].³ [REDACTED].⁴ [REDACTED].⁵ [REDACTED].⁶
3. In the Motion, the Accused requests that the Chamber (i) order that the Witness be recalled for further cross-examination in this case (“Request to Recall the Witness”) and (ii) rescind the Witness’s protective measures of pseudonym, image, and voice distortion (“Request to Rescind Protective Measures”).⁷ In support, the Accused attaches as Confidential Annex B to the Motion a news article publicising an interview with the Witness (“Publication”), in which she discusses, *inter alia*, her experiences in Omarska camp in the Prijedor municipality during the conflict, as well as the fact that she has testified in several cases before the Tribunal, including most recently in the present case.⁸ The Accused argues that the fact that the Witness has again revealed her status as a witness before the Tribunal, despite “an explicit order” making such information confidential, “calls into question the credibility of the [W]itness’ explanation of the earlier interview and the continuing need for protective measures” and submits that the most appropriate course of action is to recall the Witness for further cross-examination on this issue and allow the Chamber to assess its impact on her credibility.⁹ Finally, the Accused submits that at the conclusion of her further cross-examination, the Chamber would also be in a position to determine whether her protective measures should be rescinded in light of her “self-disclosures”.¹⁰

¹ [REDACTED].

² [REDACTED].

³ [REDACTED].

⁴ [REDACTED].

⁵ [REDACTED].

⁶ [REDACTED].

⁷ Motion, paras. 1, 7.

⁸ Motion, para. 5; Confidential Annex B.

⁹ Motion, paras. 6–7.

¹⁰ Motion, para. 7.

4. On 26 March 2013, the Office of the Prosecutor (“Prosecution”) filed the “Prosecution Response to Motion to Recall Prosecution Witness KDZ080 and for Rescission of Protective Measures” (“Response”). In the Response, the Prosecution first opposes the Motion with regard to the Accused’s Request to Recall the Witness.¹¹ The Prosecution argues that the Accused fails to show good cause for recalling the Witness, as she already provided an explanation for her earlier statements to the media about the fact that she had testified at the Tribunal during her testimony in this case and the Accused failed to take the opportunity then to cross-examine her on the veracity of this explanation.¹² The Prosecution further argues that the Publication has no bearing on the reasons given by the Witness regarding prior publications as: (i) “the *substance* of this article does not provide any new information upon which the Witness’s prior account could be challenged”; and (ii) “the *mere fact* that the Witness has given a subsequent media interview” does not cast doubt on the Witness’s explanation for how her testimony became public in the past.¹³ Moreover, in the Prosecution’s submission, the Accused has failed to show how the possibility of undermining the Witness’s prior explanations through further cross-examination would affect the Chamber’s determination as to why protective measures were justified.¹⁴ Finally, the Prosecution contends that recalling the Witness in order to allow the Accused to confront her on the basis of the Publication’s contents would be of no benefit to the Chamber and would “unnecessarily burden the proceedings and place a further burden on th[e] Witness”.¹⁵

5. Second, the Prosecution submits that it does not take a position on the Accused’s Request to Rescind Protective Measures.¹⁶ The Prosecution defers to the Chamber to seek the views of the Witness through the Registry’s Victims and Witnesses Section (“VWS”) pursuant to Rule 75(J) of the Rules.¹⁷ However, the Prosecution refers to the specific language of Rule 75(J) and notes in this respect that despite having the protective measures of pseudonym, image, and voice distortion, much of the Witness’s testimony in this case was given in open session and that moreover, her testimony is of a sensitive nature, relating to her personal experiences of detention and mistreatment in detention camps in Prijedor.¹⁸

¹¹ Response, para. 1.

¹² Response, paras. 2–3.

¹³ Response, para. 3 (emphasis in original). The Prosecution also submits that the Witness’s revelations are relevant only to the question of protective measures and does not affect her broader credibility. Response, para. 4.

¹⁴ Response, para. 4.

¹⁵ Response, para. 5.

¹⁶ Response, paras. 1, 7.

¹⁷ Response, para. 8.

¹⁸ Response, para. 9.

6. On 15 April 2013, the Deputy Registrar of the Tribunal submitted a report prepared by the VWS pursuant to Rule 33(B) of the Rules (“VWS Submission”)¹⁹ in accordance with the Chamber’s order of 28 March 2013 instructing the VWS to contact the Witness pursuant to Rule 75(J) and to inquire whether she consents to the rescission of her protective measures in this case given her recent public statements to the media.²⁰ In the VWS Submission, the VWS informs the Chamber that the Witness does not consent to the rescission of her protective measures and that their continuation is necessary for her safety and security.²¹ Moreover, the Witness told the VWS that tensions are particularly high in the area in which she resides, and where she is an ethnic minority, due to the high profile of the cases and recent testimony of witnesses at the Tribunal.²² [REDACTED].²³ Finally with respect to the recent media statements, the Witness informed the VWS that she “has not revealed any details about her testimony nor indicated which protected witness she was”; and stated that in fact, it “was always known and/or speculated” that she was a witness before the Tribunal.²⁴

II. Applicable Law

A. Request to Rescind Protective Measures

7. 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.²⁵

¹⁹ Deputy Registrar’s Submission Pursuant to Rule 33(B) of the Rules in Compliance with the Oral Order Dated 28 March 2013, confidential and *ex parte*, 15 April 2013. On 16 April 2013, the Chamber ordered that the Registry re-classify the VWS Submission as confidential and *inter partes* as it considered that the parties should be provided with access to the information contained therein. Oral Ruling, T. 37247 (16 April 2013) (private session).

²⁰ Oral Ruling, T. 36298–36300 (28 March 2013) (private session).

²¹ VWS Submission, paras. 2–3.

²² VWS Submission, para. 3.

²³ [REDACTED].

²⁴ VWS Submission, para. 4.

²⁵ 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 the 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, para. 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.

8. Rule 75(F)(i) of the Rules provides that protective measures that have been ordered in respect of 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”). Under Rule 75(G)(i) of the Rules, a party seeking to rescind protective measures ordered in the first proceedings must apply to any Chamber, however constituted, remaining seised of the first proceedings. However, if no Chamber remains seised of the first proceedings, Rule 75(G)(ii) provides that a party to the second proceedings seeking to rescind protective measures ordered in the first proceedings must apply to the Chamber seised of the second proceedings. Furthermore, Rule 75(I) requires the Chamber, before determining an application made pursuant to Rule 75(G)(ii), to obtain all relevant information from the first proceedings and consult with any judge who ordered the protective measures in those proceedings. Finally, Rule 75(J) requires that the Chamber ensure through the VWS that the witness has given consent to the rescission of the relevant protective measures; however, “on the basis of a compelling showing of exigent circumstances or where a miscarriage of justice would otherwise result”, the Chamber may *proprio motu* order the rescission of protective measures absent the consent of the witness in exceptional circumstances.

B. Request to Recall the Witness

9. Pursuant to Rule 89(B) of the Rules, a Chamber shall apply “rules of evidence which best favour a fair determination of a matter before it and are consonant with the spirit of the Statute and the general principles of law”. Rule 90(F) of the Rules provides that:

The Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to:

- (i) make the interrogation and presentation effective for the ascertainment of the truth; and
- (ii) avoid needless consumption of time.

10. In order to determine a request to recall a witness, the Chamber must consider whether the requesting party has demonstrated good cause to recall that witness.²⁶ In doing this, the Chamber must take into consideration the purpose of the evidence that the requesting party expects to elicit from the witness, as well as the party’s justification for not eliciting that

²⁶ Decision on Accused’s Requests in Relation to Notes Taken by Witness Adrianus Van Baal, 17 February 2011 (“Van Baal Decision”), para. 7; Decision on Accused’s Motion to Recall Harry Konings for Further Cross-examination, 11 February 2011, para. 8 (“Konings Decision”); *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-T, Reasons for Decision to Recall Witness JF-047, 31 March 2011 (“*Stanišić and Simatović* Decision”), para. 6; *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, Decision on Prosecution Motion to Recall Marko Rajčić, 24 April 2009 (“*Gotovina* Decision”), para. 10; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on Defence Motion to Recall Prosecution Witness OAB for Cross-examination, 19 September 2005 (“*Bagosora* Decision”), para. 2.

evidence when the witness originally testified.²⁷ Furthermore, the right to be tried without undue delay as well as concerns for judicial economy demand that a request to recall a witness “should not be granted lightly and only when the evidence is of significant probative value and not cumulative in nature”.²⁸ If the witness is to be recalled in order to show inconsistencies between the witness’s testimony and his or her subsequent statements, the requesting party must demonstrate that prejudice was sustained due to its inability to put inconsistencies to the witness.²⁹ The witness will not be recalled if there is no need for the witness’s explanation of the inconsistency because it is minor or its nature is self-evident.³⁰

III. Discussion

A. Request to Rescind Protective Measures

11. The Chamber shall first consider the Accused’s Request to Rescind Protective Measures. The Chamber considers that the Trial Chamber in the [REDACTED] constitutes the Chamber seised of the first proceedings within the meaning of Rule 75(F)(i) as it granted the Witness the protective measures which were continued in the present case.³¹ However, as there is no Chamber currently seised of the [REDACTED], the Accused has properly applied to this Chamber for the rescission of the Witness’s protective measures pursuant to Rule 75(G)(ii). Moreover, the Chamber notes that pursuant to Rule 75(I), it consulted with [REDACTED]. [REDACTED] opined that the Witness’s protective measures have been rendered ineffective by her public statements to the media following her testimony before the Tribunal, including in the present case; however, he suggested that the Chamber proceed with caution.

12. In considering the Accused’s Request to Rescind Protective Measures, the Chamber has carefully examined the Witness’s own submissions, as well as the Accused’s and Prosecution’s submissions, and the Publication itself. First and foremost, the Chamber recalls its specific warning to the Witness on 26 October 2011, namely to refrain from “making *public statements* which render her protective measures ineffective” and furthermore, that “[i]n order for the protective measures in this case to be effective, the Chamber would therefore *urge the [W]itness in the future to refrain from mentioning that she testified at the Tribunal*”.³² The Chamber notes that the Publication—which is only one example of multiple news sources around the world in

²⁷ Van Baal Decision, para. 8; Konings Decision, para. 8; *Stanišić and Simatović* Decision, para. 6; *Gotovina* Decision, para. 10; *Bagosora* Decision, para. 2.

²⁸ *Gotovina* Decision, para. 10; *Bagosora* Decision, para. 2.

²⁹ Van Baal Decision, para. 8; Konings Decision, para. 8; *Bagosora* Decision, para. 3.

³⁰ Van Baal Decision, para. 8; Konings Decision, para. 8; *Bagosora* Decision, para. 3.

³¹ *See supra* footnote 1.

³² Oral Ruling, T. 20379 (26 October 2011) (private session) (emphasis added).

which the interview of the Witness appeared³³— not only indicates that the Witness had testified before the Tribunal in “several cases”, but states specifically that she testified in the present case.³⁴

13. The Chamber further notes that the Publication refers to the Witness’s full name, as well as certain details which mirror many areas of the Witness’s testimony in this case. For instance, the Publication, *inter alia*, refers to: (i) the Witness being a “young judge” in Prijedor before the conflict; (ii) Bosnian Serbs taking control of “her native Prijedor” in early 1992; and (iii) many details about her experiences in Omarska camp, including about killings, forced labour, and rapes that occurred therein. Moreover, the Chamber notes that the fact that the Witness was one of the few female judges in Prijedor at the time could easily reveal her identity and was one of the precise reasons for which portions of her testimony in this case were given in private session so as to ensure that her identity was protected.³⁵ The Chamber further notes that in the VWS Submission, the Witness does not state that she did not authorise the journalist to reveal that she has been a witness at the Tribunal, as she stated in the past.³⁶ Therefore, the Chamber does not consider the Witness’s submission that she did not reveal details about her testimony nor which protected witness she was in this case to be convincing.³⁷

14. Accordingly, based on the content of the Witness’s recent statements to the media, it would not be difficult for the public to connect the substance of her testimony in this case, given largely in open session, to her public statements and thereby determine which witness she was in the present case. In fact, the Witness herself states that it “was always known and/or speculated” that she was a witness before the Tribunal.³⁸ The Chamber considers that the Witness’s detailed statements to the media about her experiences in Prijedor municipality during the conflict, which are markedly similar to areas of her public testimony and which reveal certain attributes traceable to her personally, combined with her own admission that the public already knew she was a witness before the Tribunal, run contrary to the protective measures from which she benefits and ultimately render them entirely ineffective.

15. In addition, the Chamber has considered the Witness’s submission that protective measures remain necessary due to particularly high tensions in the area in which she resides as a

³³ See Motion, para. 5.

³⁴ See Motion, Confidential Annex B, p. 9.

³⁵ See, *inter alia*, T. 20388–20389 (26 October 2011) (private session).

³⁶ See Prosecution Response to Motion to Modify Protective Measures: Witness KDZ080, 25 October 2011 (“First Response”), Confidential Appendix A, para. 3.

³⁷ See VWS Submission, para. 4.

³⁸ See VWS Submission, para. 4.

result of the high profile of Tribunal cases.³⁹ The Chamber first recalls that, as found above, the Witness's recent statement to the media revealing the location of her "native" home, in connection with her ethnicity, name, and details consistent with her public testimony in this case, along with the fact that she testified therein, has rendered her protective measures ineffective. Moreover, although the Chamber was satisfied with a similar submission from the Witness in the First Decision,⁴⁰ the Chamber has considered the Witness's security concerns as provided to the VWS against the backdrop of her recent statement to the media. In the VWS Submission, the Witness expresses her fears and security concerns in broad and general terms and does not indicate any specific incidents or concrete examples of threats to her security. In fact, the Chamber notes that the only specific example provided by the Witness to date of a threat to her security occurred in 2002—over ten years ago.⁴¹

16. For the foregoing reasons, the Chamber is satisfied that the Accused has made a compelling showing of exigent circumstances to justify the rescission of the Witness's protective measures in this case. In exercising its duty to balance the right of the Accused to a fair and public trial, the rights of victims and witnesses to the protection of their identity when required by the circumstances to safeguard their security, and the right of the public to access to information, the Chamber finds that in the absence of consent from the Witness, exceptional circumstances exist in this particular case to justify rescinding the Witness's protective measures pursuant to Rule 75(J) of the Rules.

17. Given that the Chamber has decided to rescind the Witness's protective measures in this case, the Chamber shall therefore lift the confidentiality of the following portions of her testimony which were given in private session for the purposes of protecting her identity: (1) T. 20379, line 23 to T. 20380, line 2; (2) T. 20388, lines 4 to 11; (3) T. 20388, line 23 to T. 20390, line 4; (4) T. 20390, line 7 to T. 20391, line 9; (5) T. 20391, line 21 to T. 20392, line 4; (6) T. 20399, line 22 to T. 20400, line 1; (7) T. 20401, line 14 to T. 20402, line 8; (8) T. 20402, line 25 to T. 20406, line 23; (9) T. 20409, line 25 to T. 20410, line 3; (10) T. 20415, lines 14 to 18; (11) T. 20419, line 8 to T. 20420, line 14; and (12) T. 20446, line 23 to T. 20447, line 23.

18. [REDACTED]. The remainder of the Witness's testimony given in private session shall therefore remain as such.

19. [REDACTED].

³⁹ See VWS Submission, para. 3.

20. The Chamber has also reviewed the effect that rescinding the protective measures granted to the Witness will have on the exhibits admitted under seal during her testimony in this case, namely exhibits P3690, P3691, P3693, D1819, and D1820. Having reviewed these exhibits in light of its decision, the Chamber is satisfied that P3690, P3693, D1819, and D1820 can now be made public. [REDACTED].⁴² [REDACTED].

21. [REDACTED].⁴³ [REDACTED].

B. Request to Recall the Witness

22. The Chamber first notes that one of the Accused's primary reasons in support of the Request to Recall the Witness is to allow the Chamber the opportunity to determine whether her protective measures should be rescinded in light of her "self-disclosures".⁴⁴ Given that the Chamber has decided to rescind the Witness's protective measures, it finds that this aspect of the Accused's Request to Recall the Witness is now moot.

23. The Chamber therefore shall now consider the Accused's remaining submissions in support of the Request to Recall the Witness, namely that the Witness should be recalled for further cross-examination concerning the fact that she revealed her status as a witness before the Tribunal again, despite "an explicit order" making such information confidential, to allow the Chamber to assess its impact on the Witness's credibility.⁴⁵ The Chamber notes that the Accused had the opportunity to cross-examine the Witness on the issue of the similar prior statements she made to the media during her testimony in this case and declined to do so. Moreover, the Accused did not provide any justification in the Motion for not eliciting this information from the Witness at that time. Finally, the Chamber is not convinced that further cross-examination on this narrow issue would be of assistance in assessing the Witness's evidence in this case. Accordingly, the Chamber finds that the Accused has not demonstrated good cause to recall the Witness.

IV. Disposition

24. For the foregoing reasons, the Chamber, pursuant to Articles 20, 21, and 22 of the Statute, and Rules 54, 75, 79, and 89 of the Rules, hereby **GRANTS** the Motion in part and:

⁴⁰ See Oral Ruling, T. 20378–20379 (26 October 2011) (private session).

⁴¹ See First Response, Confidential Appendix A, para. 3.

⁴² [REDACTED].

⁴³ [REDACTED]

⁴⁴ See Motion, para. 7.

⁴⁵ See Motion, paras. 6–7.

- a) **GRANTS** the Request to Rescind Protective Measures in part and **RESCINDS** the protective measures previously granted to the Witness for the purposes of her testimony in this case;
- b) **INSTRUCTS** the Registry to lift the confidentiality of the following portions of the transcript and the corresponding audio-visual record, according to paragraph 17 above: (1) T. 20379, line 23 to T. 20380, line 2; (2) T. 20388, lines 4 to 11; (3) T. 20388, line 23 to T. 20390, line 4; (4) T. 20390, line 7 to T. 20391, line 9; (5) T. 20391, line 21 to T. 20392, line 4; (6) T. 20399, line 22 to T. 20400, line 1; (7) T. 20401, line 14 to T. 20402, line 8; (8) T. 20402, line 25 to T. 20406, line 23; (9) T. 20409, line 25 to T. 20410, line 3; (10) T. 20415, lines 14 to 18; (11) T. 20419, line 8 to T. 20420, line 14; and (12) T. 20446, line 23 to T. 20447, line 23;
- c) [REDACTED];
- d) **INSTRUCTS** the Registry to change the status of P3690, P3693, D1819, and D1820 from confidential to public;
- e) [REDACTED];
- f) [REDACTED];
- g) [REDACTED];
- h) **ORDERS** that the implementation of this Decision by the Registry shall be stayed for three weeks after its filing date;
- i) **DENIES** the Request to Recall the Witness; and
- j) **INSTRUCTS** the Registry to provide the Witness with a copy of this Decision.

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



Judge O-Gon Kwon
Presiding

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

[Seal of the Tribunal]