



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-08-91-T
Date: 13 October 2009
Original: English

IN TRIAL CHAMBER II

Before: Judge Burton Hall, Presiding
Judge Guy Delvoie
Judge Frederik Harhoff

Registrar: Mr. John Hocking

Decision of: 13 October 2009

PROSECUTOR

v.

MIĆO STANIŠIĆ AND STOJAN ŽUPLJANIN

PUBLIC

**DECISION DENYING RADOVAN KARADŽIĆ'S MOTION
FOR VARIANCE OF PROTECTIVE MEASURES**

In Prosecutor v. Mićo Stanišić & Stojan Župljanin

The Office of the Prosecutor

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In Prosecutor v. Radovan Karadžić

The Office of the Prosecutor

Mr. Alan Tieger
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The Accused

Radovan Karadžić

TRIAL CHAMBER II (“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 “Motion by Radovan Karadžić for variance of protective measures”, filed publicly with a confidential *ex parte* annex on 24 August 2009 (“Motion”) by the self-representing Accused Radovan Karadžić. The Prosecution responded on 4 September 2009 (“Response”).¹

A. Submissions

1. Applicant

1. Radovan Karadžić has filed almost identical motions requesting variance of protective measures in a number of cases before the Tribunal.² He submits that there are over 162 Prosecution witnesses who will testify with protected measures in the case against him and that this is inconsistent with his right to a public trial.³ He contends that for proposed *viva voce* witnesses at trial “the best determination as to whether pseudonyms continue to be appropriate is made at trial when the witness is present in the courtroom”.⁴ Radovan Karadžić, therefore, seeks an order granting discretion to the Trial Chamber seised of the *Karadžić* case to vary the protective measures that apply to Witness KDZ061, who is to testify for the Prosecution in both the present case and in the *Karadžić* case, without him having to file a motion with this Trial Chamber pursuant to Rule 75(G)(i) of the Rules of Procedure and Evidence (“Rules”).⁵ Specifically, he requests that this Trial Chamber amend its order granting protective measures to Witness KDZ061 to include the following provision:⁶

The Trial Chamber hearing the trial of Radovan Karadžić may vary a protective measure made by this order if, in the exercise of its discretion, it believes that it is warranted under the circumstances.⁷

Radovan Karadžić proposes that the Presiding Judge of the Trial Chamber hearing the *Karadžić* case enquire whether the witness desires the protective measures to continue and for what reasons.

¹ Prosecution’s response to the motion by Radovan Karadžić for variance of protective measures, filed on 4 Sep 2009 (“Response”).

² *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-31/1-A, Motion by Radovan Karadžić for variance of protective measures, 24 August 2009; *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Motion by Radovan Karadžić for variance of protective measures, 26 August 2009; *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Motion by Radovan Karadžić for variance of protective measures, 24 August 2009; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Motion by Radovan Karadžić for variance of protective measures, 26 Aug 2009.

³ Motion, para. 4

⁴ *Id.*, para. 5.

⁵ *Id.*, para. 6.

⁶ *Prosecutor v. Mićo Stanišić*, Case No. IT-04-79-PT, Decision on Prosecution’s motions for protective measures for victims and witnesses, filed with confidential annexes on 6 Jun 2005.

⁷ Motion, para. 1.

Radovan Karadžić argues that should those reasons appear insufficient, he will then make an oral motion for rescission of the protective measures.⁸

2. Radovan Karadžić refers to a decision by the Appeals Chamber in the *Krajišnik* case on a motion submitted by Stojan Župljanin for access to confidential material in that case. Radovan Karadžić deems the situation of that case to be “analogous” to the present situation and submits that the reason for the Appeals Chamber’s referral of the decision on Stojan Župljanin’s motion to the Trial Chamber seized of Stojan Župljanin’s case was that that Trial Chamber was “best placed to decide such issues”.⁹ On this basis, Radovan Karadžić argues that the Trial Chamber seized of the *Karadžić* case:

will likely be best placed to determine if protective measures continue to be warranted in the individual circumstances, at the particular point in time at which the witness gives testimony [which] may well be several years after the protective measures were granted for that witness.¹⁰

2. Prosecution

3. The Prosecution argues that the Motion should be denied as it proposes to circumvent Rule 75(G) by deferring the authority to rescind, vary or augment protective measures to the Trial Chamber seized of the second proceedings.¹¹ The Prosecution argues this may render ineffective the protective measures in other proceedings as it potentially allows for one Trial Chamber to reveal the identity of a witness who is testifying under a pseudonym in an alternative trial.¹² In the Prosecution’s opinion, the purpose of the regime under Rule 75(F) to (K) is explicitly to avoid such variance by ensuring that the Chamber seized of first proceedings enjoys exclusive control over variations of protective measures as it is the Chamber best placed to assess the security concerns of the witness.¹³ The Prosecution contends that allowing the Motion would undermine the very purpose of Rule 75.¹⁴

4. The Prosecution submits that the Motion is unsupported by the Rules and the jurisprudence.¹⁵ Rule 75 does not provide for a general referral of authority to another Chamber and there has been no instance where a Trial Chamber has referred a Rule 75 decision to another

⁸ *Id.*, para. 5.

⁹ Motion, para. 7, referring *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, Order regarding Rule 75 motion by Mićo Stanišić, filed on 22 August 2007 (“First *Krajišnik* decision”); *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, Order regarding Rule 75 motion by Stojan Župljanin, filed on 25 Feb 2009 (“Second *Krajišnik* decision”). The Trial Chamber notes that Radovan Karadžić cites only the Second *Krajišnik* decision in his motion.

¹⁰ Motion, para. 8.

¹¹ Response, para. 7.

¹² *Id.*, para. 10.

¹³ *Id.*, para. 11.

¹⁴ *Id.*, para. 18.

¹⁵ *Id.*, para. 3.

Chamber.¹⁶ In this respect, the Prosecution contends that the *Krajišnik* decision cited in the Motion as well as another similar decision in that case are not applicable in this instance.¹⁷ It submits that in both situations, the Appeals Chamber, not a Trial Chamber, was seised of the requests and that in both the requests concerned “variation of delayed disclosure measures under Rule 69 so that an accused could access confidential information.”¹⁸ As a result, the witnesses in question had already testified, thus reducing the risk of conflicting protective measures.¹⁹ Both decisions also concerned specific requests and not, as Radovan Karadžić seeks, the granting of a broad discretionary authority.²⁰ The Prosecution notes that the Appeal Chamber’s reasoning for granting deferral was that the Trial Chamber was best placed to decide on the pending requests as it had “organic familiarity” with the proceedings.²¹ The Prosecution submits that if “organic familiarity” is a criterion for deciding which Chamber is best placed to decide on matters concerning protective measures, then the *Stanišić and Župljanin* Trial Chamber “is clearly most familiar with the individual circumstances underlying the need for protective measures” and, therefore, is best placed to decide on motions to vary or rescind them.²²

B. Applicable law

5. Article 20(1) of the Statute requires that proceedings be conducted with the full respect for the rights of the accused and due regard for the protection of victims and witnesses. Further, 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, but not limited to, the protection of the victim’s identity. These provisions, as well as subsequent jurisprudence, reflect the duty of the Trial Chamber to balance the right of the accused to a fair trial with the rights of victim and witnesses to protection.²³

6. Rule 75(A) 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), protective measures may include, *inter alia*, the giving of testimony through image altering devices and the assignment of a pseudonym.

¹⁶ *Id.*, para. 12.

¹⁷ *Id.*, para. 14.

¹⁸ *Id.*, para. 17.

¹⁹ *Id.*, paras 15, 17.

²⁰ *Id.*, para. 16.

²¹ Response, para. 15. See also First *Krajišnik* decision, p. 1 and Second *Krajišnik* decision, p. 2.

²² Response, para. 15.

²³ *Prosecution v. Tadić*, Case No. IT-94-1-T, Decision on Prosecution’s motion requesting protective measures for Witness I, filed on 14 Nov 1995, para. 11; *Prosecution v. Tadić*, Case No. IT-94-1-T, Decision on the Prosecutor’s motion requesting protective measures for Witness R, filed on 31 Jul 1996, p. 4; *Prosecutor v. Brđanin and Talić*, Case No. IT-99-36-PT, Decision on motion by Prosecution for protective measures, 3 Jul 2000, para. 7.

7. Pursuant to Rule 75(F)(i), once protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal (“first proceedings”), such protective measures shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal (“second proceedings”) or another jurisdiction unless and until they are rescinded, varied or augmented in accordance with the procedure set out. Pursuant to Rule 75(G), a party to the second proceedings seeking to rescind, vary or augment protective measures ordered in the first proceedings must apply either (i) to any Chamber, however constituted, remaining seised of the first proceedings, or (ii) if no Chamber remains seised of the first proceedings, to the Chamber seised of the second proceedings.

C. Discussion

8. The basic premise of the Motion is that the Accused’s right to a public trial would be breached where witnesses testify with protective measures. This is a misguided argument that has no basis. There is no infringement of this right in a situation where witnesses, who have legitimate security concerns, testify with protective measures which hide their identities from the public eye.

9. The purpose of Rule 75(G) is to grant authority to rescind, vary or augment protective measures to one Chamber at a time in order to prevent conflicting decisions regarding protective measures ordered in relation to a victim or witness. The reason for this is easy to understand and needs no further explanation. It would defeat this purpose to grant transfer of such authority by way of general referral.

10. Rule 75(G)(i) is abundantly clear that any request for variance of protective measures must be made to the Chamber seised of the first proceedings. The Trial Chamber notes that it is indeed seised of the first proceedings in which the protective measures were granted to Witness KDZ061 and as a result is best placed to determine any variation of protective measures.²⁴ This Trial Chamber has a better understanding and appreciation of the context in which such measures were initially ordered and the reasons for their imposition.

11. The Trial Chamber cannot agree with Radovan Karadžić that the present case is analogous to the second *Krajišnik* decision to which he refers. The second *Krajišnik* decision concerned applications, *inter alia*, to rescind or vary the protective measure of delayed disclosure to the accused of witness identities. Delayed disclosure directly impacts on the ability of an accused to adequately prepare his defence. Specific reasons relating to judicial consistency and economy may, in limited circumstances, warrant the Chamber seised of the first proceedings to refer a motion to

vary such protective measures to the Chamber seized of the second proceedings. However, the Trial Chamber considers Radovan Karadžić's request regarding a broad transfer of authority to vary protective measures in relation to Witness KDZ061, to be materially different to the situation in the *Krajišnik* decision.

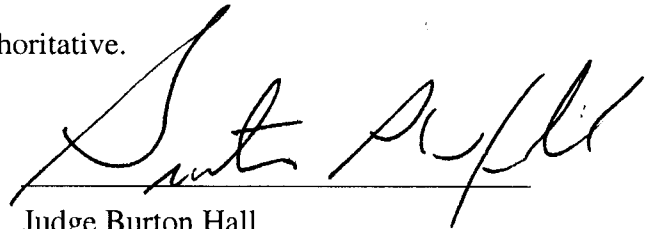
12. The Trial Chamber further notes that in the second *Krajišnik* decision, the Appeals Chamber being properly seized of the first proceedings, recognised that the Trial Chamber being seized of the applicant's case had an organic familiarity with the proceedings in question. This included the Trial Chamber's need to address the potential concerns of harmonising its decision on the Župljanin motion in the second *Krajišnik* decision with its previous first *Krajišnik* decision regarding his co-accused, Mićo Štanišić.²⁵

13. For the foregoing reasons, this Trial Chamber considers that in effect, Radovan Karadžić seeks an order of this Trial Chamber to circumvent the system laid down in Rule 75(G). This Trial Chamber holds that it is not within a Chamber's authority pursuant to Rule 75 to grant such a request.

D. Disposition

14. Pursuant to Articles 20, 21 and 22 of the Statute and Rule 75 of the Rules, the Trial Chamber **DENIES** the Motion.

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



Judge Burton Hall
Presiding

Dated this thirteenth day of October 2009

At The Hague

The Netherlands

[Seal of the Tribunal]

²⁴ *Prosecutor v. Mićo Štanišić*, Case No. IT-04-79-PT, Decision on Prosecution's motion for protective measures for victims and witnesses, 6 June 2005.

²⁵ Second *Krajišnik* decision, p. 1.