



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-98-32/1-A
Date: 25 September 2009
Original: English

BEFORE THE APPEALS CHAMBER

Before: Judge Mehmet Güney, Presiding
Judge Fausto Pocar
Judge Liu Daqun
Judge Theodor Meron
Judge Carmel Agius

Registrar: Mr. John Hocking

Decision of: 25 September 2009

PROSECUTOR
v.
MILAN LUKIĆ
SREDOJE LUKIĆ
PUBLIC

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

The Office of the Prosecutor:

Mr. Paul Rogers

Counsel for Milan Lukić:

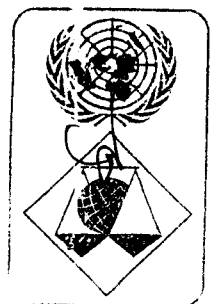
Mr. Jason Alarid
Mr. Dragan Ivetić

Counsel for Sredoje Lukić:

Mr. Đuro J. Čepić
Mr. Jens Dieckmann

The Applicant

Mr. Radovan Karadžić



1. The Appeals 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 (“Appeals Chamber” and “Tribunal”, respectively) is seised of the “Motion by Radovan Karadžić for Variance of Protective Measures”, filed on 24 August 2009 (“Motion”), in which the self-representing accused Radovan Karadžić (“Karadžić”) requests the Appeals Chamber to order the variation of protective measures ordered for a witness by the Trial Chamber in this case.¹ The Prosecution responded on 3 September 2009.²

I. SUBMISSIONS

2. Karadžić has filed almost identical motions requesting variance of protective measures in a number of cases before the Tribunal.³ He states that in his trial, a large number of Prosecution witnesses will testify with protective measures. For those witnesses who are to testify, Karadžić asserts that the Trial Chamber hearing his case will “be best placed to determine if protective measures continue to be warranted in the individual circumstances of the witness” at the moment when the witness appears in court to testify.⁴

3. Karadžić asserts that protected Prosecution Witness KDZ361 previously testified in this case⁵ as a protected witness under a different pseudonym. Accordingly, pursuant to Rule 75(G)(i) of the Rules of Procedure and Evidence (“Rules”), Karadžić requests that the Appeals Chamber order the variation of protective measures for Witness KDZ361 by adding a provision that “[t]he 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.”⁶

4. The Prosecution responds that Karadžić intends to circumvent the provision of Rule 75(G) of the Rules “by having the authority to rescind or vary the protective measures of witness KDZ361 referred to the *Karadžić* Trial Chamber.”⁷ The Prosecution contends that such a procedure is unsupported by the Rules or the Tribunal’s jurisprudence.⁸ In respect of two decisions in the

¹ *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Decision on Prosecution Motion for Protective Measures for Rebuttal Witnesses, 2 April 2009 (confidential).

² Prosecution’s Response to Motion by Radovan Karadžić for Variance of Protective Measures, 3 September 2009 (“Response”).

³ *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, 24 August 2009; *Prosecutor v. Stanišić and Župljanin*, Case No. IT-08-91-PT, Motion by Radovan Karadžić for Variance of Protective Measures, 24 August 2009.

⁴ Motion, paras 5, 8.

⁵ *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T.

⁶ Motion, paras 1, 9.

⁷ Response, paras 1, 11 (internal footnote omitted).

⁸ Response, para. 1.

Krajišnik case, where the Chamber seized of the first proceedings referred the decision on the respective motions to the Chamber seized of the second proceedings,⁹ the Prosecution submits that the decisions drew on a specific, “discrete request”.¹⁰ However, in the Prosecution’s submission, Karadžić seeks the “referral of a general authority” to the *Karadžić* Trial Chamber.¹¹ It is also contended that in the two decisions, a variation of delayed disclosure measures under Rule 69 of the Rules was requested, which, the Prosecution submits, cannot be compared to the trial-related protective measures at issue in Karadžić’s request.¹²

II. JURISDICTION

5. Rule 75(G) of the Rules provides that:

A party to the second proceedings seeking to rescind, vary or augment protective measures ordered in the first proceedings must apply:

- (i) to any Chamber, however constituted, remaining seized of the first proceedings; or
- (ii) if no Chamber remains seized of the first proceedings, to the Chamber seized of the second proceedings.

6. When the Appeals Chamber becomes seized of an appeal against a trial judgement, it becomes the Chamber “seized of the first proceedings” within the meaning of Rule 75(G)(i) of the Rules.¹³ The Appeals Chamber, therefore, finds that Karadžić, as a party to the second proceedings,¹⁴ properly filed his Motion before the Appeals Chamber.

III. DISCUSSION

7. The Chamber notes that protected Witness KDZ361 is scheduled to testify as a Prosecution witness in the trial against Karadžić.¹⁵ Pursuant to Rule 75(F) of the Rules, protective measures that have been ordered in any proceedings before the Tribunal continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal unless and until they are rescinded, varied or augmented. Rule 75(G) is clear in bestowing the competence to consider requests to vary protective

⁹ *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Order Regarding Rule 75 Motion by Stojan Župljanin, 25 February 2009 (“Second *Krajišnik* Decision”); *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Order Regarding Rule 75 Motion by Mićo Stanišić, 22 August 2007 (“First *Krajišnik* Decision”).

¹⁰ Response, para. 9.

¹¹ Response, para. 7.

¹² Response, para. 10.

¹³ *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Decision on Momčilo Perišić’s Motion Seeking Access to Confidential Material in the Blagojević and Jokić Case, 18 January 2006, para. 3. See also *Protais Zigiranyirazo v. The Prosecutor*, Case No. ICTR-01-73-A, Decision on Michael Bagaragaza’s Motion for Access to Confidential Material, 14 May 2009.

¹⁴ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT.

¹⁵ Prosecution’s Submission Pursuant to Rule 65ter(E)(i)-(iii), 18 May 2009, Appendix II, Prosecution 65ter Witness List (confidential), pp. 124-126 and Appendix II. A, Prosecution List of Witnesses and Related Exhibits (confidential), p. 69.

measures on the Chamber seized of the first proceedings.¹⁶ The Chamber seized of the first proceedings is best placed to determine any variation of protective measures as it has a greater understanding and appreciation of the context in which such measures were initially ordered and the reasons for their imposition.

8. The Appeals Chamber considers that if this competence were to be transferred to the Chamber seized of the second proceedings by way of a general referral, the regulatory regime of Rule 75(G)(i) of the Rules would be frustrated and an important protection feature for victims and witnesses before the Tribunal would be circumvented.

9. The two decisions cited by the parties, in which the Appeals Chamber in the *Krajišnik* case referred the decision on a Rule 75(G) application to the Chamber seized of the *second* proceedings, do not contradict the above findings.¹⁷ The decisions concerned applications *inter alia* to rescind or vary the protective measure of delayed disclosure to the accused of witness identities.¹⁸ Delayed disclosure directly impacts on the ability of an accused to adequately prepare his defence. Practical interests of judicial consistency and judicial economy may, in certain circumstances, warrant the Chamber seized of the first proceedings to refer a motion to vary such protective measures to the Chamber seized of the second proceedings. However, this situation is materially different from the present situation, where Karadžić seeks a general referral that any protective measure regarding Witness KDZ361 ordered by the Chamber seized of the first proceedings may subsequently be varied by the Chamber seized of the second proceedings.¹⁹

10. On the basis of the above, the Appeals Chamber finds that Rule 75(G) of the Rules outlines in no uncertain terms the procedure to be followed if a party seeks to vary protective measures ordered in previous proceedings. As the Motion seeks a *de facto* circumvention of this Rule, it shall be denied.

IV. DISPOSITION

11. For the foregoing reasons, pursuant to Rule 75 of the Rules, the Appeals Chamber **DENIES** the Motion.

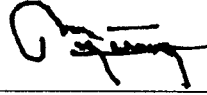
¹⁶ See Rule 75(G)(i) of the Rules.

¹⁷ First *Krajišnik* Decision, p. 2; Second *Krajišnik* Decision, p. 2. The Appeals Chamber notes that Karadžić cites only the Second *Krajišnik* Decision in his Motion (footnote 2 of the Motion).

¹⁸ See First *Krajišnik* Decision, p. 1. The Appeals Chamber further notes that in the Second *Krajišnik* Decision, one of the Chamber's main concerns was a potential need to harmonise its Decision on Župljanin's motion with a previous decision of the Trial Chamber in the *Stanišić* case on a request of his co-accused, Mićo Stanišić (*Prosecutor v. Mićo*

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

Judge Pocar appends a Separate Opinion to the present Decision.



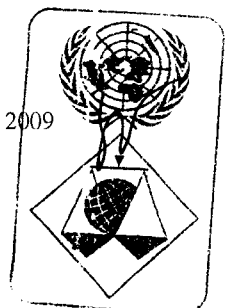
Judge Mehmet Güney
Presiding

Dated this 25th day of September 2009
At The Hague,
The Netherlands

[Seal of the Tribunal]

Stanišić, Case No. IT-04-79-PT, Decision on Mićo Stanišić's Motion to Rescind or Vary the Delayed Disclosure Orders in *Prosecutor v. Krajišnik*, 31 January 2008), see Second *Krajišnik* Decision, p.1.

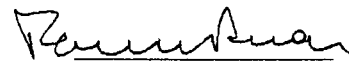
¹⁹ Motion, paras 1, 9.



SEPARATE OPINION OF JUDGE POCAR

1. I agree with the outcome of the present Decision. However, with regard to the reasoning in paragraph 9 of the Decision, I wish to reiterate the position that I have previously expressed on this matter.²⁰

Done this twenty-fifth day of September 2009
At The Hague,
The Netherlands


Judge Fausto Pocar

²⁰ *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Decision on “Motion by Mićo Stanišić for Access to All Confidential Materials in the Krajišnik Case”, 21 February 2007, Partially Dissenting Opinion of Judge Pocar, para. 2.

