

**UNITED
NATIONS**



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 Nos. IT-05-88-A &
IT-95-5/18-T
Date: 28 March 2012
Original: English

IN THE APPEALS CHAMBER

Before:

Judge Patrick Robinson, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Andrésia Vaz
Judge Khalida Rachid Khan

Registrar:

Mr. John Hocking

Decision of:

28 March 2012

PROSECUTOR

v.

VUJADIN POPOVIĆ
LJUBIŠA BEARA
DRAGO NIKOLIĆ
RADIVOJE MILETIĆ
MILAN GVERO
VINKO PANDUREVIĆ

PUBLIC

**DECISION ON RADOVAN KARADŽIĆ'S MOTION TO
RESCIND PROTECTIVE MEASURES: WITNESS KDZ122**

The Office of the Prosecutor:

Mr. Peter Kremer QC
Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused:

Mr. Radovan Karadžić *pro se*

Counsel for the Defence:

Mr. Zoran Živanović and Ms. Mira Tapušević for Mr. Vujadin Popović
Mr. John Ostojčić and Mr. Theodor Scudder for Mr. Ljubiša Beara
Ms. Jelena Nikolić and Mr. Stéphane Bourgon for Mr. Drago Nikolić
Ms. Natacha Fauveau Ivanović and Mr. Nenad Petrušić for Mr. Radivoje Miletić
Mr. Dragan Krgović and Mr. David Josse for Mr. Milan Gvero
Mr. Peter Haynes and Mr. Simon Davis for Mr. Vinko Pandurević

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);

BEING SEISED OF the “Motion to Rescind Protective Measures: Witness KDZ122”, filed publicly with a confidential annex by Radovan Karadžić (“Karadžić”) on 27 February 2012 (“Motion” and “Confidential Annex”, respectively);

NOTING that Karadžić requests that the Appeals Chamber rescind the protective measure of giving testimony in closed session granted by Trial Chamber II of the Tribunal in the *Popović et al.* case (“Trial Chamber”) to a witness known in the *Karadžić* case by the pseudonym KDZ122 (“Witness”), arguing that the protective measure in these circumstances is contrary to the public interest,¹ and that the Trial Chamber effectively rescinded in part the protective measure by revealing portions of the Witness’s testimony in its public judgement;²

NOTING the “Response to Motion to Rescind Protective Measures: Witness KDZ122”, filed confidentially by the Office of the Prosecutor (“Prosecution”) on 29 February 2012 (“Response”), in which the Prosecution opposes the Motion on the basis that it ignores the safety and security of the Witness and that of his/her family,³ and contends that the Trial Chamber carefully protected the Witness’s identity in its public judgement by using a pseudonym throughout;⁴

NOTING the “Reply Brief: Motion to Rescind Protective Measures: Witness KDZ122”, filed confidentially by Karadžić on 1 March 2012 (“Reply”);

NOTING the “Prosecution’s Motion to Strike Karadžić’s ‘Reply Brief: Motion to Rescind Protective Measures: Witness KDZ122’, and in the Alternative, Leave to File a Sur-Reply and Sur-Reply”, filed confidentially by the Prosecution on 2 March 2012 (“Motion to Strike the Reply”) in which the Prosecution requests that the Reply be struck because “[p]ursuant to Rule 126 *bis*, the Accused is not entitled to file a reply without leave of the relevant Chamber”,⁵ or in the alternative, that it be granted leave “to respond to those allegations in the Reply which purport to be new or which require clarification”;⁶

¹ Motion, para. 1; Confidential Annex, para. 7.

² Confidential Annex, paras 5, 8.

³ Response, para. 1.

⁴ Response, para. 4.

⁵ Motion to Strike the Reply, para. 2.

⁶ Motion to Strike the Reply, para. 3.

RECALLING that where a motion is filed in appeal proceedings, the moving party may file a reply within four days of the filing of the response without first seeking leave to file such a reply;⁷

NOTING that Karadžić filed the Reply within four days of the filing of the Response;

NOTING that the Trial Chamber orally granted the protective measure of giving testimony in closed session to the Witness on 24 September 2007;⁸

NOTING that, on 2 March 2012, the Pre-Appeal Judge instructed the Victims and Witnesses Section of the Tribunal (“VWS”) to consult with the Witness for the purpose of determining whether he/she consents to the lifting of his/her protective measure, to inform the Witness of the implications of the lifting, and to report as soon as practicable to the Appeals Chamber on the outcome of its consultation;⁹

NOTING that, on 7 March 2012, the Registrar filed a confidential and *ex parte* report of the VWS;¹⁰

CONSIDERING that pursuant to Rule 75(F)(i) of the Rules, protective measures that have been ordered in respect of a witness in any proceedings before the Tribunal (the “first proceedings”) shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal (the “second proceedings”) unless and until they are rescinded, varied or augmented;

CONSIDERING that pursuant to Rule 75(G)(i) of the Rules, a party to the second proceedings seeking to rescind, vary, or augment protective measures ordered in the first proceedings must apply to any chamber remaining seised of the first proceedings;

RECALLING that when the Appeals Chamber becomes seised of an appeal against a trial judgement, it becomes the chamber “seised of the first proceedings” within the meaning of Rule 75(G)(i) of the Rules;¹¹

⁷ Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal, Doc. IT/155 Rev. 3, 16 September 2005, para. 14. See also *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Decision on “Defence Request to File a Reply to Confidential ‘Prosecution Response to Šainović’s Second Motion to Admit Additional Evidence’”, 12 July 2010, p. 1; *Prosecutor v. Ante Gotovina and Mladen Markač*, Case No. IT-06-90-A, Decision on Application and Proposed *Amicus Curiae* Brief, 14 February 2012, fn. 17.

⁸ *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, T.15701:3-15701:22 (24 September 2007). See also *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, T.15724:23-15726:7 (25 September 2007).

⁹ Order Relating to Radovan Karadžić’s Motion to Rescind Protective Measures: Witness KDZ122, 2 March 2012, p. 2.

¹⁰ Confidential and *Ex Parte* Report of VWS dated 6 March 2012 on the “Order Relating to Radovan Karadžić’s Motion to Rescind Protective Measures: Witness KDZ122” dated 2 March 2012, appended to Registrar’s Submission Pursuant to Rule 33(B) in Compliance with the Order Relating to Radovan Karadžić’s Motion to Rescind Protective Measures: Witness KDZ122 Dated 2 March 2012, 6 March 2012 (confidential and *ex parte*) (“VWS Submission”).

¹¹ Decision on Prosecution’s Urgent Motion to Rescind Protective Measures for Witness, 7 February 2012, p. 2 and reference cited therein.

CONSIDERING that the Appeals Chamber is currently seised of the *Popović et al.* case and therefore has jurisdiction to rule on the Motion;

CONSIDERING that pursuant to Rule 75(J) of the Rules, the Appeals Chamber shall ensure through the VWS that the Witness has given consent to the rescission, variation or augmentation of his/her protective measures;

CONSIDERING that the VWS has informed the Appeals Chamber that, after consultation, the Witness does not consent to the rescission of the protective measure of testifying in closed session and wishes the protection granted in the *Popović et al.* case to continue;¹²

FINDING that no compelling showing of exigent circumstances has been demonstrated within the meaning of Rule 75(J) of the Rules that would justify a *proprio motu* variation or rescission of the protective measures in the absence of the Witness's consent, and that such variation or rescission of protective measures is not necessary to prevent a miscarriage of justice within the meaning of Rule 75(J) of the Rules;

PURSUANT to Rules 54, 75 and 107 of the Rules;

HEREBY DENIES the Motion to Strike the Reply; and

HEREBY DENIES the Motion.

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



Judge Patrick Robinson
Presiding Judge

Dated this 28th day of March 2012,
At The Hague,
The Netherlands.

[Seal of the Tribunal]

¹² VWS Submission, para. 2.