



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-02-60-A
Date: 23 October 2012
Original: English

THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Patrick Robinson
Judge Mehmet Güney
Judge Fausto Pocar
Judge Andréia Vaz

Registrar: Mr. John Hocking

Order of: 23 October 2012

PROSECUTOR

v.

**VIDOJE BLAGOJEVIĆ
DRAGAN JOKIĆ**

PUBLIC

**DECISION ON PROSECUTION'S MOTION TO LIFT
CONFIDENTIAL STATUS OF THE APPEALS CHAMBER'S
RULE 115 DECISION OF 21 JULY 2005**

The Office of the Prosecutor:

Mr. Peter Kremer

Counsel for Vidoje Blagojević:

Mr. Vladimir Domazet

Counsel for Vujadin Popović:

Mr. Zoran Živanović and
Ms. Mira Tapušковиć

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 “Prosecution Motion to Lift Confidential Status of the Appeal Chamber’s Rule 115 Decision of 21 July 2005”, filed confidentially by the Office of the Prosecutor (“Prosecution”) on 19 July 2011 in the *Vujadin Popović et al.* case (“Motion”).¹ Vujadin Popović (“Popović”) responded to the Motion on 1 August 2011.²

I. BACKGROUND

2. On 21 July 2005, the Appeals Chamber issued the confidential “Decision on Appellant Vidoje Blagojević’s Motion for Additional Evidence Pursuant to Rule 115” (“Decision”) in this case. On 18 October 2011, the President of the Tribunal issued a confidential order, assigning an Appeals Bench for the purpose of deciding the Motion.³

II. APPLICABLE LAW

3. Rule 54 of the Rules of Procedure and Evidence of the Tribunal (“Rules”) provides that “[a]t the request of either party or *proprio motu*, a Judge or a Trial Chamber may issue such orders [...] as may be necessary for the [...] preparation or conduct of the trial.” Rule 107 of the Rules states that the Rules “that govern proceedings in the Trial Chambers shall apply *mutatis mutandis* to proceedings in the Appeals Chamber.”

III. SUBMISSIONS

4. The Prosecution submits that the Decision contributes to an issue of significance to the jurisprudence of the Tribunal and, accordingly, requests that the Decision be made public.⁴ The Prosecution contends that since the Decision no longer refers to confidential material, there is no

¹ *Prosecutor v. Vujadin Popović*, Case No. IT-05-88-A, Prosecution Motion to Lift Confidential Status of the Appeal Chamber’s Rule 115 Decision of 21 July 2005, 19 July 2011 (confidential).

² *Prosecutor v. Vujadin Popović*, Case No. IT-05-88-A, Vujadin Popović’s Response to Prosecution Motion to Lift Confidential Status of the Appeal Chamber Rule 115 Decision of 21 July 2005, 1 August 2011 (confidential) (“Response”).

³ Order Assigning Judges to a Motion by the Prosecution, 18 October 2011 (confidential). Then President Robinson assigned the following Judges to decide the Motion: Judge Robinson, presiding, Judge Mehmet Güney, Judge Fausto Pocar, Judge Andréia Vaz, and Judge Theodor Meron. Judge Meron replaced Judge Robinson as the presiding judge on this matter when he took office as the President of the Tribunal on 17 November 2011.

⁴ Motion, paras 1, 3, 5. Specifically, the Appeals Chamber found that evidence is considered “‘available at trial’ if it becomes available at a stage when it is still reasonably possible for the relevant party to seek to introduce it before the Trial Chamber. Depending on the circumstances, evidence received after closing arguments in a case may meet this standard.” See Decision, para. 10. The Appeals Chamber further held that evidence that was “available at trial” will not be admitted when a party made no effort to introduce the material to the Trial Chamber while awaiting the trial judgement. See Decision, paras 12-14.

need to preserve its confidential status.⁵ Specifically, the Prosecution submits that the provider of the confidential material referred to in the Decision consented to the public use thereof pursuant to Rule 70 of the Rules.⁶ Moreover, the material was admitted publicly in the *Popović* trial and subsequently referred to in the public and redacted version of the *Popović et al.* Trial Judgement.⁷

5. Popović does not object to the confidential status of the Decision being lifted, subject to the *proviso* that its jurisprudential contribution does not apply “retroactively” to Popović’s Rule 115 Motion, which was pending at the time of the Motion.⁸ Otherwise, Popović submits, he would be unjustly subjected to jurisprudence of which he was not aware at the relevant time.⁹

IV. DISCUSSION

6. At the outset, the Appeals Chamber finds that the Decision’s holding regarding the availability of material at trial pursuant to Rule 115 of the Rules constitutes an important contribution to the jurisprudence of the Tribunal.¹⁰ While the Prosecution did not furnish explicit evidence in the Motion demonstrating that the information provider consented to the public use of the confidential material, or that the consent covers the specific images discussed in the Decision,¹¹ the Appeals Chamber observes that the Decision limits itself to a general description of the confidential material and does not identify the information provider.¹²

7. Similarly, the Appeals Chamber finds Popović’s argument with respect to the possible prejudice suffered as a result of the Decision being made public to be without merit. Specifically, the Appeals Chamber denied Popović’s Rule 115 Motion on the basis that, *inter alia*, Popović had been granted access to confidential materials from the *Blagojević and Jokić* case, including the Decision.¹³ Moreover, the Appeals Chamber observes that no issue of “retroactive” application of

⁵ Motion, para. 4.

⁶ Motion, para. 4.

⁷ Motion, para. 4, referring to *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88, Trial Judgement, 10 June 2010 (public redacted version) (“*Popović et al.* Trial Judgement”), paras 72-75, 358, 418, nn. 847, 858, 994, 1012, 1050, 1089, 1146, 1206, 1216-1217, 1224, 1298, 1385, 1387, 1390, 1526, 1543, 1673, 1832, 1909, 2012, 2201, 2205.

⁸ Response, paras 1, 3-4. See also *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-A, Vujadin Popović’s Motion Pursuant to Rule 115, 2 June 2011 (confidential) (“Popović’s Rule 115 Motion”).

⁹ Response, paras 2-3.

¹⁰ Cf. Motion, para. 3. See also *supra*, n. 5.

¹¹ See Motion, para. 4.

¹² See Decision, paras 2, 8, 11, 16-20.

¹³ *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-A, Decision on Vujadin Popović’s Motion for Admission of Additional Evidence on Appeal Pursuant to Rule 115, 20 October 2011 (“*Popović et al.* Decision of 20 October 2011”), paras 34, 43.

jurisprudence to Popović could conceivably arise as Popović's Rule 115 Motion was filed after the issuance of the Decision, which is a mere clarification of Rule 115 of the Rules.¹⁴

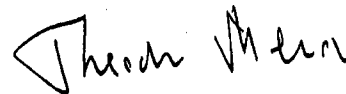
8. In light of the above, and taking into account the principle that all decisions filed before the Tribunal shall be public unless there are exceptional reasons for maintaining their confidentiality,¹⁵ the Appeals Chamber considers that the Decision should be reclassified as public.

V. DISPOSITION

9. Based on the foregoing, the Appeals Chamber **GRANTS** the Motion and **ORDERS** the Registry of the Tribunal to reclassify the Decision as public.

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

Done this 23th day of October 2012,
At The Hague,
The Netherlands.



Judge Theodor Meron
Presiding

[Seal of the Tribunal]

¹⁴ See *Popović et al.* Decision of 20 October 2011, n. 92 (where the Appeals Chamber held that the “Decision is not a new jurisprudential development but a mere clarification of Rule 115 of the Rules”).

¹⁵ *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-AR73.3, Order Lifting Confidentiality, 10 June 2011, p. 1; *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-AR73.6, Decision on Ivan Čermak and Mladen Markač Interlocutory Appeals against Trial Chamber's Decision to Reopen the Prosecution Case, 1 July 2010, para. 6.