IT-98-29/1-A
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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 No. IT-98-29/1-A Date: 8 October 2009 Original: English

BEFORE THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mehmet Güney
Judge Liu Daqun
Judge Andrésia Vaz
Judge Theodor Meron

Registrar: **Mr. John Hocking**

Decision of: **8 October 2009**

PROSECUTOR

v.

DRAGOMIR MILOŠEVIĆ

PUBLIC

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

The Office of the Prosecutor:

Mr. Paul Rogers

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

Counsel for Dragomir Milošević:

Mr. Branislav Tapušković
Ms. Branislava Isailović

The Applicant

Mr. Radovan Karadžić

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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 by Radovan Karadžić ("Applicant") on 26 August 2009, requesting the Appeals Chamber to grant the variation of the protective measures ordered for two witnesses by the Trial Chamber in the *Dragomir Milošević* case.[1] The Office of the Prosecutor ("Prosecution") filed its Response on 3 September 2009.[2] The Applicant did not file a reply.

I. SUBMISSIONS

2. The Applicant submits that a large number of Prosecution witnesses in his trial were granted protective measures in previous cases before the Tribunal.[3] The Applicant claims that the Trial Chamber seised of his case is best placed to determine if the protective measures previously granted to Prosecution witnesses continue to be warranted in his case or may be rescinded.[4]

3. The Applicant submits that protected Prosecution Witnesses KDZ166 and KDZ323 previously testified in the *Dragomir Milošević* case as protected witnesses under different pseudonyms.[5] He requests that, pursuant to Rule 75(G)(i) of the Rules of Procedure and Evidence of the Tribunal ("Rules"), the Appeals Chamber vary the protective measures ordered for Witnesses KDZ166 and KDZ323 in the *Dragomir Milošević* case 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 the Applicant intends to circumvent the provision of Rule 75(G) of the Rules "by having the authority to rescind or vary the protective measures of witnesses KDZ166 and KDZ323 referred to the *Karadžić* Trial Chamber".[7] It contends that such a procedure

[1] Motion by Radovan Karadžić for Variance of Protective Measures, with a confidential and *ex parte* Annex, 26 August 2009 ("Motion"), paras 1, 9.
[2] Prosecution's Response to Motion by Radovan Karadžić for Variance of Protective Measures, 3 September 2009 ("Response").
[3] Motion, para. 4.
[4] Motion, paras 5-6, 8. The Appellant has filed analogous motions requesting variance of protective measures in a number of cases before the Tribunal. See *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-A, Motion by Radovan Karadžić for Variance of Protective Measures, 24 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.
[5] Motion, para. 2; see also confidential and *ex parte* Annex.
[6] Motion, paras 1, 9.
[7] Response, paras 1-2, 11-12.

is unsupported by the Rules or the Tribunal's jurisprudence.[8] The Prosecution acknowledges that in two decisions rendered in the *Krajišnik* case, the Appeals Chamber, seised of the first proceedings, referred the decision on the respective motions on variation of protective measures to the Trial Chamber seised of the second proceedings.[9] However, the Prosecution submits that the *Krajišnik* Decisions are distinguishable from the matter at hand on two grounds. First, the *Krajišnik* Decisions drew on a specific, discrete request while the Applicant seeks the "referral of a general authority" to the *Karadžić* Trial Chamber.[10] Second, the *Krajišnik* Decisions addressed a request for variation of delayed disclosure measures under Rule 69 of the Rules, which, the Prosecution submits, cannot be compared to the protective measures at issue in the present case, which were ordered pursuant to Rule 75 of the Rules.[11]

II. DISCUSSION

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

6. As a preliminary matter, the Appeals Chamber recalls 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.[12] The Appeals Chamber, therefore, finds that the Applicant, as a party to the second proceedings,[13] properly filed his Motion before the Appeals Chamber.

7. The Appeals Chamber further recalls that, 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) confers the competence to consider requests to vary protective

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[8] Response, para 1.
[9] Response, para. 8, referring to *Prosecutor v. Momčilo Krajišnik,* Case No. IT-00-39-A, Order Regarding Rule 75 Motion by Mićo Stanišić, 22 August 2007; *Prosecutor v. Momčilo Krajišnik,* Case No. IT-00-39-A, Order Regarding Rule 75 Motion by Stojan Župljanin, 25 February 2009 (collectively, "*Krajišnik* Decisions").
[10] Response, para. 9.
[11] Response, para. 10.
[12] *Prosecutor v. Milan Lukić and Sredoje Lukić,* Case No. IT-98-32/1-A, Decision on Radovan Karadžić's Motion for Variance of Protective Measures, 25 September 2009, ("*Lukić* Decision") para. 7, referring to *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.
[13] *Prosecutor v. Radovan Karadžić,* Case No. IT-95/18-PT.

measures on the Chamber seised of the first proceedings.[14] As previously observed by the Appeals Chamber, if the Chamber seised of the first proceedings were to transfer this competence to the Chamber seised 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".[15]

8. The *Krajišnik* Decisions do not contradict the above interpretation.[16] These decisions concerned applications to, *inter alia,* rescind or vary the measure of delayed disclosure to the accused of witness identities, ordered by the Chamber seised of the first proceedings pursuant to Rule 69 of the Rules.[17] The question addressed in the *Krajišnik* Decisions is materially different from the present situation, where the Applicant seeks a general referral that any protective measure ordered by the Chamber seised of the first proceedings pursuant to Rule 75 of the Rules may subsequently be varied by the Chamber seised of the second proceedings.[18]

9. On the basis of the above, the Appeals Chamber reiterates that Rule 75(G) of the Rules clearly defines the procedure to be followed if a party seeks to vary protective measures ordered in previous proceedings.[19] As the Motion seeks a *de facto* circumvention of this Rule, it shall be denied without further consideration.

III. DISPOSITION

10. For the foregoing reasons, the Appeals Chamber **DENIES** the Motion, without prejudice to the Applicant's right to seek variation of the relevant protective measures in full compliance with the applicable procedure.

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

Judge Fausto Pocar
Presiding

Dated this eighth day of October 2009
At The Hague,
The Netherlands

[Seal of the Tribunal]

[14] See Rule 75(G)(i) of the Rules.
[15] *Lukić* Decision, para. 8.
[16] *Lukić* Decision, para. 9.
[17] *Krajišnik* Decisions, p. 1, respectively.
[18] Motion, paras 1, 9.
[19] *Lukić* Decision, para. 10.