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-00-39-A

Date: 21 February 2007

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mohamed Shahabuddeen
Judge Andrésia Vaz
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: **Mr. Hans Holthuis**

Decision of: **21 February 2007**

PROSECUTOR

v.

MOMČILO KRAJIŠNIK

DECISION ON "MOTION BY MIĆO STANIŠIĆ FOR ACCESS TO ALL CONFIDENTIAL MATERIALS IN THE KRAJIŠNIK CASE"

The Office of the Prosecutor:

Mr. Alan Tieger
Mr. Peter Kremer
Ms. Christine Dahl

Counsel for the Applicant:

Mr. Stevo Bezbradica

Counsel for the Appellant:

Mr. Colin Nicholls

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 "International Tribunal", respectively),

BEING SEIZED of the "Motion by Mićo Stanišić for Access to All Confidential Materials in the Krajišnik Case" filed on 14 November 2006 ("Motion") by Counsel on behalf of Mićo Stanišić ("Applicant") whereby the Applicant requests "access to all confidential materials in the Krajišnik's [*sic*] Case";[1]

NOTING the "Prosecution's Response Mićo Stanišić's Motion for Access to All Confidential Materials in the *Krajišnik* Case" ("Prosecution Response") filed partly *ex parte* and confidentially on 23 November 2006;

NOTING the "Appellant Counsel's Response to Motion by Mićo Stanišić for Access to All Confidential Materials in the Krajišnik Case" ("Krajišnik Response") filed by Counsel on behalf of Momčilo Krajišnik ("Appellant") on 5 February 2007;

NOTING that in the Status Conference, held pursuant to Rule 65*bis*(B) of the Rules of Procedure and Evidence ("Rules") before the Pre-Appeal Judge on 11 December 2006, the Appellant was granted an extension of time until 15 February 2007 for filing his response, pursuant to Rule 127(B) of the Rules;[2]

CONSIDERING that the Krajišnik Response was thus filed in time;

NOTING the "Defence's Motion for Leave to Reply and Proposed Reply to Prosecuion's [*sic*] Response to Mićo Stanišić's Motion for Access to Confidential Material in the Krajišnik Case" ("Reply to Prosecution Response") filed by Counsel on behalf of the Applicant on 30 November 2006, which contains a substantive reply;

CONSIDERING that even though, pursuant to Section 14 of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal,[3] the Reply to Prosecution Response was filed in an untimely manner without any justification for the delay, the Appeals Chamber, in the interests of justice and the speedy disposal of the Motion, in this case grants the Applicant leave and thus will consider the submissions made in the Reply to Prosecution Response;

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[1] Motion, para. 1.
[2] Status Conference, 11 December 2006, Transcript p. 20.
[3] IT/155/Rev. 3, 16 September 2005.

REMINDING the parties, however, that as a matter of principle they are required to adhere to the deadlines prescribed in the Rules and the Practice Direction;

NOTING that in the Motion, the Applicant requests access to "all confidential transcripts of all closed and private sessions from the [Krajišnik] trial and appellate proceedings, all confidential filings made during the trial and appellate proceedings and all confidential exhibits from the trial relating to the [Stanišić] Indictment" and argues "that the alleged events in and facts in the Indictment against him are closely related to the charge against the accused in the Krajišnik's [*sic*] Case and that access to all confidential material in that case will be of significant assistance for the preparation of the case" of the Applicant;[4]

NOTING that the Applicant submits that there is a material, geographical and temporal overlap between *Prosecutor v. Stanišić* and *Prosecutor v. Krajišnik* establishing a nexus between the two cases as follows:[5]

> 7. The indictment against Mr. Momčilo Krajišnik concerns alleged events which occurred in the period from 1 July 1991 to 30 December 1992 and it charges him for acting individually, or in concert with other participants in a joint criminal enterprises [*sic*], or for planning, instigating, ordering, committing, or otherwise adding [*sic*] and abetting the planning, preparation, or execution of the partial destruction of the Bosnian Muslim and Bosnian-Croat national, ethic [*sic*], racial, or religious groups in territories within Bosnia-Herzegovina, persecution, extermination, murder, forced transfer, and deportation of Bosnian Muslims and Bosnian Croats in 35 indictment municipalities. The indictment against Mr. Mićo Stanišić concerns alleged events which occurred in the period from 1 April 1992 to 30 December 1992 for the similar crimes as in the Krajišnik's [*sic*] Case in 18 municipalities, which are the part of the Krajišnik's [*sic*] indictment.
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> 8. At the time of the alleged events, the Applicant and the Accused in the *Krajišnik Case* occupied senior leadership positions. The Applicant was Minister of the Serbian Ministry of Internal Affairs in BiH. Mr. Momčilo Krajišnik was President of the Assembly of Serbian People in Bosnia and Herzegovina.
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> 9. The Prosecution alleges that both of the Accused participated, as co-perpetrators or aider and abettor, in a joint criminal enterprise (JCE) with other named and unmanned [*sic*] individuals. The Prosecution alleges that the objective of the JCE was the permanent removal, by force or other means, of Bosnian Muslims and Bosnian Croats from large portions of Bosnia-Herzegovina thorough [*sic*] the commission of the crimes as stated in both of incitements [*sic*].
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> 10. At the time of events alleged in both Indictments, the Prosecution alleges that an armed conflict was occurring involving the accused in the Krajišnik Case and the Applicant.

NOTING that the Applicant submits that he "undertakes to comply with all protective measures applicable in the Krajišnik Case and any additional protective measures which the Appeals Chamber may order";[6]

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[4] Motion, para. 4.
[5] *Ibid.*, paras 7-10.
[6] *Ibid.*, para. 12.

NOTING that the Prosecution submits in the Prosecution Response that it understands the Motion not to seek access to *ex parte* material, disclosure of which it opposes;[7]

NOTING that the Prosecution further submits that it does not oppose granting the Applicant access to confidential material from the *Krajišnik* trial and appeal proceedings provided that: (1) material provided to the Prosecution pursuant to Rule 70 may only be disclosed with the consent of the provider;[8] and (2) the Applicant is not granted access to the confidential transcripts and related exhibits in the *Krajišnik* case of the witnesses listed in the Annex to the Prosecution Response as it intends to call these witnesses in the *Stanišić* case with the same level of protection afforded to them in the *Krajišnik* case, namely, delayed disclosure, meaning "that the statements and/or transcripts of prior testimony and related exhibits of the protected witness be provided to the Defence in [the *Stanišić*] case a certain period, such as 30 days, before the witness in question [is] expected to testify";[9]

NOTING that the Prosecution further submits that in case it will later decide not to call any witness listed in the Annex, it will provide forthwith the confidential transcripts and related exhibits to the Applicant;[10]

NOTING that in his Reply to Prosecution Response the Applicant: (1) clarifies his request insofar as that he seeks access to both confidential *inter partes* and *ex parte* material;[11] (2) requests the Appeals Chamber to determine which material is subject to protection under Rule 70;[12] and (3) opposes delayed disclosure for the witnesses listed in Annex A of the Prosecution Response, asks the Appeals Chamber to "impos[e] the deadline until the Prosecution must disclose the identities and the underacted [*sic*] witness statement [*sic*],"[13] and, in case delayed disclosure is ordered, requests to be granted "access to the confidential transcripts and related exhibits in the *Krajišnik* case of the witness [*sic*] listed in the Annex at least 30 days before the commencement of trial";[14]

NOTING that in the Krajišnik Response, it is submitted that "Counsel agrees with the submissions contained in the Prosecution's Response"[15] but that "with respect to any confidential Defence material disclosed, disclosure should be contingent on the Stanišić Defence being ordered to comply with all protective measures ordered by the Trial Chamber in the Krajišnik case"[16] and that

[7] Prosecution Response, para. 2.
[8] *Ibid.*, paras 3-4.
[9] *Ibid.*, para 5; *see also* para. 6 et seq.
[10] *Ibid.*, para. 10.
[11] Reply to Prosecution Response, paras 4-6.
[12] *Ibid.*, paras 8-9.
[13] *Ibid.*, para. 12.
[14] *Ibid.*, para. 13.
[15] Krajišnik Response, para. 6.
[16] *Ibid.*, para. 7.

"Counsel objects to the disclosure of any Defence filings that were made in that case on a confidential and ex parte basis";[17]

CONSIDERING that Rule 75(F)(i) of the Rules stipulates that "[o]nce protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal (the 'first proceedings'), such protective measures: 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 in accordance with the procedure set out in this Rule";

CONSIDERING that under 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, however constituted, remaining seised of the first proceedings [...]";

FINDING that the Applicant, as a party to second proceedings, has properly filed his Motion before the Appeals Chamber as the Chamber seized of the first proceedings under Rule 75 of the Rules;

CONSIDERING that a party is always entitled to seek material from any source, including from another case before the International Tribunal, to assist in the preparation of its case if the material sought has been identified or described by its general nature and if a legitimate forensic purpose for such access has been shown;[18]

CONSIDERING that "the relevance of the material sought by a party may be determined by showing the existence of a nexus between the applicant's case and the cases from which such material is sought, i.e. if the cases stem from events alleged to have occurred in the same geographic area and at the same time";[19]

CONSIDERING that "access to confidential material from another case may be granted wherever the Chamber is satisfied that the party seeking access has established that such material may be of material assistance to his case"[20] and that "it is sufficient that access to the material sought is likely to assist the applicant's case materially, or that there is at least a good chance that it would";[21]

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[17] *Ibid.*, para. 8.
[18] *See Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-R, Decision on "Defence Motion on Behalf of Rasim Delić Seeking Access to All Confidential Material in the *Blaškić* Case", 1 June 2006 ("*Blaškić* 2006 Decision"), p. 8 with further references in footnote 34.
[19] *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Decision on Appellants Dario Kordić and Mario Čerkez's Request for Assistance of the Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post Appeal Pleadings and Hearing Transcripts filed in the Prosecutor v. Blaškić, 16 May 2002 ("*Blaškić* 2002 Decision"), para. 15.
[20] *Ibid.*, para. 14; see for further references *Blaškić* 2006 Decision, footnote 36.
[21] *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 ("*Blagojević and Jokić* Decision"), para. 4; see for further references *Blaškić* 2006 Decision, footnote 37.

FINDING that the Applicant has sufficiently identified and described by its general nature the *inter partes* confidential material in the *Prosecutor v. Krajišnik* trial and appeals proceedings to which he seeks access;

FINDING FURTHER that there is a substantial geographical and temporal overlap between the *Prosecutor v. Stanišić* and *Prosecutor v. Krajišnik* cases such that the *inter partes* confidential material filed in the trial and appeals proceedings in *Prosecutor v. Krajišnik* is likely to be of material assistance in the preparation of the defence in *Prosecutor v. Stanišić*, and that therefore, the Applicant has demonstrated a legitimate forensic purpose for access to said confidential material;

CONSIDERING, however, that "*ex parte* material, being of a higher degree of confidentiality, by nature contains information which has not been disclosed *inter partes* because of security interests of a State, other public interests, or privacy interests of a person or institution"[22] and that "[c]onsequently, the party on whose behalf *ex parte* status has been granted enjoys a protected degree of trust that the *ex parte* material will not be disclosed";[23]

FINDING that the Applicant has not demonstrated a legitimate forensic purpose in relation to such *ex parte* material;

CONSIDERING that "material provided under Rule 70 shall not be released to the Accused in another case unless the provider consents to such disclosure";[24]

CONSIDERING that "[t]he purpose of Rule 70(B) to (G) is to encourage States, organizations, and individuals to share sensitive information with the Tribunal [...] by permitting the sharing of information on a confidential basis and by guaranteeing information providers that the confidentiality of the information they offer and of the information's sources will be protected"[25] and that, "[w]hen a person possessing important knowledge is made available [...] on a confidential basis, not only the informant's identity and the general subject of his knowledge constitute the

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[22] *Prosecutor v. Miroslav Bralo*, Case No. IT-95-17-A, Decision on Motions For Access to Ex Parte Portions of the Record on Appeal and for Disclosure of Mitigating Material, 30 August 2006 ("*Bralo* Decision"), para. 17. *See already Prosecutor v. Blagoje Simić*, Case No. IT-95-9-A, Decision on Defence Motion by Franko Simatović for Access to Transcripts, Exhibits, Documentary Evidence and Motions Filed by the Parties in the *Simić et al.* Case, 12 April 2005 (*Simić* Decision), p. 3.

[23] *Bralo* Decision, para. 17.

[24] *Blaškić* 2006 Decision, p. 11; Prosecutor *v. Tihomir Blaškić*, Case No. IT-95-14-A, Decision on Prosecution's Motion for Clarification of the Appeals Chamber's Decision Dated 4 December 2002 on Paško Ljubičić's Motion for Access to Confidential Material, Transcripts and Exhibits in the Blaškić Case, 8 March 2004, para. 35; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Order on Protective Measures and Prosecution's Submissions on Disclosure of Rule 70 Material and *Ex Parte* Filings from the Trial in Prosecutor v. Blaškić to Paško Ljubičić, 20 April 2004, p. 4.

[25] *Blaškić* 2006 Decision, p. 12; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR108*bis* & AR73.3, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2002 ("*Milošević* Decision"), para. 19.

'information' shielded by Rule 70, but also the substance of the information shared by the person";[26]

FINDING therefore that neither the material provided under Rule 70 to either the Prosecution or the Defence in a case nor its sources may be released to the accused in another case prior to obtaining consent from the provider of that information and that this holding does not depend upon whether or not that material was used as evidence in a previous case;

CONSIDERING that once an Appeals Chamber determines that confidential material filed in another case is likely to materially assist an applicant, the Appeals Chamber shall determine which protective measures shall apply to said material as it is within the Appeals Chamber's discretionary power to strike a balance between the rights of a party to have access to material to prepare its case and guaranteeing the protection and the integrity of confidential information;[27]

CONSIDERING that "delayed disclosure" orders are protective measures to which Rule 75(F) of the Rules applies;[28]

CONSIDERING that even though such orders given in the first proceedings could be considered moot once disclosure is made, "the meaning of the expression '*mutatis mutandis*' itself requires a flexible application of the principle enshrined in [Rule 75] and suggests that the same kinds of protection given to a witness in one case should be automatically extended to this witness in a later case, regardless of whether this is literally 'continuation'";[29]

FINDING that the sensitive witnesses in the *Krajišnik* case, as listed in the Prosecution Annex, were protected by delayed disclosure orders and that, if they are going to testify in another case, the information from the *Krajišnik* case should similarly be subject to delayed disclosure to the defendants in that other case (unless an order pursuant to Rule 75(G) is made);[30]

HEREBY

1) **GRANTS** the Motion **IN PART** and allows access, subject to the conditions set forth below, to the Applicant to all materials classified as *inter partes* and confidential in the *Prosecutor v. Krajišnik* trial and appeals proceedings, and **ORDERS**, Judge Pocar and Judge Schomburg dissenting with regard to sub-paragraphs (a) and (b), that

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[26] *Milošević* Decision, para. 23.
[27] *Simić* Decision, p. 7.
[28] *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Decision on Mićo Stanišić's Motion for Access to All Confidential Materials in the Brđanin Case, 24 January 2007 ("*Brđanin* Decision"), para. 17.
[29] *Ibid.*
[30] *Ibid.*

(a) the Prosecution identify to the Registry, within fifteen days of the date of this decision, all *inter partes* confidential material relating to the witnesses listed in the Annex to the Prosecution Response and to promptly notify the Registry should the Prosecution subsequently decide not to call at the Applicant's trial a witness / witnesses listed in the Annex to the Prosecution Response;

(b) with regard to the material identified in subparagraph (a), the Registry disclose this material only in accordance with the time frames set out in the delayed disclosure orders by the *Krajišnik* Trial Chamber or upon receiving notice from the Prosecution pursuant to subparagraph (a) above, unless this order is subsequently modified by the Appeals Chamber or, should the Appeals Chamber no longer be seized of this case, by the Trial Chamber in the Applicant's case;

(c) for all other materials classified as *inter partes* and confidential in the *Prosecutor v. Krajišnik* trial and appeals proceedings, the Prosecution and Momčilo Krajišnik apply to the Appeals Chamber for additional protective measures or redactions, if required, within fifteen days from the date of this decision, including identification of which, if any, material falls under Rule 70 of the Rules, and therefore should not be disclosed without the consent of the provider;

(d) upon identifying any such Rule 70 material, the Prosecution or Momčilo Krajišnik should seek the provider's consent to the disclosure and inform the Appeals Chamber in its submissions as to whether such consent has been obtained;

(e) where no additional protective measures or redactions are requested either by the Prosecution or Momčilo Krajišnik within fifteen days from the date of this decision, the Registry shall provide the Applicant, his Counsel and any employees who have been instructed or authorized by his Counsel, with all *inter partes* confidential material described in subparagraphs (c) and (d), in electronic format where possible;

(f) where additional protective measures or redactions are requested for any of the *inter partes* confidential material described above in subparagraphs (c) and (d), either by the Prosecution or Momčilo Krajišnik, within fifteen days from the date of this decision, the Registry shall withhold that material until the Appeals Chamber has issued a decision on the request(s):

- if the Appeals Chamber denies the request(s), the Registry shall be ordered to provide the Applicant, his Counsel and any employees who have been instructed or authorized by his Counsel, with the *inter partes* confidential

material to which the Appeals Chamber grants access, in electronic format where possible;

- if the Appeals Chamber grants the request(s), the party or parties applying for additional protective measures or redactions shall be ordered to proceed with the authorized protective measures or redactions and, thereafter, shall provide the *inter partes* confidential material to the Registry for provision to the Applicant, his Counsel and any employees who have been instructed or authorized by his Counsel, in electronic format where possible; and

(g) save for the disclosure required by this decision, the *inter partes* confidential material provided by the Registry shall remain subject to any protective measures previously imposed by the Trial or Appeals Chambers.

2) **ORDERS** that the Applicant, his Counsel and any employees who have been instructed or authorized by his Counsel to have access to the *inter partes* confidential material described above shall not, without express leave of the Appeals Chamber finding that it has been sufficiently demonstrated that third party disclosure is absolutely necessary for the preparation of the defence of the Applicant:

(a) disclose to any third party, the names of witnesses, their whereabouts, transcripts of witness testimonies, exhibits, or any information which would enable them to be identified and would breach the confidentiality of the protective measures already in place;

(b) disclose to any third party any documentary evidence or other evidence, or any written statement of a witness or the contents, in whole or in part, of any non-public evidence, statement or prior testimony; or

(c) contact any witness whose identity was subject to protective measures.

If, for the purposes of preparing the defence of the Applicant, non-public material is disclosed to third parties – pursuant to authorization by the Appeals Chamber – any person to whom disclosure of the confidential material in this case is made shall be informed that he or she is forbidden to copy, reproduce or publicize, in whole or in part, any non-public information or to disclose it to any other person, and further that, if any such person has been provided with such information, he or she must return it to the Applicant, his Counsel or any authorized employees of his Counsel as soon as it is no longer needed for the preparation of his defence.

For the purposes of sub-paragraph 2, third parties exclude: (i) the Applicant; (ii) his Counsel; (iii) any employees who have been instructed or authorized by his Counsel to have access to confidential material; and (iv) personnel from the International Tribunal, including members of the Prosecution.

If Counsel for the Applicant or any members of his Defence team who are authorized to have access to the *inter partes* confidential material from the *Prosecutor v. Krajišnik* trial and appeals proceedings should withdraw from the *Prosecutor v. Stanišić* case, any confidential material to which access is granted in this Decision that is in their possession shall be returned to the Registry of the International Tribunal.

3) **DISMISSES** the Motion in all other respects.

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

Dated this twenty-first day of February 2007,
At The Hague, The Netherlands.

Judge Fausto Pocar
Presiding Judge

[Seal of the International Tribunal]

PARTIALLY DISSENTING OPINION OF JUDGE POCAR

1. I am in agreement with the majority in this Decision that Stanišić has sufficiently demonstrated that the *inter partes* confidential material file in the *Prosecutor v. Krajišnik* case is likely to be of material assistance in the preparation of the defence in his case and therefore he should be allowed access to said material. However, I dissent from this Decision's denial of the Stanišić's request for access to *ex parte* materials for reasons expressed in my Dissenting Opinion in the *Simić* case.[1]

2. Furthermore, I join Judge Schomburg in dissenting from the majority's continued application of "delayed disclosure" as a protective measure ordered in the *Krajišnik* case pursuant to Rule 69 of the Rules to the *Prosecutor v. Stanišić* trial under Rule 75(F)(i), but for reasons slightly different than his. While I agree with the majority that under the *Brđanin* holding delayed disclosure orders are protective measures to which Rule 75(F) may apply, I do not agree that it is prudent to presume that delayed disclosure as a protective measure applies *automatically* in the second proceedings. As reasoned by Judge Schomburg, delayed disclosure is a protective measure different from those typically ordered under Rule 75(B). Delayed disclosure directly impacts on the ability of an accused to adequately prepare his defence and is a measure ordered under the exceptional circumstances of a specific case. Thus, in my view, the Prosecution seeking continued application of delayed disclosure in a second proceedings from a Chamber seized of the first proceedings wherein delayed disclosure was first ordered, should be granted such a protective measure provided that it satisfies the Chamber presiding over the second proceedings that delayed disclosure remains necessary under the exceptional circumstances of that case. In this way, a proper balance is struck between the Tribunal's obligation to ensure the right of an accused to a fair trial under Article 21 of the Statute while also providing for necessary protection for victims and witnesses pursuant to Article 22 of the Statute.

3. For these reasons, I respectfully dissent.

[1] *See Prosecutor v. Blagoje Simić*, Case No. IT-95-9-A, Decision on Defence Motion by Franko Simatović for Access to Transcripts, Exhibits, Documentary Evidence and Motions Filed by the Parties in the *Simić et al.* Case, 12 April 2005, Dissenting Opinion of Judge Pocar.

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

Done this 21st day of February 2007,
At The Hague,
The Netherlands

Fausto Pocar
Appeals Judge

[Seal of the International Tribunal]

PARTIALLY DISSENTING OPINION OF JUDGE SCHOMBURG

Introduction

1. I agree with the Appeals Chamber in granting Stanišić access to all confidential *inter partes* material in the *Krajišnik* case, subject to the usual restrictions. However, I respectfully dissent from the majority as regards the continuing application of "delayed disclosure" orders from the *Krajišnik* trial vis-à-vis the *Stanišić* defence.

2. Judicial consistency is of high value to the International Tribunal. I am aware that the bench of the Appeals Chamber in *Brđanin* recently decided on the same issue with the same reasoning that the majority applies here.[1] However, not having had the opportunity to contribute to that decision, only now can I take the opportunity and feel obliged to respectfully present my dissenting thoughts on the matter.

Interpretation of Rule 69

3. In my view, a proper interpretation of the Rules of Procedure and Evidence ("Rules") suggests that measures ordered pursuant to Rule 69 in a first trial do not fall within the ambit of Rule 75(F) maintaining those measures in a second trial. Consequently, the Prosecution, if it wishes to have similar orders imposed in another trial, must apply anew to the Chamber seized of the second trial.

4. The accused Stanišić, whose case before this Tribunal is still at the pre-trial stage, asked the Appeals Chamber to grant him access to confidential material in the *Krajišnik* case. The Appeals Chamber, seized of the appeal by Krajišnik against his conviction, is satisfied that such a request is warranted because Stanišić has shown that the material sought may be of assistance to his case. The Prosecution, however, requests not to reveal to Stanišić any information relating to a number of witnesses listed in an *ex parte* annex to its response. It argues that these witnesses, who have testified in the *Krajišnik* trial, are also expected to be called in the *Stanišić* proceedings. The *Krajišnik* Trial Chamber, so the Prosecution argues, had

> ordered, in respect of several witnesses with exceptionally serious security concerns, that the protective measure of 'delayed disclosure' be ordered: that is, that the statements and/or transcripts of prior testimony and related exhibits of the protected witness be provided to the Defence in that case a certain period, such as 30 days, before the witness in question was expected to testify.[2]

The Prosecution further claims that "[i]t is imperative that those witnesses be afforded, in *Stanišić*, the same level of protection as they enjoyed in the *Krajišnik* case" and that "the route of filing a

[1] *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Decision on Mićo Stanišić's Motion for Access to All Confidential Materials in the Brđanin Case, 24 January 2007 ("*Brđanin* Decision").

motion for access must not be allowed to undermine the protective measure of delayed disclosure."[3] The Appeals Chamber adopts the Prosecution's approach, arguing that Rule 75(F) of the Rules also relates to protective measures pursuant to Rule 69 of the Rules and denying Stanišić access to material relating to the witnesses listed in the annex to the Prosecution Response.[4] I respectfully disagree with this approach.

5. In balancing on the one hand an accused's right to a fair trial – including the right to be informed in detail of the case against him and providing him with sufficient time to prepare his entire case before the trial starts – with the need on the other hand to protect endangered victims and witnesses, Rule 69(A) requires "exceptional circumstances" in which the identity of a victim or witness is not disclosed to the defence "until such a person is brought under the protection of the Tribunal." Rule 69(C) makes clear that the identity of the victim or witness in question must in any case be disclosed to the defence "in sufficient time prior to the trial[5] to allow adequate time for preparation of the defence."[6] As such, Rule 69 deals *specifically* with witness protection in relation to the disclosure of a witness's identity to the defence (this term being defined in Rule 2). Rule 69 is to be found in Part V of the Rules ("Pre-Trial Proceedings") under Section 4, entitled "Production of Evidence." Section 4 deals exclusively with the disclosure obligations of the parties and addresses primarily such obligations falling upon the Prosecution. Rule 69 in this context is an exception to the general Rule 66, which stipulates that the Prosecution disclose "copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial [...]." Thus, it becomes clear from the purpose and placement of Rule 69 that it solely applies with a view to the Prosecution's disclosure obligations vis-à-vis an individual defence in one specific case at the pre-trial stage.[7] An assessment must be made in each single case as to whether "exceptional circumstances" exist that would justify "delayed disclosure" with a view to the individual defence and the potential dangers to witnesses if their identity was known to the defence.

6. Rule 75 on the other hand is located in Part VI of the Rules ("Proceedings Before Trial Chambers"), in Section 1 ("General Provisions"). It deals with the protection of witnesses and

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[2] Prosecution Response, para. 5.
[3] *Ibid.*. para. 9.
[4] See Decision, p. 6.
[5] Underlined for emphasis. *See* in more detail John R.W.D. Jones and Steven Powles, International Criminal Practice, 3rd edition (2003), at p. 615 (paras 8.5.182-183). *See also Prosecutor v. Bagosora et al.*, Separate Dissenting Opinion of Judge Pavel Dolenc on the Decision and Scheduling Order on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses, Case No. ICTR-98-41-I, 5 December 2001.
[6] Of course, pursuant to Rules 67(C) and 68, the Prosecution is under the permanent obligation to disclose material to the Defence once it "discovers additional evidence or material which should have been disclosed earlier pursuant to the Rules" and to disclose "any material which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of evidence."
[7] *See* already Dissenting Opinion of Judge O-Gon Kwon, *Prosecutor v. Vladimir Lazarević and Sreten Lukić*, Case No. IT-03-70-PT, Decision on Prosecution's Motion for Protective Measures and Request for Joint Decision on Protective Measures, Corrected Version, 19 May 2005, para. 2 et seq.

victims vis-à-vis the public[8] in general and strikes a balance between the requirements of a public and publicly accessible trial and the need to protect those participants in the proceedings who are particularly vulnerable. Specifically, Rule 75(B)(i) provides for the ordering of "measures to prevent disclosure to the *public or the media* of the identity or whereabouts of a victim or a witness [...]."[9] Even more importantly, Rule 75(A) prescribes that any measure ordered under Rule 75 must be "consistent with the rights of the accused." Measures pursuant to Rule 75 therefore apply with respect to the public only. For example, bar a decision by a Trial Chamber pursuant to Rule 69, the defence in a case where the Trial Chamber has ordered the protective measure of expunging names and identifying information from the Tribunal's record pursuant to Rule 75(B) will still know of the witnesses' real names and related statements.

7. Accordingly, "protective measures" pursuant to Rule 75(F)(i) – which provides that

> once protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal, such protective measures shall continue to have effect mutatis mutandis in any other proceedings [...] unless and until they are rescinded, varied or augmented [...]

– are only those measures ordered under Rule 75, concerning the public and media. In other words, if the names and identities of witnesses are kept from the public in one trial, they continue to be withheld in all other proceedings, unless otherwise ordered.

8. However, the protective measure of "delayed disclosure" of information to Krajišnik that was ordered by the *Krajišnik* Trial Chamber pursuant to Rule 69 in relation to a certain number of witnesses is not carried over to other proceedings. These orders were given in the unique context of the *Krajišnik* trial and originated in the "exceptional circumstances" of that case. To continue applying those orders vis-à-vis Stanišić only because the same witnesses are expected to be called in the *Stanišić* trial is contrary to the wording and the spirit of the Rules.[10] Indeed, in my opinion,

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[8] *See e.g. Prosecutor v. Kunarac et al.*, Case No. IT-96-23-PT, Decision on Prosecution Motion to Protect Victims and Witnesses, 29 April 1998, p. 3: "For the purposes of this Decision, the term "public" does not include those entities or persons who are assisting the accused, his counsel or the Prosecutor in the preparation of their cases." *See also Prosecutor v. Kovačević*, Case No. IT-97-24-PT, Decision on Prosecution Motion to Protect Victims and Witnesses, 12 May 1998, p. 4.

[9] Italics added for emphasis.

[10] In addition, as Judge Kwon has pointed out in his Dissent (*supra* note 7), if Rule 75(F) were also to cover Rule 69 measures then Rule 75(F)(ii)'s purpose would be rather limited. Rule 75(F)(ii) provides that the continuation of protective measures ordered in the first proceedings does not affect the Prosecution's disclosure obligations in the second proceedings. The Prosecution, however, must inform the defence of the nature of the protective measures. It is difficult to see how the Prosecution could follow its disclosure obligations in the second proceedings if indeed the "delayed disclosure" measures from the first proceeding would carry over. Rule 75(F) (ii) is clearly aimed at measures taken under Rule 75(B) vis-à-vis the public. This view is also supported by the Report of the Rules Committee for the Twenty-Sixth-Plenary Session (11-12 July 2002) of 24 June 2002 (IT/206/R) when Rule 75(F) [then (E)] was added to the Rules: The Report describes the purpose Rule 75(F) to "allow for the prosecution to honour its disclosure obligation in other cases whilst maintaining the protective measures ordered in the first proceedings, and *provides that the Defence receiving the information in subsequent proceedings is aware of the measures in place*" (p. 2, italics added for emphasis). Of course, this would not make sense if "delayed disclosure" was considered a protective measure for the purposes of Rule 75(F) because the defence would not even be aware of that measure in the first place.

the Appeals Chamber – following the reasoning in the Brđanin Decision[11] – fails to give sufficient weight to the following further considerations:

9. The Appeals Chamber is not in a position to assess whether in the case of Stanišić the same "delayed disclosure" measures that were ordered in the *Krajišnik* proceedings are necessary. The fact that the *Krajišnik* Trial Chamber found that there were exceptional circumstances warranting such severe measures in the *Krajišnik* case does not mean that they are equally called for in the factual and temporal framework of the *Stanišić* case. In fact, it is only the *Stanišić* Trial Chamber that is in a position to make such an assessment in the context of the entire pre-trial proceedings.

10. Even assuming, *arguendo*, that Rule 75(F) does include measures ordered under Rule 69, this would not lead to a different appraisal. As noted by the Appeals Chamber, all "delayed disclosure" orders made in the *Krajišnik* trial became moot once the information was disclosed to Krajišnik. It is difficult to see how orders that were specific to the *Krajišnik* trial, not only in relation to the exceptional circumstances warranting them but also with respect to the timeframe of the *Krajišnik* trial, are now supposed to be carried over to the *Stanišić* case. There simply cannot be a continuation of measures that are no longer in force. Again, this difficulty illustrates that measures pursuant to Rule 69 are not included under Rule 75(F) because they are of a completely different nature.

11. Furthermore, I note that the Prosecution in its *ex parte* annex lists only the pseudonyms given to the witnesses in the *Krajišnik* case. It does not even try to demonstrate "exceptional circumstances" by specifying in any way when and why "delayed disclosure" orders were given by the *Krajišnik* Trial Chamber and why they would be warranted (or indeed "imperative")[12] in the *Stanišić* case as well.[13] The Appeals Chamber decides according to the Prosecution request, without assessing whether "exceptional circumstances" still prevail at this moment in the context of the *Stanišić* case with a view to the *Stanišić* Defence. Moreover, the Appeals Chamber fails to consider at all whether the danger to witnesses that led to the original protection orders granted by the *Krajišnik* Trial Chamber is still present today. Of course, it could be argued that there is no new assessment of protective measures ordered under Rule 75 either. This argument is easily refuted: As explained above, the International Tribunal must strike a careful balance between the rights of the accused to be informed of the case against him and the protection of victims and witnesses. "Delayed disclosure," under Rule 69, has a particularly strong impact on the preparation of the entire case by the defence. Rule 75 measures on the other hand concern the restriction of the flow of

[11] *Brđanin* Decision, *supra* note 1, para. 17.
[12] Prosecution Response, para. 9.
[13] In any event, it should be the Prosecution's obligation and responsibility when requesting that protecting measures under Rule 69 are maintained with respect to another trial to comprehensively describe those protective measures and provide the Chamber with this information.

information to the public. It is thus necessary to make a distinction in justifying continuing to withhold sensitive information from the public than from the defence.[14]

12. Furthermore, the *Brđanin* Decision, on which the Appeals Chamber relies, in turn refers to a Trial Chamber decision in *Prosecutor v. Lazarević and Lukić* of 19 May 2005.[15] It is true that in that case, the majority of the Trial Chamber – Judge Kwon dissenting – held that "delayed disclosure" orders granted in the *Milutinović, Ojdanić and Šajnović* case also applied to *Lazarević and Lukić*. However, the *factual* basis on which the request by the Prosecution was decided was completely different: The orders in *Milutinović, Ojdanić and Šajnović* were still in effect in that case, that is, the relevant information had not been yet disclosed to those accused.

13. The Appeals Chamber in the case before us hints that Stanišić could apply again to this Appeals Chamber for a variation of the "delayed disclosure" orders pursuant to Rule 75(G). I observe two difficulties with that approach: first, the annex to the Prosecution Response was filed *ex parte*. Therefore, Stanišić does not even know how many and which witnesses' identities are under "delayed disclosure" and for which reason. It is difficult to envisage how he could file a meaningful reasoned motion for variation. Second, such a motion would have to be brought again before the *Krajišnik* Appeals Chamber, as the Chamber is still seized of the "first proceedings" pursuant to Rule 75(G). However, it is not easy to make out how the *Krajišnik* Appeals Chamber would be in a position to construct a meaningful assessment of "exceptional circumstances" in the *Stanišić* case. In this context, I note that Stanišić in his reply already now explicitly asks that if "delayed disclosure" were ordered he should have access to the witnesses' information at least 30 days before the commencement of the trial (*sic*!).[16] I further note that the Prosecution mentions that "delayed disclosure" was ordered by the *Krajišnik* Trial Chamber until "30 days before the witness in question was expected to testify."[17] The *Krajišnik* Appeals Chamber is not the proper forum for such a variation. I stress again that the *Stanišić* Trial Chamber is the only Chamber that is in a position to decide whether, at present, specific measures under Rule 69 are necessary to protect the witnesses expected to testify in that trial.

14. It should also be pointed out that since the *Krajišnik* Appeals Chamber decides on "delayed disclosure" measures vis-à-vis Stanišić now, Stanišić is barred from appealing against such a decision either by way of interlocutory appeal or in the framework of an appeal, if any, against his

[14] It should be recalled that justice must be seen to be done in an open and public manner. I note that in many cases it is similarly questionable to continue protective measure orders under Rule 75 even when the original orders were given a long time ago and relevant information is in the public domain, e.g. when a witness has decided to give interviews to the press revealing his or her role in the proceedings.
[15] *Prosecutor v. Vladimir Lazarević and Sreten Lukić*, Case No. IT-03-70-PT, Decision on Prosecution's Motion for Protective Measures and Request for Joint Decision on Protective Measures, Corrected Version, 19 May 2005.
[16] Applicant Reply, para. 13.
[17] Prosecution Response, para. 5.

judgment. However, if the decision to impose "delayed disclosure" is left to the Trial Chamber, Stanišić could seek redress with the Appeals Chamber if he so wants.

15. In sum, the protective measure of "delayed disclosure" – ordered under Rule 69 specific to one case – does not carry over to a second case pursuant to Rule 75(F). Since "delayed disclosure" is ordered with a view to the *specific* "exceptional circumstances" in that case, it is the Chamber seized of the second case that is in the best position to make a meaningful assessment as to whether similar measures in relation to the same witnesses should be ordered in that case, too. In the present case, this does not mean that the Appeals Chamber should have granted Stanišić immediate access to the material related to the witnesses listed in the Prosecution annex. To alleviate any concerns about the safety of protected witnesses, the Appeals Chamber should have ordered the Registry to withhold that information from the *Krajišnik* trial until the *Stanišić* Trial Chamber, on the application by the Prosecution pursuant to Rule 69 and within a reasonable timeframe fixed by the Appeals Chamber, has decided on such a request in the *Stanišić* case. If the *Stanišić* Trial Chamber had granted the request, the Registry would still withhold the *Krajišnik* material. If it had denied the request, the Registry would provide Stanišić with the *Krajišnik* material. This way, the delicate balance between the right of an accused to a fair trial and the necessity to protect and victims and witnesses would be fully maintained.

16. It should not be forgotten that Article 20(1) of the Statute of the International Tribunal calls for proceedings to be conducted "with full respect for the rights of the accused and due regard for the protection of victims and witnesses." Rules 69 and 75 of the Rules were developed pursuant to the direction provided in Article 22 of the Statute. They each address one specific facet of witness protection and are extraordinarily careful in balancing the fair trial rights of the accused with the sometimes conflicting exigencies of witness protection. To apply the case-specific measure of "delayed disclosure," tailored to another completely different case, without a new assessment by the competent Chamber presiding over that case, would mean to tilt the scale to the disadvantage of the accused.

Conclusion

17. Consequently the disposition in relation to the witnesses listed in the *ex parte* annex to the Prosecution Response should read as follows:

The Appeals Chamber **ORDERS** that:

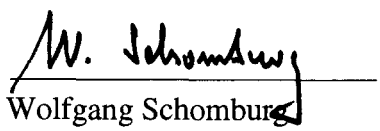
in relation to the witnesses listed in the annex to the Prosecution Response, the Prosecution, if it so

wishes, may request the *Stanišić* Trial Chamber within one month from the date of this decision to impose protective measures pursuant to Rule 69, such as delayed disclosure;

- the Registry shall withhold material relating to the witnesses specified in the annex to the Prosecution Response until the *Stanišić* Trial Chamber has ruled on such a request;
    - if the *Stanišić* Trial Chamber denies the request, the Registry shall be ordered to provide the Applicant, his Counsel and any employees who have been instructed or authorized by his Counsel with the *inter partes* confidential material relating to these witnesses, in electronic format where possible;
    - the same applies if no such request is made within one month from the date of this decision;
    - if the *Stanišić* Trial Chamber grants the request, the Registry shall withhold material relating to those witnesses in whose respect the request is granted.

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

Dated this twenty-first day of February 2007,
At The Hague, The Netherlands.



Wolfgang Schomburg
Judge

[Seal of the International Tribunal]