



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of
Former Yugoslavia since 1991

Case No. IT-04-79-PT
IT-00-39-A
Date: 31 January 2008
Original: English

IT-04-79-PT 15552
015552-015545 511
31 January 2008

IN TRIAL CHAMBER II

Before: Judge Kevin Parker, Presiding
Judge Christine Van Den Wyngaert
Judge Krister Thelin

Registrar: Mr. Hans Holthuis

Decision of: 31 January 2008

PROSECUTOR

v.

MIĆO STANIŠIĆ

PUBLIC

**DECISION ON MIĆO STANIŠIĆ'S
MOTION TO RESCIND OR VARY THE DELAYED
DISCLOSURE ORDERS IN *PROSECUTOR V. KRAJIŠNIK***

The Office of the Prosecutor:

Ms. Anna Richterova

Counsel for the Accused:

Mr. Stevo Bezbradica

TRIAL CHAMBER II 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 (“Trial Chamber”);

BEING SEISED OF the “Motion by Mićo Stanišić to Rescind or Vary the Delayed Disclosure Orders Pursuant to Rule 75(G)”, filed on 17 August 2007 in the Appeals Chamber (“Motion”), which was referred to the Trial Chamber pursuant to the “Order regarding Rule 75 Motion by Mićo Stanišić” issued by the Appeals Chamber on 22 August 2007;

NOTING the “Decision on ‘Motion by Mićo Stanišić for Access to All Confidential Materials in the *Krajišnik* Case’” issued on 21 February 2007 (“Appeals Chamber Decision”), in which the Appeals Chamber by a majority decided, *inter alia*, to order the Registry to disclose all *inter partes* confidential materials related to witnesses subject to orders for delayed disclosure in *Prosecutor v. Krajišnik*¹ only in accordance with the time frames set out in such orders or upon receiving notice from the Prosecution that it has decided not to call any such witness at the trial of the Accused, 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 Accused’s case;²

NOTING that in the Motion the Accused requests that it be ordered:

- (a) that the orders of delayed disclosure in *Prosecutor v. Krajišnik* concerning witnesses to be called in *Prosecutor v. Stanišić* should be rescinded and that the Accused be given access to the confidential transcripts and the exhibits related to such witnesses;³ or
- (b) that such orders be varied and that the Accused be granted access to the confidential transcripts and exhibits related to such witnesses at least 30 days before the commencement of trial.⁴

NOTING that the Appeals Chamber has held that “delayed disclosure” orders are protective measures to which Rule 75(F) applies;⁵

NOTING that the Accused submits in support of his request that:

¹ Case No. IT-99-36-T.

² Appeals Chamber Decision, p. 7.

³ Motion, para. 13(a).

⁴ Motion, para. 13(b).

⁵ Appeals Chamber Decision, p. 6.

(a) delayed disclosure “is a measure ordered under the exceptional circumstances of a specific case and because of that delayed disclosure as a protective measure does not need to apply automatically in the second proceedings”;⁶

(b) the Prosecution has not explained when and why measures of delayed disclosure were ordered in *Prosecutor v. Krajišnik* and why they would be warranted in *Prosecutor v. Stanišić*;⁷

(c) the Prosecutor has not shown that the witnesses who are subject to measures of delayed disclosure will be interfered with or intimidated once their identity is made known to the Accused or his counsel.⁸

NOTING that in the “Prosecution’s Response to Mićo Stanišić’s Motion to Rescind or Vary the Delayed Disclosure Orders pursuant to Rule 75(G) – *Krajišnik* Case” filed on 27 August 2007 (“Response”) the Prosecution submits that the Motion should be denied on the grounds that the Motion is “nothing more than an attempt to re-litigate issues already resolved by the Appeals Chamber” and, alternatively, to the extent that the Defence Motion is a genuine request to rescind or vary protective measures in force in *Prosecutor v. Krajišnik*, it has failed to meet the required standard;⁹

NOTING that the Prosecution submits that the Accused is seeking reconsideration of the Appeals Chamber Decision in regard to orders of delayed disclosure issued in *Prosecutor v. Krajišnik*¹⁰ and that because no clear error of reasoning has been demonstrated and reconsideration is not necessary to prevent injustice, reconsideration of the Appeals Chamber Decision in regard to such orders is not justified;¹¹

NOTING that the Prosecution gives the following reasons in support of its submission that the Accused has not provided the necessary justification for rescinding or varying the measures of delayed disclosure:

⁶ Motion, para. 8. The motion cites in support *Prosecutor v. 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. Motion, para. 8, n. 10.

⁷ Motion, para. 10.

⁸ Motion, para. 11.

⁹ Response, para. 2.

¹⁰ Response, para. 5.

¹¹ Response, paras. 6–10.

(a) if a witness subject to a measure of delayed disclosure is to testify in another case, the measure of delayed disclosure should continue to apply and the burden is on the Defence to justify the rescission of such a measure;¹²

(b) the Accused has not established the reasons why the measures of delayed disclosure are no longer justified¹³ and the Accused has not provided any reason to vary the date of disclosure given in the measures of delayed disclosure;¹⁴

NOTING the “Defence’s Motion for Leave to Reply and Proposed Reply to Prosecution’s Response to Mićo Stanišić Motion to Rescind or Vary the Delayed Disclosure Orders pursuant to Rule 75(G) - *Krajišnik* Case” filed on 30 August 2007 (“Reply”);

NOTING that in the Reply the Accused requests pursuant to Rule 126 *bis* leave to file a reply to the Response;¹⁵

CONSIDERING that leave to reply should be granted;

NOTING that in the Reply the Accused submits that:

(a) in the Motion the Accused did not attempt to re-litigate issues, but made a genuine request to rescind or vary the orders of delayed disclosure issued in *Prosecutor v. Krajišnik*;¹⁶

(b) in the Appeals Chamber Decision the Appeals Chamber did not issue a decision regarding the variation of orders of delayed disclosure and, therefore, there is no need to reconsider any such decision;¹⁷ and

(c) the Trial Chamber in *Prosecutor v. Stanišić* is the only Chamber which should decide whether the orders of delayed disclosure should be maintained in *Prosecutor v. Stanišić*;¹⁸

NOTING that the Prosecution subsequently indicated that it will not call Witness KRAJ 636, who was subject to delayed disclosure orders in *Prosecutor v. Krajišnik*, and that it seeks leave to

¹² Response, para. 12.

¹³ Response, paras. 11 and 13.

¹⁴ Response, para. 14.

¹⁵ Reply, para.3.

¹⁶ Reply, para. 4.

¹⁷ Reply, para. 7.

¹⁸ Reply, para. 6.

disclose material relevant to Witness KRAJ 636 with redactions necessary for the protection of the identity of the witness;¹⁹

CONSIDERING that pursuant to Rule 75(F)(i) the orders of delayed disclosure issued in *Prosecutor v. Krajišnik* shall continue to have effect *mutatis mutandis* in *Prosecutor v. Stanišić* unless and until they are rescinded, varied or augmented in accordance with the procedure set forth in Rule 75;

NOTING that in the “Motion by Mićo Stanišić for Access to all Confidential Materials in the *Krajišnik* case”, filed on 14 November 2006 (“November 2006 Motion”), the Accused is seeking access to confidential materials and not the rescission, variation or augmentation of the orders of delayed disclosure issued in *Prosecutor v. Krajišnik*;²⁰

CONSIDERING that the Accused is, therefore, neither seeking to re-litigate issues already resolved by the Appeals Chamber nor seeking reconsideration of the Appeals Chamber Decision;

NOTING that, pursuant to Rule 75(A), a Judge or Chamber may order appropriate measures for the privacy and protection of victims and witnesses, provided that the measures are consistent with the rights of the accused;

NOTING that in the Appeals Chamber Decision the Appeals Chamber held that the sensitive witnesses in the *Krajišnik* case were protected by orders of delayed disclosure 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)”;²¹

CONSIDERING that the Accused has not submitted either that the specific circumstances in *Prosecutor v. Krajišnik* are grounds for the rescission or variation of the measures of delayed disclosure granted in *Prosecutor v. Krajišnik* or that the rescission or variation of such measures of delayed disclosure is consistent with the privacy and protection of victims and witnesses or the rights of the accused;

¹⁹ Prosecution’s Notice of Information Requested by the Trial Chamber in relation to the Accused’s Motion to Rescind or Vary Delayed Disclosure Orders Pursuant to Rule 75(G) in *Prosecutor v. Krajišnik*, confidential and *ex parte*, 26 October 2007 (“Notice of Information”), paras. 8-9 and 10(b).

²⁰ November 2006 Motion, para. 13. Cf. *Prosecutor v. 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, para. 17, n. 41 (“[...] [T]he Applicant does not ask the Appeals Chamber to “rescind, vary or augment” [the measures of delayed disclosure] pursuant to Rule 75(G) – a request that, in any event, the Applicant would be better served to raise with his Trial Chamber, assuming the Appeals Chamber is no longer seised of this case, as the time of his trial approaches.”).

²¹ Appeals Chamber Decision, p. 6.

NOTING that the witnesses subject to orders for delayed disclosure in *Prosecutor v. Krajišnik* who the Prosecution has intended to call in *Prosecutor v. Stanišić* are identified in an *ex parte* and confidential Annex to the “Prosecution’s Response to Mićo Stanišić’s Motion for Access to Confidential Material in the *Krajišnik* Case”, which was filed on 23 November 2006, and that therefore the Accused is not in possession of any information about the identity of such witnesses;

CONSIDERING that since the Accused is not in possession of any information about the witnesses subject to orders for delayed disclosure or the grounds on which those orders were issued, he is unable to give any grounds related to the characteristics of the witnesses or their likely testimony that would justify what is sought in the Motion;

NOTING that pursuant to Rule 75(I) before determining an application to rescind, vary or augment protective measures ordered in the first proceedings before the Tribunal, the Chamber shall endeavour to obtain all relevant information from the first proceedings, including from parties to those proceedings, and shall consult with any Judge who ordered the protective measures in the first proceedings, if that Judge remains a Judge of the Tribunal;

NOTING the “Order Regarding Witnesses subject to Mićo Stanišić’s Motion to Rescind or Vary the Delayed Disclosure Orders in *Prosecutor v. Krajišnik*”, issued confidentially and *ex parte* on 27 September 2007 (“confidential *ex parte* Order”), in which the Trial Chamber ordered that the Prosecution shall submit any information that would be relevant to the determination of the Motion concerning developments arising after the issuance of the orders for delayed disclosure in *Prosecutor v. Krajišnik*, in particular in the circumstances of the witnesses subject to delayed disclosure;²²

NOTING the Notice of Information, in which the Prosecution:

- (a) provided information concerning developments arising after the issuance of the orders for delayed disclosure in *Prosecutor v. Krajišnik*;²³
- (b) requested in respect of certain of the witnesses subject to orders for delayed disclosure in *Prosecutor v. Krajišnik* that such orders for delayed disclosure remain in force;²⁴

²² Confidential *ex parte* Order, p. 3.

²³ Notice of Information, paras. 4–9.

²⁴ Notice of Information, para. 10(a).

(c) stated, as has already been noted, that it had decided to withdraw from its 65 *ter* list Witness KRAJ 636 and requested that the material relevant to Witness KRAJ 636 be disclosed with redactions necessary for the protection of the identity of the witness;²⁵

NOTING the “Corrigendum to Prosecution’s Notice of Information Requested by the Trial Chamber in Relation to the Accused’s Motion to Rescind or Vary Delayed Disclosure Orders Pursuant to Rule 75(G) in *Prosecutor v. Krajišnik*”, filed confidentially and *ex parte* on 29 January 2008;

CONSIDERING that, having obtained all relevant information in relation to *Prosecutor v. Krajišnik*, the Trial Chamber has determined that the measures of delayed disclosure granted in *Prosecutor v. Krajišnik* in regard to those whom the Prosecution still wishes to call as witnesses in *Prosecutor v. Stanišić* remain justified;

CONSIDERING that the request of the Prosecution for the disclosure with redactions of material relevant to Witness KRAJ 636 falls within the scope of the request for disclosure contained in the Motion;²⁶

CONSIDERING that the Accused should have access to material relevant to Witness KRAJ 636 with redactions necessary for the protection of the identity of the witness;

PURSUANT to Rules 54, 75 and 126 *bis*,

GRANTS leave to reply;

DENIES the Motion in part and **ORDERS** that:

(a) The orders for delayed disclosure issued in *Prosecutor v. Krajišnik* in respect of those witnesses whom the Prosecution has identified in the Notice of Information as persons whom it wishes to call as witnesses in *Prosecutor v. Stanišić* shall remain in force; and

(b) The Prosecution shall disclose immediately all material relevant to Witness KRAJ 636 with redactions necessary for the protection of the identity of the witness.

²⁵ Notice of Information, paras. 8–9 and 10(b).

²⁶ Motion para. 13.

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

Dated this 31st day of January 2008,

At The Hague

The Netherlands



Kevin Parker
Presiding Judge

[Seal of the Tribunal]