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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: 4 March 2008
Original: English

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andrésia Vaz
Judge Theodor Meron

Registrar: Mr. Hans Holthuis

Decision of: 4 March 2008

PROSECUTOR

v.

MOMČILO KRAJIŠNIK

PUBLIC REDACTED VERSION

**DECISION ON PROSECUTOR'S APPLICATIONS FOR
VARIATION OF PROTECTIVE MEASURES SUBMITTED ON
BEHALF OF THE PROSECUTOR'S OFFICE OF BOSNIA AND
HERZEGOVINA**

The Office of the Prosecutor:

Mr. Serge Brammertz

Prosecutor's Office of Bosnia and Herzegovina

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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 seized of the “Prosecutor’s Application for Variation of Protective Measures” and of the “Confidential and *Ex Parte* Prosecutor’s Application for Variation of Protective Measures with Confidential and *Ex Parte* Annexes A, B, C and D” filed confidentially and *ex parte* by the Office of the Prosecutor (“Prosecution”) on, respectively, 21 December 2007 and 21 February 2008 (“Application of 21 December 2007” and “Application of 21 February 2008”, respectively, and jointly, “Applications”).

2. In its Application of 21 December 2007, the Prosecution seeks the variation of protective measures on behalf of the Prosecutor’s Office of Bosnia and Herzegovina (“POBiH”) concerning statements, transcripts, exhibits and other material related to protected witnesses, [REDACTED] in the case *Prosecutor v. Momčilo Krajišnik* (“Confidential Witness Material”).¹ The Prosecution claims that the Confidential Witness Material “would greatly assist the POBiH [REDACTED]”.²

3. In its Application of 21 February 2008, the Prosecution seeks the variation of protective measures on behalf of the POBiH concerning statements, transcripts exhibits and other material relating to witness [REDACTED] in the case of *Prosecutor v. Momčilo Krajišnik*. The Prosecution claims that “[t]he witness provides crucial information [REDACTED]”.³

4. With respect to the Application of 21 December 2007, the Appeals Chambers notes that on 23 April 2007, the POBiH indicated in a letter to the Prosecution that in addition to evidence it had already received from the Prosecution, the POBiH learned that “the [Tribunal] was in possession of evidentiary materials that might be used in the investigation [REDACTED]”. The POBiH therefore asked that the Prosecution “transfer all the available documentation which has not been previously sent [...] and could be used in the investigation [REDACTED]”.⁴ With respect to the Application of 21 February 2008, a request for assistance was sent by the POBiH to the Prosecution on 23 November 2006 asking the Prosecution to prioritize the transfer of the “Category ‘2’” case [REDACTED].⁵

5. The Appeals Chamber notes that until recently, a party in another jurisdiction had to seek the assistance of the Prosecution to make an application to a Chamber for a variation of protective

¹ Application of 21 December 2007, para. 1. [REDACTED].

² Application of 21 December 2007, para. 3.

³ Application of 21 February 2008, para. 3.

⁴ See *Ex Parte Confidential Annex B* of the Application of 21 December 2007, p. 3851 (“POBiH Request of 23 April 2007”).

measures,⁶ because “only one of the parties, defined in Rule 2 as the [Prosecution] and Defence, [...] can make an application to a Chamber for variation of measures imposed”.⁷ However, on 12 July 2007, Rule 75(H) of the Rules of Procedure and Evidence (“Rules”) was amended as follows:

A Judge or Bench in another jurisdiction or parties in another jurisdiction authorised by an appropriate judicial authority may seek to rescind, vary, or augment protective measures ordered in proceedings before the Tribunal by applying to the President of the Tribunal, who shall refer the application:

- (i) to any Chamber, however constituted, remaining seised of the first proceedings;
- (ii) if no Chamber remains seised of the first proceedings, to a Chamber seised of second proceedings; or,
- (iii) if no Chamber remains seised, to a newly constituted Chamber.

6. Pursuant to Rule 6(D) of the Rules, “[a]n amendment shall enter into force seven days after the date of issue of an official Tribunal document containing the amendment, but shall not operate to prejudice the rights of the accused or of a convicted or acquitted person in any pending case.” The Appeals Chamber has previously held that

the purpose of amendment of a Rule or adoption of a new Rule is to create conditions which are more conducive to the proper administration of justice. Hence Rule 6(C) prescribes that ‘an amendment shall enter into force immediately’, without any limitation of its application other than that of not prejudicing the rights of the accused. Therefore, except in the case where the amendment explicitly states that it is not to have retroactive effect for certain particular reasons, the general rule is that it has retroactive as well as prospective effect. Second, [...] no general principle precludes procedural rules from applying retroactively.⁸

Accordingly, the amended Rule 75(H) of the Rules - a procedural rule not prejudicing the rights of the accused - was clearly applicable at the time the Prosecution submitted its Application regardless

⁵ See *Confidential and Ex Parte* Annex B of the Application of 21 February 2008, pp. 4450-4449 (“POBiH Request of 23 November 2006”).

⁶ See e.g. *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-T, *Ex Parte* Order on the Prosecution’s Application for Variation of Protective Measures, 18 May 2005, para. 1; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, *Ex Parte* Decision on Prosecution Application for Variation of Protective Measures, 18 May 2005, pp. 1-2; *Prosecutor v. Radoslav Brdanin*, Case No. IT-99-36-A, Order to Vary Protective Measures, 13 May 2005, pp. 1-2.

⁷ Decision on Registrar’s Submission on a Request from the Office of the Chief Prosecutor of Bosnia and Herzegovina Pursuant to Rule 33(B), Case No. IT-05-85-Misc 2, 6 April 2005, para. 16.

⁸ *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-AR108bis, Decision on Prosecution Motion to Set Aside the Decision of the Appeals Chamber of 29 July 1997, 12 August 1997, para. 13 (“*Blaškić* Decision”); see also *Prosecutor v. Nyiramasuhuko*, Case No. ICTR-98-42-A15bis, Decision in the Matter of Proceedings Under Rule 15bis(D), 24 September 2003, paras 13-14. Rule 6(D) of the Rules has replaced Rule 6(C) which, at the time of the *Blaškić* Decision read: “An amendment shall enter into force immediately, but shall not operate to prejudice the rights of the accused in any pending case.” The Appeals Chamber notes that the inclusion in Rule 6(D) of the Rules of a seven-day period before the entry into force of a rule amendment has no bearing on the general rule that rule amendments apply retroactively. On the retrospective application of Rule 6(D) of the Rules, see also *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-A, Decision on Motions Related to the Pleadings in Dragan Jokić’s Appeal, 24 November 2005, para. 21 and footnote 36; *Prosecutor v. Paško Ljubičić*, Case No. IT-00-41-AR11bis.1, Decision on Appeal Against Decision on Referral under Rule 11bis, 4 July 2006, para. 9

of the fact that the Request by the POBiH had been made several months before the amendment of that rule.

7. The Appeals Chamber further notes that Rule 75(H) of the Rules now requires parties in another jurisdiction to have been authorized by an appropriate judicial authority before applying to the President of the Tribunal.⁹ The objective of this specific requirement is, *inter alia*, to ensure equal footing to prosecutors and defense counsel seeking access to material protected in accordance with Rule 75 of the Rules. Allowing the Prosecution to file applications on behalf of the POBiH or other domestic prosecutorial authorities would in effect allow them to bypass the newly adopted procedural requirements set out in Rule 75(H) of the Rules. The more appropriate approach would have been for the Prosecution to immediately inform the POBiH of the amendment of Rule 75(H) of the Rules and provide sufficient information to the POBiH so as to allow it to submit applications before the President of the Tribunal at the earliest time.

8. In light of the foregoing, the Appeals Chamber **DENIES** the Applications and **INVITES** the POBiH to apply to the President for variation of protective measures ordered by the Tribunal, once authorized to do so by the appropriate judicial authority in accordance with Rule 75(H) of the Rules.

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

Dated this 4th day of March 2008,
At The Hague, The Netherlands.



Fausto Pocar
Presiding Judge

[Seal of the Tribunal]

⁹ See *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-R75H.2, Decision on Application Pursuant to Rule 75(H), 30 January 2008, pp. 2-3; *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-R75H.1, Decision on Application Pursuant to Rule 75(H), 30 January 2008, pp. 2-3; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-R75H.1, Decision on Application Pursuant to Rule 75(H), 30 January 2008, pp. 2-3; *Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-R75H.1, Decision on Application Pursuant to Rule 75(H), 14 February 2008, p. 3.