

UNITED  
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01 November 2013

~~IT-03-69-A~~  
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~~01 November 2013~~

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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 Nos. IT-03-69-A &  
IT-04-75-T  
Date: 1 November 2013  
Original: English

**IN THE APPEALS CHAMBER**

**Before:** Judge Theodor Meron, Presiding  
Judge Carmel Agius  
Judge Fausto Pocar  
Judge Liu Daqun  
Judge Khalida Rachid Khan

**Registrar:** Mr. John Hocking

**Decision of:** 1 November 2013

**PROSECUTOR**

v.

**JOVICA STANIŠIĆ  
FRANKO SIMATOVIĆ**

***PUBLIC***

**DECISION ON GORAN HADŽIĆ'S MOTION FOR ACCESS TO  
CONFIDENTIAL MATERIAL IN THE STANIŠIĆ AND  
SIMATOVIĆ CASE**

**The Office of the Prosecutor:**

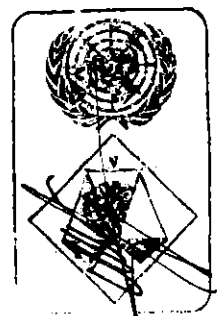
Mr. Douglas Stringer  
Mr. Dermot Groome

**Counsel for the Defence:**

Mr. Wayne Jordash and Mr. Scott Martin for Jovica Stanišić  
Mr. Mihajlo Bakrač and Mr. Vladimir Petrović for Franko Simatović

**Counsel for Goran Hadžić:**

Mr. Zoran Živanović and Mr. Christopher Gosnell



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 "Goran Hadžić's Motion for Access to Confidential Trial Judgement and Other Materials in the *Stanišić and Simatović* Case", filed by Goran Hadžić ("Hadžić") on 21 August 2013 ("Motion"). The Office of the Prosecutor ("Prosecution") responded on 4 September 2013.<sup>1</sup> Neither Jovica Stanišić ("Stanišić") nor Franko Simatović ("Simatović") responded to the Motion. Hadžić did not reply to the Response.

## I. BACKGROUND

2. On 5 April 2012, Trial Chamber I of the Tribunal ("Trial Chamber") granted in part Hadžić's request to access confidential material in the *Stanišić and Simatović* case related to events in Croatia between 1991 and 1993 and ordered, *inter alia*, Hadžić and the Prosecution to identify to the Registry: (i) *inter partes* confidential material related to events in Croatia between 1991 and 1993 in the *Stanišić and Simatović* case, which is not subject to Rule 70 of the Rules of Procedure and Evidence of the Tribunal ("Rules"), for disclosure to Hadžić; and (ii) all confidential materials admitted into evidence in the same case that are related to events in Croatia between 1991 and 1993 and are subject to Rule 70 of the Rules, and to seek consent of the providers of such material for disclosure to Hadžić.<sup>2</sup>

## II. SUBMISSIONS OF THE PARTIES

3. Hadžić requests that the Appeals Chamber grant him access to confidential materials from the *Stanišić and Simatović* case pursuant to the Decision of 5 April 2012, specifically requesting: (i) access to the "confidential Trial Judgement"; (ii) ongoing disclosure of confidential materials submitted in the course of the *Stanišić and Simatović* appeal proceedings; and (iii) disclosure of the

<sup>1</sup> Prosecution Response to Goran Hadžić's Motion for Access to Confidential Trial Judgement and Other Materials in the *Stanišić and Simatović* Case, 4 September 2013 ("Response").

<sup>2</sup> *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-T, Decision on Motion by Goran Hadžić for Access to Confidential Material in the *Stanišić and Simatović* Case, 5 April 2012 ("Decision of 5 April 2012"), pp. 3-4. The Trial Chamber further ordered that "material including documents, audio and video files and/or transcripts and records concerning the following issues should be excluded from the scope of the present decision: remuneration, provisional release, fitness to stand trial, reports of the Reporting Medical Officer, expert reports on health issues submitted by the Registry, notices of non-attendance in court, modalities of trial, protective measures, subpoenas, video-conference links, and orders to redact the public transcript and the public broadcast of a hearing". See Decision of 5 April 2013, p. 4.

confidential versions of the final trial briefs of Stanišić and Simatović as well as any other remaining documents undisclosed.<sup>3</sup>

4. Hadžić argues that the Trial Chamber was previously satisfied that he had a legitimate forensic purpose for access to confidential materials in the *Stanišić and Simatović* case “due to the considerable temporal and geographic overlap between the cases” and the “overlap in the membership and purpose of the joint criminal enterprises charged in” that case and in the *Hadžić* case.<sup>4</sup> Hadžić therefore submits that the same reasoning should apply to his Motion.<sup>5</sup>

5. The Prosecution does not oppose Hadžić’s request but clarifies that it understands Hadžić’s request to relate only to materials entered onto the record in the *Stanišić and Simatović* proceedings and not to materials that do not form part of the record in that case.<sup>6</sup>

### III. APPLICABLE LAW

6. The Appeals Chamber recalls that a party is always entitled to seek material from any source, including from another case before the 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.<sup>7</sup> The Appeals Chamber notes that access to confidential material is granted wherever the party seeking access has demonstrated that such material may be of material assistance to his case.<sup>8</sup> Furthermore, the requesting party may demonstrate the relevance of the material sought 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.<sup>9</sup>

<sup>3</sup> Motion, para. 1, referring to *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-T, Judgement, 30 May 2013 (with confidential Appendix C) (“Trial Judgement”); *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-T, Stanišić Defence Final Trial Brief, 17 December 2012 (confidential with confidential annexes; public redacted version filed on 11 February 2013); *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-T, Simatović [*sic*] Defence Final Trial Brief, 14 December 2012 (confidential; public redacted version filed on 15 February 2013) (together “Confidential Defence Final Trial Briefs”).

<sup>4</sup> Motion, para. 2, citing Decision of 5 April 2012, para. 4.

<sup>5</sup> Motion, para. 2.

<sup>6</sup> Response, para. 1.

<sup>7</sup> See, e.g., *Prosecutor v. Vujadin Popović et al.*, Case Nos. IT-05-88-A & IT-09-92-T, Decision on Motion by Ratko Mladić for Access to Confidential Material, 20 February 2013 (“*Popović et al.* Decision”), p. 2 and reference cited therein; *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Decision on Vlastimir Đorđević’s Motion for Access to Transcripts, Exhibits and Documents, 16 February 2010 (“*Šainović et al.* Decision”), para. 9 and references cited therein.

<sup>8</sup> See, e.g., *Popović et al.* Decision, p. 2 and reference cited therein; *Šainović et al.* Decision, para. 9 and references cited therein.

<sup>9</sup> See, e.g., *Popović et al.* Decision, p. 2 and reference cited therein; *Šainović et al.* Decision, para. 9 and references cited therein.

## IV. DISCUSSION

### A. Preliminary Matters

7. According to the Practice Direction, a response to a motion filed during appeals from judgement shall be filed within ten days of the filing of the motion.<sup>10</sup> The Appeals Chamber notes that the Response was filed 14 days after the Motion and therefore does not comply with the Practice Direction. The Prosecution does not provide any reasons for its late filing. However, according to paragraph 19 of the Practice Direction, the Appeals Chamber retains the discretion to consider as validly filed any response filed after the expiration of a prescribed time-limit. As none of the other parties have suffered prejudice from the late filing, the Appeals Chamber will consider the Response as validly filed.<sup>11</sup>

8. The Appeals Chamber also notes that Hadžić incorporates in his Motion arguments by reference to his prior motions for access to materials in the *Stanišić and Simatović* case.<sup>12</sup> The Appeals Chamber recalls that, pursuant to paragraph 12(c) of the Practice Direction, a motion for a specific ruling or relief must contain, *inter alia*, “the grounds on which the ruling or relief is sought”.<sup>13</sup> The Appeals Chamber further notes that, in the well-established practice of the Tribunal, parties substantiate their arguments in support of each of their submissions in their motions and not by reference to submissions made elsewhere.<sup>14</sup> Accordingly, the Appeals Chamber will not treat the arguments raised in Hadžić’s previous motions as incorporated in the Motion.

### B. Analysis

9. The Appeals Chamber notes that the Trial Chamber found that Hadžić “ha[d] identified the material sought with sufficient specificity and ha[d] established a legitimate forensic purpose for gaining access to it.”<sup>15</sup> Specifically, the Trial Chamber noted that there was a sufficient nexus between the *Hadžić* case and the *Stanišić and Simatović* case “due to the considerable temporal and

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<sup>10</sup> Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the International Tribunal, Doc. IT/155/Rev. 4, 4 April 2012 (“Practice Direction”), para. 13.

<sup>11</sup> See *Prosecutor v. Ante Gotovina and Mladen Markač*, Case No. IT-06-90-A, Decision on Application and Proposed *Amicus Curiae* Brief, 14 February 2012, para. 5.

<sup>12</sup> See Motion, para. 2, fn. 4 and references cited therein.

<sup>13</sup> See also *Prosecutor v. Ante Gotovina and Mladen Markač*, Case No. IT-06-90-A, Decision on Ante Gotovina’s Renewed Application for an Order Pursuant to Rule 54 *bis* Directing the Government of the Republic of Serbia to Produce Documents, 16 November 2011, para. 4.

<sup>14</sup> See, e.g., *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR72.5, Decision on Appeal of Trial Chamber’s Decision on Preliminary Motion to Dismiss Count 11 of the Indictment, 9 July 2009, para. 13 and references cited therein.

<sup>15</sup> Decision of 5 April 2012, para. 4.

geographic overlap between the cases” and “the substantial overlap in the membership and purpose of the joint criminal enterprise charged in the two cases.”<sup>16</sup>

10. In these circumstances, the Appeals Chamber is satisfied that Hadžić has identified with sufficient specificity the confidential material sought and has established a legitimate forensic purpose for gaining access to it. In particular, the Appeals Chamber considers that there is a sufficient factual nexus between the *Stanišić and Simatović* case and the *Hadžić* case due to the considerable temporal and geographic overlap between the cases, namely events occurring in Croatia between 1991 and 1993 as well as the substantial overlap in the purpose and membership of the joint criminal enterprise charged in the cases.

11. In light of the foregoing and subject to the conditions detailed below, the Appeals Chamber finds that Hadžić has met the requirements for access to: (i) the confidential appendix C to the Trial Judgement (“Confidential Appendix C”);<sup>17</sup> (ii) the Confidential Defence Final Trial Briefs; and (iii) any other remaining confidential documents in the same case heretofore undisclosed. Further, for reasons of judicial economy, Hadžić’s access to *inter partes* confidential materials submitted in the course of the *Stanišić and Simatović* appeal proceedings is granted on an ongoing basis, subject to the conditions set out below.<sup>18</sup>

12. The Appeals Chamber further finds that unless a legitimate forensic purpose can be demonstrated, no access should be granted to confidential filings or transcripts concerning remuneration, provisional release, fitness to stand trial, weekly reports of the reporting medical officer, expert reports on health issues submitted by the Registry, notices of non-attendance in court, modalities of trial, protective measures, subpoenas, video-conference links, and orders to redact the public transcript and the public broadcast of a hearing.<sup>19</sup>

13. The Appeals Chamber notes that protective measures ordered in one proceeding “shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal”.<sup>20</sup> It further recalls that once the Appeals Chamber has granted access to confidential materials from another case, it then determines if and what additional protective measures are necessary in order to “strike

<sup>16</sup> Decision of 5 April 2012, para. 4.

<sup>17</sup> Confidential Appendix C is the only part of the Trial Judgement that is confidential.

<sup>18</sup> Cf. *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-T, Decision on Motion by Vujadin Popović for Access to Confidential Information in the *Mladić* Case, 11 September 2012, para. 8.

<sup>19</sup> The Appeals Chamber also recalls that Hadžić requests access to confidential material pursuant to the Decision of 5 April 2012, which: (i) excluded disclosure of *ex parte* materials, and (ii) is restricted in scope to events occurring in Croatia between 1991 and 1993. See Motion, para. 1. See also Decision of 5 April 2012, paras 7-8.

<sup>20</sup> Rule 75(F)(i) of the Rules.

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".<sup>21</sup>

14. The Appeals Chamber finds that any protective measures ordered in the present case should continue to apply to any material released to Hadžić. This does not prevent the parties to the present case from requesting additional protective measures, if they so choose.

**V. DISPOSITION**

15. For the foregoing reasons, and pursuant to Rules 54 and 107 of the Rules, the Appeals Chamber hereby:

**GRANTS** the Motion;

**ALLOWS** Hadžić, subject to the conditions set forth below, access to the following *inter partes* confidential materials in the *Stanišić and Simatović* case related to events in Croatia between 1991 and 1993: (i) Confidential Appendix C and the Confidential Defence Final Trial Briefs; (ii) any other remaining confidential documents heretofore undisclosed; and (iii) *inter partes* confidential materials in the appeal proceedings on an ongoing basis, with the exception of material: (a) provided under Rule 70 of the Rules; (b) not forming part of the trial record; (c) related to personal information about Stanišić and Simatović and their family members; and (d) having no forensic purpose, namely material related to: remuneration of counsel, provisional release, fitness to stand trial, reports of the reporting medical officer, expert reports on health issues submitted by the Registrar, notices of non-attendance in court, modalities of trial, protective measures, subpoenas, video-conference links, orders to redact the transcripts and the broadcasts of hearing, witness scheduling, witness appearance, witness attendance, execution of arrest warrant, enforcement of sentences, the health of the accused, and notices of compliance filed in respect of other access decisions;

**ORDERS** the Prosecution, Stanišić and Simatović:

1. to file before the Appeals Chamber and the Registry, without undue delay and on an ongoing basis, lists identifying material related to personal information about Stanišić and Simatović and their family members;
2. to file before the Appeals Chamber and the Registry, without undue delay and on an ongoing basis, lists identifying any material provided under Rule 70 of the Rules;

<sup>21</sup> See, e.g., *Šainović et al.* Decision, para. 19 and references cited therein.

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3. to seek leave from the Rule 70 providers to disclose this material to Hadžić without undue delay and on an ongoing basis;
4. to notify the Registry, without undue delay and on an ongoing basis, of the consent of providers to the disclosure of Rule 70 material to Hadžić received by the Prosecution or the Defence pursuant to Order 3. above;
5. to apply to the Appeals Chamber for non-disclosure, additional protective measures or redactions, if required, without undue delay;

**REQUESTS** the Registry:

1. to withhold any material related to personal information about Stanišić and Simatović and their family members, as identified by Stanišić and Simatović;
2. to withhold any material provided pursuant to Rule 70 of the Rules, as identified by the Prosecution, Stanišić or Simatović, until the responses of the providers have been relayed;
3. where the providers have consented to further disclosure, to provide Hadžić with all such material, in electronic format where possible;
4. where the providers have refused consent to further disclosure, to withhold that material;
5. where no additional protective measures, non-disclosure or redactions are requested, and where material has not, without undue delay, been identified by the Prosecution, Stanišić or Simatović as material containing sensitive information that has little or no evidentiary value to Hadžić or having been provided pursuant to Rule 70 of the Rules, to provide Hadžić with all *inter partes* confidential material described above, in electronic format where possible;
6. where non-disclosure, additional protective measures or redactions are requested, to withhold that material until the Appeals Chamber has issued a decision on the request;

**ORDERS**, unless otherwise required by this decision, that the *inter partes* confidential material provided by the Registry shall remain subject to any protective measures in effect;

**ORDERS** that Hadžić, his Counsel and any persons involved in the preparation of his case who have been instructed or authorised by Hadžić or his Counsel to have access to the *inter partes* confidential material described above, shall not, without the Appeals Chamber expressly finding that third party disclosure is necessary for the preparation of Hadžić's defence and granting the appropriate leave:

1. 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;
2. 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
3. contact any witness whose identity was subject to protective measures;

**ORDERS** that if, for the purposes of the preparation of Hadžić's defence, confidential material is disclosed to third parties<sup>22</sup> – pursuant to authorisation by the Appeals Chamber – any person to whom disclosure of the confidential material is made shall be informed that he or she is forbidden to copy, reproduce or publicise, in whole or in part, any confidential 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 Hadžić or his Counsel as soon as the information is no longer needed for the preparation of Hadžić's case;

**ORDERS** that if any persons who are authorised to have access to confidential material should withdraw from the case, any confidential material to which access is granted in this decision and that remains in their possession - and copies thereof - shall be returned to the Registry.

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



Judge Theodor Meron  
Presiding

Dated this first day of November 2013,  
At The Hague,  
The Netherlands.

[Seal of the Tribunal]

<sup>22</sup> For the purposes of this paragraph, third parties exclude: (i) Hadžić; (ii) his Counsel; (iii) any other Defence team members who have been instructed or authorized by Hadžić and/or his Counsel to have access to confidential material; and (iv) personnel of the Tribunal, including members of the Prosecution.

