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05 April 2012

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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-03-69-T
Date: 5 April 2012
Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Michèle Picard
Judge Elizabeth Gwaunza

Registrar: Mr John Hocking

Decision of: 5 April 2012

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

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

Office of the Prosecutor

Mr Dermot Groome
Mr Douglas Stringer

Counsel for Jovica Stanišić

Mr Wayne Jordash
Mr Scott Martin

Counsel for Franko Simatović

Mr Mihajlo Bakrač
Mr Vladimir Petrović

Counsel for Goran Hadžić

Mr Zoran Živanović
Mr Christopher Gosnell

I. PROCEDURAL HISTORY AND SUBMISSIONS

1. On 2 February 2012, Goran Hadžić (“the Applicant”) requested access, by his motion (“Motion”) pursuant to Articles 21 and 22 of the Statute of the Tribunal and Rules 53, 54, 69, and 75 (G) (i) of the Rules of Procedure and Evidence (“the Rules”), to the following confidential material related to events in Croatia between 1991 and 1993 from the record of the *Stanišić and Simatović* case: (i) confidential documents disclosed pursuant to Rule 66 (A) (i); (ii) transcripts from all closed and private sessions; (iii) confidential exhibits and exhibits not available through the Tribunal’s Judicial Database; and (iv) confidential filings and filings not available through the Tribunal’s Judicial Database.¹ The Applicant submits that the Prosecution has charged him and the accused Stanišić and Simatović with crimes committed in Croatia between 1991 and 1993 as members of the same joint criminal enterprise.²

2. On 16 February 2012, the Prosecution responded specifying that it does not oppose the request for access to certain categories of confidential *inter partes* material provided that the Chamber establishes conditions to preserve the safety of witnesses and guard against improper disclosure to third parties.³ The Prosecution submits that, in addition to material related to crimes committed in Croatia, material related to Bosnia and Herzegovina and relevant to the joint criminal enterprise could be of assistance in the preparation of the Applicant’s defence and invites the Chamber to grant access to all confidential evidence and material in the present case except for crime-base evidence related solely to Bosnia and Herzegovina.⁴ In addition, the Prosecution requests that the Chamber provisionally withhold giving access to material provided to the Prosecution on a confidential basis pursuant to Rule 70 of the Rules until consent is granted by the provider, as well as material relating to witnesses who have been granted delayed disclosure or for whom the Prosecution intends to apply for delayed disclosure in the case against the Applicant.⁵ It opposes the request concerning *ex parte* material, as the Applicant has failed to meet the higher standard required for such access, and certain categories of material containing sensitive information as lacking evidentiary value.⁶

¹ Defence Motion on behalf of Goran Hadžić seeking access to all confidential material in *Prosecution v. Stanišić and Simatović* related to Croatia, 2 February 2012, paras 1-3.

² Motion, paras 6-9.

³ Prosecution Response to Motion of Goran Hadžić for access to confidential material related to Croatia in Motion for Access to Confidential Materials in the *Stanišić and Simatović* Case, 16 February 2012 (“Prosecution Response”), para. 1.

⁴ Prosecution Response, paras 6-8.

⁵ Prosecution Response, paras 9-10.

⁶ Prosecution Response, paras 1, 12-13. The Prosecution has failed to keep its response within the relevant word limit provided for in the Practice Direction on the Length of Briefs and Motions of 16 September 2005 and did not seek

II. APPLICABLE LAW

3. The Chamber refers to the law applicable to requests for access to confidential material, as set out in a previous decision.⁷

III. DISCUSSION

4. The Chamber is satisfied that the Applicant has identified the material sought with sufficient specificity and has established a legitimate forensic purpose for gaining access to it. Furthermore, the Chamber is satisfied that there is a good chance that access to such material would materially assist the Applicant in the preparation of his defence. In particular, the Chamber considers that there is a sufficient nexus between the case against the Applicant and the *Stanišić and Simatović* case due to the considerable temporal and geographic overlap between the cases. There is also a substantial overlap in the membership and purpose of the joint criminal enterprises charged in the two cases. While the Prosecution suggested that the Chamber grant access to material exceeding the geographical scope of the Applicant's request, the Chamber limits its decision to the parameters of the Motion.

5. The Chamber holds that no confidential material admitted into evidence in the present case and provided to the Prosecution or Defence under Rule 70 of the Rules should be disclosed to the Applicant unless the provider of such material has consented to such disclosure. Consequently, the Prosecution and Defence in the present case are instructed to approach providers of such material with a view to obtaining their consent.

6. The Chamber notes that protective measures of delayed disclosure currently in force continue to apply *mutatis mutandis* in the case against the Applicant and are not affected, as such, by the present decision. With regard to material related to witnesses for whom the Prosecution in the *Hadžić* case intends to request delayed disclosure, the Chamber notes that any potential forensic value for the Applicant does not outweigh the consideration that must be given to the safety and protection of victims and witnesses pursuant to Articles 20 (1) and 22 of the Statute and Rule 75 (A) of the Rules. However, any interference with the Applicant's right of access to material with potential forensic value must not exceed what would be strictly necessary in the relevant circumstances. Accordingly, the Chamber considers that access to such material must be withheld at least until the requests for delayed disclosure have been decided upon. The Chamber understands

leave to exceed such limit in advance of its response. In light of the limited extent of the non-compliance, the Chamber has considered the Prosecution's response in its entirety on an exceptional basis.

⁷ Decision on Motions of Mićo Stanišić and Stojan Župljanin for Access to all confidential materials in the Stanišić and Simatović Case, 10 March 2011 ("10 March 2011 Decision"), paras 15-18.

that such requests will be made no later than the submission of the Prosecution's 65 *ter* filings. In the event that the requests are granted, the Applicant can have access to such material following the lapse of the delayed disclosure period specified in the protective measures orders. Alternatively, if the requests are denied the Applicant shall be granted access to the relevant material at that time.

7. The Chamber reiterates its considerations set out in a previous decision that confidential filings or transcripts concerning remuneration, provisional release, fitness to stand trial, weekly reports of the Reporting Medical Officer, Registry submission of expert reports on health issues, 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 are considered, in principle, not to have sufficient forensic value for access purposes.⁸ In the absence of a demonstrated legitimate forensic purpose for the Applicant, the Chamber finds that he should not be granted access to such material.

8. With regard to *ex parte* and sensitive filings, the Chamber considers that the Applicant has failed to demonstrate a legitimate forensic purpose in this regard and that this part of his request must be denied.

9. In relation to the request for access to confidential material disclosed under Rule 66 (A) (i) of the Rules, the Chamber considers that to the extent that these documents have been admitted into evidence, access to them is granted by way of this decision. To the extent that these documents have not been admitted into evidence, they remain within the Prosecution's domain and any request to gain access thereto should be directed to the Prosecution.

IV. DISPOSITION

10. For the foregoing reasons, pursuant to Rules 54 and 75 of the Rules, the Chamber hereby

GRANTS the Motion in part;

ORDERS the Prosecution and the Defence, to identify to the Registry, on an ongoing basis, the following *inter partes* confidential material related to events in Croatia between 1991 and 1993 in the case of *Prosecutor v. Stanišić and Simatović*, which is not subject to Rule 70, for disclosure to the Applicant:

- (i) all closed and private session testimony transcripts;

⁸ 10 March 2011 Decision, para. 40.

- (ii) all confidential exhibits;
- (iii) all confidential filings and submissions (including all confidential Chamber decisions);
- (iv) all closed-session hearing transcripts other than testimonies;

ORDERS the Prosecution and the Defence to identify without undue delay all confidential material admitted into evidence in the present case that are related to events in Croatia between 1991 and 1993 and are subject to Rule 70 of the Rules, and to contact the providers of such material to seek their consent for disclosure to the Applicant, and, where such consent is given, to notify the Registry thereof;

ORDERS 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;

ALLOWS the Prosecution to withhold material related to witnesses for whom it intends to request delayed disclosure at least until such requests have been decided upon. To the extent that the requests are denied, such material should be identified as specified above. Alternatively, should the requests be granted, such material should only be identified in accordance with the delayed disclosure orders;

INVITES the Prosecution and the Defence, if deemed necessary, and without undue delay, to file a request to the Chamber for non-disclosure of specified material, additional protective measures, or redactions before identifying the above material to the Registry;

REQUESTS the Registry:

- (i) to disclose to the Applicant, the following material:
 - (a) the confidential, non-Rule 70, material related to events in Croatia between 1991 and 1993 once it has been identified by the Prosecution and Defence in accordance with this decision;

- (b) the Rule 70 material identified as such by the Prosecution and Defence, once notice has been given to the Registry that consent from the Rule 70 providers has been received;
- (ii) to withhold from disclosure to the Applicant, material for which non-disclosure, additional protective measures, or redactions are requested, until the Chamber has issued a decision on the request;

ORDERS the Applicant, if disclosure to specified members of the public is directly and specifically necessary for the preparation and presentation of his case, to file a motion to the Chamber seeking such disclosure. For the purposes of the present decision, reference to the “public” includes all persons, governments, organisations, entities, associations, and groups other than the Judges of the Tribunal, the staff of the Registry, the Prosecutor and his representatives, and the Applicant, his Counsel and any persons involved in the preparation of his case who have been instructed or authorised by the Applicant and/or his Counsel to have access to confidential material from this case. “The public” also includes, without limitation, family members, and friends of the Applicant; accused and defence counsel in other cases or proceedings before the Tribunal; journalists and the media;

ORDERS that if, for the purposes of the preparation of the Applicant’s defence, confidential material is disclosed to the public – pursuant to prior authorisation by the 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 the Applicant or his Counsel as soon as the information is no longer needed for the preparation of his defence;

ORDERS that the Applicant, his Counsel and any persons involved in the preparation of the case who have been instructed or authorised by the Applicant and/or his Counsel to have access to the confidential material from this case, and any other persons for whom disclosure of the sought material is granted by a separate decision, shall not:

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

- (ii) disclose to any members of the public any documentary or other evidence, or any written statement of a witness or the contents, in whole or in part, of any confidential evidence or statement of prior testimony;

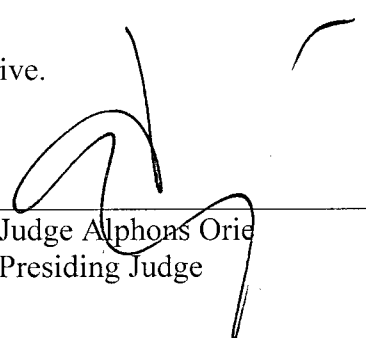
ORDERS that the Applicant, his Counsel and any persons who have been instructed or authorised by the Applicant and/or his Counsel to have access to the confidential material from this case shall return to the Registry the confidential material which remains in their possession as soon as it is no longer needed for the preparation of the Applicant's case;

ORDERS that nothing in this decision shall affect the disclosure obligations of the Prosecution under Rules 66 and 68 of the Rules;

AFFIRMS that, pursuant to Rule 75 (F) (i) of the Rules, any protective measures that have been ordered in respect of any witness in the *Stanišić and Simatović* case shall continue to have effect in the case against the Applicant; and

DENIES the remainder of the Motion.

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



Judge Alphons Orić
Presiding Judge

Dated this fifth day of April 2012,
At The Hague,
The Netherlands

[Seal of the Tribunal]