IT-95-9-A
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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-95-9-A
		Date:	12 April 2005
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Mehmet Güney, Presiding**
Judge Fausto Pocar
Judge Mohamed Shahabuddeen
Judge Wolfgang Schomburg
Judge Inés Mónica Weinberg de Roca

Registrar: **Mr. Hans Holthuis**

Decision: **12 April 2005**

PROSECUTOR

v.

BLAGOJE SIMIĆ

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

Counsel for the Prosecutor:
Norman Farrell

Counsel for the Appellant:
Igor Pantelić and Peter Murphy

Counsel for the Applicant:
Zoran Jovanović

Interested Parties:
Miroslav Tadić and Simo Zarić

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 ("International Tribunal"),

BEING SEISED OF the "Defence Motion to Access Transcripts and Documents" filed by Franko Simatović ("Applicant") on 20 November 2003 ("Motion"), whereby the Applicant, with regard to the *Prosecutor v. Blagoje Simić, Miroslav Tadić and Simo Zarić* case ("*Simić et al.* case"), requests "[a]ccess to the transcripts of all open and closed session proceedings"; "[a]ccess to the trial exhibits, documentary evidence and motions filed by the parties"; and "the liberty to apply to the Trial Chamber in the future for specific orders in respect to any closed material that the Defence believes could aid its case, and which the Prosecution is not otherwise required to disclose";[1]

NOTING that, in support of his request, the Applicant argues that he is "charged for crimes allegedly committed in the period from 1991 until 1995 and in the territories of the present Croatia and Bosnia and Herzegovina" and "that these times and places correlate to a great extent with those for which the co-accused" in the *Simić et al.* case were charged;[2]

NOTING the "Prosecution Response to the Defence Motion to Access Transcripts and Documents Filed on Behalf of Franko Simatović" filed by the Prosecution on 1 December 2003 ("Response"), in which it "does not object to the Applicant gaining access to confidential evidence (transcripts and exhibits) in this case" subject to the continued application of the protective measures already imposed and augmentation of those protective measures pursuant to Rule 75 of the Rules of Procedure and Evidence of the International Tribunal ("Rules");[3]

NOTING, however, that in its Response, the Prosecution does object "to the Applicant's request for access to confidential filings or pleadings in this case, including *ex parte* filings made by the Prosecution" since the "Motion fails to provide any basis for the request, nor does it specify what class or description of confidential filing or motion it seeks, nor does it provide any legitimate forensic purpose for seeking access [*sic*] filings or motions in this case";[4]

[1] Motion, para. 9.
[2] Motion, para. 6.
[3] Response, paras 6-7.
[4] Response, paras 9-10.

NOTING that the Applicant did not file a reply to the Prosecution's Response;

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;[5]

CONSIDERING that "access to confidential material [from another case] may be granted whenever the Chamber is satisfied that the party seeking access has established that such material may be of material assistance to his case"[6] 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 good chance that it would";[7]

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, for example, if the cases stem from events alleged to have occurred in the same geographical area at the same time";[8]

CONSIDERING that material from open sessions is available to the public and therefore leave from the Appeals Chamber for access to that material is not required;

FINDING that there is a substantive geographical and temporal overlap between the Applicant's case and the *Simić et al.* case and that the *inter partes* confidential transcripts, exhibits, documentary evidence and motions from the *Simić et al.* case are likely to be of material assistance

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[5] *Prosecutor v. Tihomir Blaškić,* 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. Tihomir Blaškić,* 16 May 2002 ("*Blaškić* Decision"), para. 14; *Prosecutor v. Kordić and Čerkez,* IT-95-14/2-A, Order on Paško Ljubičić's Motion for Access to Confidential Supporting Material, Transcripts and Exhibits in the *Kordić and Čerkez* Case, 19 July 2002, p. 4 ("*Kordić and Čerkez* Order"); *Prosecutor v. Kvočka et al.*, IT-98-30/1-A, Decision on Momčilo Gruban's Motion for Access to Material, 13 January 2003, para. 5 ("*Kvočka et al.* Decision"); *Prosecutor v. Tihomir Blaškić,* IT-95-14-A, Decision on Joint Motion of Enver Hadžihasanović, Mehmed Alagić and Amir Kubura for Access to All Confidential Material, Transcripts and Exhibits in the case *Prosecutor v. Tihomir Blaškić*, 24 January 2003, p. 4; *Prosecutor v. Naletilić and Martinović*, IT-98-34-A, Decision on Joint Defence Motion by Enver Hadžihasanović and Amir Kubura for Access to All Confidential Material, Filings, Transcripts and Exhibits in the *Naletilić and Martinović case*, 7 November 2003, p. 3; *Prosecutor v. Tihomir Blaškić,* IT-95-14-A, Decision on Dario Kordić and Mario Čerkez's Request for Access to Tihomir Blaškić's Fourth Rule 115 Motion and Associated Documents, 28 January 2004, p. 4; *Momir Nikolić v. Prosecutor,* IT-02-60/1-A, Decision on Emergency Motion for Access to Confidential Document, 4 February 2005, p. 4.

[6] *Blaškić* Decision, 16 May 2002, para. 14; *Kordić and Čerkez* Order, 19 July 2002, p. 4.

[7] *Kvočka et al.* Decision, 13 January 2003, para. 5.

[8] *Blaškić* Decision, 16 May 2002, para. 15.

in the preparation of the Applicant's case and that, therefore, the Applicant has demonstrated a legitimate forensic purpose in relation to that 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* solely because of security interests of a State, other public interests, or privacy interests[9] of a person or institution;

CONSIDERING that 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;

CONSIDERING that the Applicant cannot demonstrate a legitimate forensic purpose in relation to such *ex parte* material;

CONSIDERING that because this decision grants the Applicant access to all *inter partes* confidential transcripts, exhibits, documentary evidence and motions in the *Simić et al.* case, it affects not only the Prosecution and Blagoje Simić, but also Blagoje Simić's co-accused, Miroslav Tadić and Simo Zarić;

CONSIDERING therefore that Miroslav Tadić and Simo Zarić are interested parties to the present Motion ("Interested Parties"), but that their interests and the interests of the witnesses who testified in support of their defence in the *Simić et al.* trial will not necessarily be represented by Counsel for the Applicant in the present case;

FOR THE FOREGOING REASONS, the Appeals Chamber by majority, Judge Pocar dissenting,

GRANTS in part the Motion and allows access to all *inter partes* confidential transcripts, exhibits, documentary evidence and motions and **ORDERS** that:

(a) the Prosecution, Blagoje Simić and Interested Parties apply to the Appeals Chamber for additional protective measures, if required, within fifteen working days from this decision and identify whether the material falls under Rule 70(C) and (F) of the Rules;

(b) subject to any application by either party in the present case or Interested Parties for additional protective measures or redaction of certain material within fifteen working days, the Registry shall give the Applicant access to all *inter partes* confidential transcripts, exhibits,

documentary evidence and motions from the *Simić et al.* case provided that the interests of the Interested Parties have been guaranteed;

(c) save as otherwise required by this decision, the material to which access is granted shall remain subject to the protective measures imposed by the Trial Chamber.

The Applicant, his Counsel and any employees who have been instructed or authorised by the Applicant's Counsel to have access to the confidential material shall not, without express leave of the Appeals Chamber:

(i) disclose to any third party, the names of witnesses, their whereabouts, transcripts of witness testimonies, the contents thereof, exhibits, the contents thereof or any information which would enable them to be identified and would breach the confidentiality of the protective measures already in place unless absolutely necessary for the preparation of Applicant's case;

(ii) disclose to any third party, any documentary 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;

(iii) contact any witness whose identity was subject to protective measures without first demonstrating to the Appeals Chamber that the witness may materially assist the Applicant's case in some identified way and that such assistance is not otherwise reasonably available to him.

If, for the purposes of preparing the Applicant's case, non-public material is disclosed to third parties – provided that the conditions set out in paragraph (i) above are met – 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 publicise, 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 or his Counsel as soon as it is no longer needed for the preparation of the case.

For the purposes of the above paragraphs, third parties exclude: (i) the Applicant, (ii) Applicant's Counsel and any employees who have been instructed or authorised by the Applicant's Counsel to

[9] *See, e.g., Blaškić* Decision, 16 May 2002, para. 22.

have access to the confidential material, (iii) personnel from the International Tribunal, including members of the Prosecution.

INSTRUCTS the Registry to assist the Interested Parties in preserving their interests and the interests of the witnesses testifying in their case in responding to this Decision.

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

Dated this 12th day of April 2005,
At The Hague,
The Netherlands.

Judge Mehmet Güney
Presiding

Judge Pocar appends a dissenting opinion to the present decision.

Judge Shahabuddeen and Judge Schomburg append a joint separate opinion to the present decision.

[Seal of the Tribunal]

DISSENTING OPINION OF JUDGE POCAR

1. I write to dissent from this decision because I believe that the denial of the Applicant's request for access to *ex parte* materials on grounds that the "Applicant cannot demonstrate a legitimate forensic purpose in relation to such *ex parte* material," is in error. First, I believe that the decision indicates a lack of understanding as to the procedure for considering requests for access to confidential materials filed in another case. Second, while this decision could be interpreted to leave the door open for future applicants to seek access to *ex parte* materials, in actual effect, it creates an absolute bar to such access. This, I submit, is an abdication of our responsibility as the Appeals Chamber under Article 21 of the Statute to ensure respect for an accused's rights to a fair trial and to prepare an effective defence.

2. First, with regard to the procedure, there can be no difference between the "legitimate forensic purpose" that an applicant is required to show for access to confidential materials filed *inter partes* versus the "legitimate forensic purpose" required for access to confidential materials filed *ex parte*. Obviously, in both situations, the applicant is not afforded the opportunity *a priori* to review the contents of the materials in order to determine their relevance for his or her defence. All that the applicant can do is demonstrate that the materials are likely to be of material assistance to his or her case by demonstrating a nexus between the two cases. Here, the majority finds that the Applicant has demonstrated such a nexus for access to the confidential materials filed *inter partes* through a showing of the "*substantive* geographical and temporal overlap"[1] between the events in his case and the present case. I fail to see how the Applicant could possibly offer a stronger or more "legitimate forensic purpose" in support of his request for access to the *ex parte* materials, without having had the benefit of reviewing them. The Applicant should not be required to engage in a "fishing expedition" for some other unknown "legitimate forensic purpose," especially where he has already clearly met the requisite test.

3. I am in full agreement with the majority that, in the context of considering a request for access, *some* distinction has to be made between confidential materials filed *inter partes* versus *ex parte*. The latter often contain information that requires greater protection due to special privacy interests of a State, institution or individual. However, it is not for the *applicant* but for the *Appeals Chamber* to make up for the difference.[2] All that the applicant

[1] Emphasis added.
[2] In their Separate Opinion, Judge Shahabuddeen and Judge Schomburg concede that the applicant's inability to see *ex parte* material prior to filing a motion for access is a "handicap." Nevertheless, they conclude that the

can do is proffer a legitimate forensic purpose for access to all confidential filings generally in another case. It is then for the Appeals Chamber to give special consideration in its review of the *ex parte* filings, keeping in mind the important privacy interests protected therein, to see whether they have any relevance for the applicant's defence. If so, then the Appeals Chamber must ask whether, on balance, the applicant's right to prepare an effective defence and the material assistance that the *ex parte* materials would provide outweighs the rights to privacy at issue. If the answer is yes, then access should be granted and the Appeals Chamber may consider whether further protective measures, such as redactions, need to be applied to the filings prior to their release. If the answer is no, then access should be denied.

4. Second, with regard to the effect of today's decision, while it may appear to leave the door open for applicants to be able to seek access to *ex parte* materials in other cases, it actually creates an absolute bar to such access thereby denying justice to future applicants. As previously noted, applicants will be hard pressed to formulate a legitimate forensic purpose that would be more appropriate than the one offered in this case. Consequently, when requests for access are filed in subsequent cases following this decision, the Appeals Chamber will never need to engage in the tedious process of looking to the substance of the *ex parte* materials at issue to determine relevancy or to engage in the weighing-of-rights-process I describe above. Underlying this decision is the assumption that, as a general rule, *ex parte* materials will rarely, if ever, be relevant for the applicant's defence, let alone exculpatory. This may be the case. However, I am mindful of our obligations to ensure and respect an accused's fundamental right to a fair trial, which includes the right to build an effective defence. I am also aware that in this International Tribunal, we preside over cases where very serious crimes and very serious penalties are at issue. I cannot agree to a decision that bars access to future applicants of an entire body of material, without the Appeals Chamber's substantive review of that material, as a bright-line rule. Neither can I agree to a decision that results in precluding the discovery of that one exception to the general rule that *ex parte* materials will rarely be relevant, *i.e.*, where the *ex parte* materials in another case actually are highly exculpatory for an applicant's defence.

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burden still falls on the applicant to assert "sufficiently strong" reasons as to why his or her need for the material at issue overrides the special privacy interests protected by an *ex parte* filing. *See* p. 2. Again, I submit that this is a fundamentally unfair burden. The Separate Opinion fails to explicate what might constitute such "sufficiently strong" reasons for the benefit of future applicants. Furthermore, I fail to see how an applicant can be expected to meet this burden given that not only is he or she unable to ascertain the relevancy of the material in the filings for his or her case, but is also completely in the dark with regard to what the special privacy interests at stake actually are.

5. For these reasons, I dissent.

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

Done this 12th day of April 2005,
At The Hague,
The Netherlands

Fausto Pocar
Appeals Judge

SEPARATE OPINION OF JUDGE SHAHABUDDEEN AND JUDGE SCHOMBURG

A. Preliminary

1. We support today's decision. We recognise that there is room for more than one view. However, we do not see any course reasonably open to us but that which we have followed.

2. It is agreed that, "in the context of considering a request for access, some distinction has to be made between confidential materials filed *inter partes* versus *ex parte*. The latter often contains information that requires greater protection due to special privacy interests of a State, institution or individual".[1]

3. Thus, in our view, an application for access to *ex parte* material has to be distinguished as a special case. The problem is how best to deal with that special case bearing in mind the requirements of fairness.

B. The test of the right of access to *ex parte* material

4. It is accepted that the test of access is whether the applicant has established that he has a legitimate forensic interest in disclosure. It is he who must establish that. He may demonstrate a forensic interest by proving geographical and temporal overlap and material assistance. The question remains whether that forensic interest is "legitimate". *Inter partes* material, which passes the tests of geographical and temporal overlap and material assistance, may be presumed to be of legitimate forensic interest, there being no special privacy interests to be taken into account in that case. It is otherwise where special privacy interests have to be taken into account.

5. In the case of *ex parte* material, if the material passes the tests of geographical and temporal overlap and material assistance, it is of forensic interest. However, in our view, that forensic interest does not qualify as being "legitimate" unless proof of legitimacy is made on grounds which are sufficiently strong to outweigh the considerations underlying the original order that the material was admitted on an *ex parte* basis; these would include "security interests of a State, other

[1] "Dissenting Opinion of Judge Pocar", para. 3.

public interests, or privacy interests of a person or institution", to which the decision of the Appeals Chamber refers.

C. Whether the decision of the Appeals Chamber sends the applicant on a fishing expedition

6. True, the material being *ex parte* material, the applicant has not seen it, and this is a handicap. But we do not agree that the handicap precludes the applicant from having reasons (which we shall not attempt to exemplify)[2] for asserting that his need for the material overrides the need to protect any special privacy interests. In this respect, we do not think that the Appeals Chamber is requiring the applicant to engage in a "fishing expedition" for some unknown "legitimate forensic purpose". It is, on the contrary, the applicant who has embarked on a fishing expedition, and he has embarked on it in purported support of an initiative which he has taken.

7. Various meanings have been ascribed to a "fishing expedition". A respected law dictionary defines the term as meaning an "attempt, through broad discovery requests or random questions, to elicit information from another party in the hope that something relevant might be found; ..."[3] In one case, it was said that the concept of a fishing expedition "arises in cases where what is sought is not evidence as such, but information which may lead to a line of inquiry which would disclose evidence".[4]

8. These observations are pertinent here. Paragraph 5 of the applicant's motion for access states:

> Upon receiving the supporting material to the Indictment against the Accused, the Defence noticed that a part of *ŠsicĆ* thereof originated from the *Bosanski Šamac* case Ši.e., the present appeal by Blagoje Simić, IT-95-9-AĆ. The Defence therefore asserts that there very well could be other evidence and witness statements that are relevant to the case at hand.[5]

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[2] General practice of the law shows that, in certain circumstances, a litigant may aver on the basis of information and belief.
[3] *Black's Law Dictionary*, 8th ed.. (Minnesota, 2004), p. 668.
[4] *State of Norway's Application,* [1987] Q.B.433, Kerr, L.J., at 482, quoted also by Glidewell, L.J., at 490.
[5] Defence Motion to Access Transcripts and Documents, 20 November 2003. para. 5.

So, the applicant's case is that "there very well could be other evidence ...", not that "there is other evidence". That is speculation so far as concerns the need to offer reasons which could prevail over the considerations on which the material was admitted on an *ex parte* basis.

9. It is the case that, to be entitled to access, an applicant only has to establish that there is a good chance that the material may help in the preparation of his case, but, in a case involving special privacy interests, the applicant also has to prove that his need for the material outweighs the need to protect those interests. If, for any reason, there is no evidence before the Appeals Chamber which can be put against the grounds on which the special privacy interests were protected through the making of the *ex parte* order, the Appeals Chamber is left only with the grounds on which the *ex parte* order was made. That order and the grounds on which it was made are not being challenged.

10. It remains to add that the information concerned can be of great sensitivity. Take, for example, an order made under Rule 68(iv) of the Rules of Procedure and Evidence to relieve the Prosecutor (on application by her) of her obligation to disclose exculpatory information if the "disclosure may prejudice further or ongoing investigations, or for any other reason may be contrary to the public interest or affect the security interests of any State ...". According to the wording of this rule, the Prosecutor provides the information "only" to the Trial Chamber, i.e., *ex parte*. It is obvious that an applicant (in another case) who seeks access to such material has to give substantial grounds for claiming access to it. We do not consider that an applicant who is asked to give such grounds is asked to go on a fishing expedition.

D. Whether special privacy interests have to be considered before or after determining that there is a legitimate forensic interest

11. A question which may be thought to arise is that indicated above. In our view, the need to protect special privacy interests is a factor to be considered in the process of determining whether there is a legitimate forensic interest; we do not appreciate how a forensic interest which is determined to be legitimate can, on any ground, be denied the right of access which accompanies legitimacy. Accordingly, we consider that the need to protect special privacy interests is a factor to be considered before and not after it is determined that there is a legitimate forensic interest.

12. We do not give further reasons because, in any case, if the balance of competing interests is to be made following on a finding that the applicant has established a legitimate forensic interest,

the evidential basis of the balance will be the same as in a case in which the balance is struck before that finding is made. Thus, if in one situation there is in fact a total lack of evidence on a point, the position will be the same in the other situation. It is hard to see how the position of the applicant is improved if the balance is to be struck after it is found that there is a legitimate forensic interest.

13. In this case, on the record there is a total absence of grounds of sufficient strength to override the grounds on which the material was admitted on an *ex parte* basis. That will be the position whether protection of any special privacy interests has to be considered before or after it is determined that any forensic interest is legitimate.

E. Conclusion

14. The special nature of *ex parte* material does not insulate it from disclosure if the applicant can demonstrate a legitimate forensic interest. This conforms to the right of an accused to a fair trial. But, in appreciating whether fairness exists, a balance of competing interests has to be applied. If, though the result of that balance is against the accused, the essentials of fairness are not satisfied, fairness has to prevail.

15. However, fairness is not implicated in every case in which it is found necessary to impose restraints on a party's quest for material. This is demonstrated by other areas concerning admissibility of material, as, for example, in the case of rape. Giving a reasonable interpretation to the right to a fair trial, we do not consider that that right confers licence to compel disclosure of *ex parte* material on what is really a purely speculative basis.

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

Mohamed Shahabuddeen

Wolfgang Schomburg

Dated 12 April 2005
At The Hague,
The Netherlands.