



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-95-11-A
Date: 22 February 2008
Original: English

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andréia Vaz
Judge Wolfgang Schomburg

Registrar: Mr. Hans Holthuis

Decision of: 22 February 2008

PROSECUTOR

v.

MILAN MARTIĆ

PUBLIC

**DECISION ON MOTION BY JOVICA STANIŠIĆ FOR ACCESS
TO CONFIDENTIAL TESTIMONY AND EXHIBITS IN THE
MARTIĆ CASE PURSUANT TO RULE 75(G)(i)**

The Office of the Prosecutor:

Ms. Michelle Jarvis
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Counsel for Milan Martić :

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Counsel for Jovica Stanišić:

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Counsel for Franko Simatović:

Mr. Zoran Jovanović

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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 “International Tribunal”, respectively) is seized of two appeals in this case. The Appeals Chamber is also currently seized of the “Defence for Stanišić’s Motion for Access to Confidential [*sic*] Testimony and Exhibits in the Martić Case Pursuant to Rule 75(G)(i)” (“Motion”), submitted by Jovica Stanišić (“Applicant”) on 14 January 2008. The Prosecution responded on 25 January 2008.¹ The Applicant did not file a reply. Milan Martić did not file a response to the Motion.

A. Submissions of the Parties

2. In the Motion, the Applicant seeks access to “all confidential materials (i.e. Prosecution and Defence witness transcripts and connected exhibits)” in *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, (“*Martić case*”) relevant to the charges brought against him in *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-PT, (“*Stanišić and Simatović case*”).² Save for some qualifications, the Prosecution does not oppose the disclosure of such confidential material.³

3. The Applicant submits that “based on a general analysis of the connections between the case against Mr. Martić and the case against the Applicant” there is a legitimate forensic purpose for the Applicant to obtain the material sought in the Motion.⁴ In particular, the Applicant states that it “is the Prosecution’s case that there was strong coordination between the leadership of Mr. Martić and that of Mr. Stanišić” and that “Mr. Martić and Mr. Stanišić have several overlapping counts in their indictment, including the events in the territory in the Serbian Autonomous District of Krajina (SAO Krajina) and the events in the later Republic of Serbian Krajina.”⁵ The Applicant compares the indictments in the *Martić* and *Stanišić and Simatović* cases⁶ and avers that “both Accused are to a large extent indicted with the involvement in the same crimes.”⁷ Finally, the Applicant claims

¹ The Appeals Chamber notes that the Motion was received by the Registry outside office hours on 14 January 2008 and was only filed and distributed on 15 January 2008. Accordingly, the time for the filing of the Prosecution Response began to run only as of this date. The Registry received the Prosecution Response outside office hours on 25 January 2008. It was thus filed on time. *See* Rule 126 of the Rules of Procedure and Evidence, Article 13 of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal (IT/155.Rev.3), 16 September 2005, and Article 25(3) of the Directive for the Court Management and Support Services Section, Judicial Services Section, Registry, (IT/121/Rev.1), 15 May 2007.

² Motion, para. 19.

³ Response, para. 15.

⁴ Motion, para. 8.

⁵ Motion, para. 9.

⁶ Motion, paras 10-14.

⁷ Motion, para. 14.

that the Trial Judgement in the *Martić* case “clarifies the Prosecution’s theory and the alleged close cooperation and coordination between Mr. Stanišić and Mr. Martić within this theory.”⁸

4. Having argued that there is a clear nexus between his case and the *Martić* case, the Applicant states that the requested material is likely to assist his case and that “[i]t is therefore that full access to all confidential materials from the case of Mr. Martić, including confidential transcripts of witness testimony and related exhibits both from Prosecution and Defence, is justified.”⁹ In the event the Appeals Chamber would require further specification of the materials for which access is sought, the Applicant lists an overview of material he believes is relevant for the charges brought against him.¹⁰ Finally, the Applicant “undertakes to comply with all protective orders issued by both the Trial and Appeals Chamber in relation to the requested material.”¹¹

5. The Prosecution responds that the Appeals Chamber should grant the Motion in part. It “agrees that there exists an overlap or nexus” between the *Stanišić and Simatović* and *Martić* cases.¹² It states that it interprets the Motion to request only confidential trial transcripts and under-seal exhibits in the *Martić* case but not filings or *inter partes* material and that, given the Applicant’s undertaking to comply with all orders for protective measures, it “does not oppose an order granting access to confidential trial transcripts and exhibits which incorporates certain safeguards for witness protection and which doesn’t contravene existing witness protection in *Stanišić and Simatović*.”¹³

6. In this context, the Prosecution submits that the private session transcripts of Witnesses MM-003 and MM-079 as well as related under-seal exhibits 242, 243, 247, 248, and 281, which would reveal the identity of the witnesses, should be withheld from the Applicant as these witnesses will also testify in the *Stanišić and Simatović* case where the Trial Chamber has granted protective measures, including delayed disclosure.¹⁴ Furthermore, the Prosecution requests the Appeals Chamber to order the Registry to withhold exhibit 787, as this exhibit is both under seal and a protected Rule 70 document. The Prosecution submits that on 25 January 2008, it requested authorization from the provider of this exhibit to disclose it to the Applicant and that it will report to the Appeals Chamber once a response is received.¹⁵

⁸ Motion, para. 15.

⁹ Motion, para. 16.

¹⁰ Motion, para. 17.

¹¹ Motion, para. 18.

¹² Response, para. 6.

¹³ Response, para. 12.

¹⁴ Response, paras 9, 10, 12.

¹⁵ Response, paras 7, 8, 12.

7. Finally, the Prosecution notes that the Applicant's co-Accused, Franko Simatović, has not joined the Motion but that "it would be inconsistent or necessitate revisiting this issue to grant access to only accused (Stanišić) as the moving party, and not the other co-accused (Simatović) in the same case." Consequently, the Prosecution submits that access should be granted to both the Applicant and his co-Accused.¹⁶

B. Discussion

8. The Appeals Chamber recalls that Rule 75(F)(i) of the Rules of Procedure and Evidence ("Rules") stipulates that "[o]nce protective measures have been ordered in respect of a victim or witness in any proceedings before the Tribunal (the 'first proceedings'), such protective measures: shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal (the 'second proceedings') unless and until they are rescinded, varied or augmented in accordance with the procedure set out in this Rule." Under Rule 75(G)(i) of the Rules "[a] party to the second proceedings seeking to rescind, vary or augment protective measures ordered in the first proceedings must apply: to any Chamber, however constituted, remaining seised of the first proceedings [...]. The Appeals Chamber finds that the Applicant, as one of the Accused in the *Stanišić and Simatović* case ("second proceedings") has properly filed his Motion before the Appeals Chamber as the Chamber seized of the *Martić* case ("first proceedings") under Rule 75 of the Rules.

9. It is an accepted principle of the International Tribunal 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."¹⁷ The Appeals Chamber has held that "[a]ccess to confidential material from another case may be granted wherever the Chamber is satisfied that the party seeking access has established that such material maybe of material assistance to his case."¹⁸ Furthermore, 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

¹⁶ Prosecution Response, para. 14.

¹⁷ See e.g. *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Decision on "Motion by Mićo Stanišić for Access to All Confidential Materials in the Krajišnik Case" ("Krajišnik Decision"), 21 February 2007, p. 4 with further references.

¹⁸ *Krajišnik Decision*, *supra* note 17, p. 4, quoting *Prosecutor v. Tihomir Blaškić*, Case No. 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. Blaškić* ("Blaškić Decision"), 16 May 2002, para. 14.

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.”¹⁹

10. The events alleged in the *Stanišić and Simatović* and *Martić* indictments²⁰ and the Applicant’s and Milan Martić’s alleged participation in the same joint criminal enterprise²¹ establish a nexus between their cases. Furthermore, the Appeals Chamber is satisfied that the Applicant has clearly identified the confidential material to which he seeks access, namely, witness transcripts and connected exhibits.²² Therefore, subject to appropriate protective measures, the Applicant has met the requirements for access to the requested confidential material from the *Martić* case.

11. The Appeals Chamber notes that Witnesses MM-003²³ and MM-079,²⁴ who both testified in the *Martić* case and in relation to whom protective measures were ordered by the *Martić* Trial Chamber, are also subject to protective orders in the *Stanišić and Simatović* case.²⁵ Accordingly, their private session transcripts as well as under-seal exhibits 242, 243, 247, 248, and 281, which reveal the witnesses’ identities, are to be withheld from the Applicant until thirty days before the start of the *Stanišić and Simatović* trial.²⁶ However, the Appeals Chamber notes that subsequent to the filing of the Motion and the Prosecution Response, the Pre-Trial Judge in the *Stanišić and Simatović* case ordered that the trial commence on 10 March 2008,²⁷ i.e. within less than thirty days after the date of this decision. Therefore, there is no reason for the Appeals Chamber to withhold access to any material related to Witnesses MM-003 and MM-079 as the Prosecution is required to disclose information pertaining to these witnesses according to the aforementioned general order of the *Stanišić and Simatović* Trial Chamber. Moreover, in the practical interests of judicial

¹⁹ *Krajišnik* Decision, *supra* note 17, p. 4, quoting *Blaškić* Decision, para. 15.

²⁰ See e.g. *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-PT, Revised Second Amended Indictment (*Stanišić and Simatović* Indictment), 15 May 2006, paras 24, 25, 26, 29 and *Prosecutor v. Milan Martić*, Case No. IT-95-11-PT, Amended Indictment (*Martić* Indictment), 9 December 2005, paras 23a, 26.

²¹ *Stanišić and Simatović* Indictment, *supra* note 20, paras 9, 12; *Martić* Indictment, *supra* note 20, paras 4, 6.

²² Motion, para. 19.

²³ Protective measures for this witness including delayed disclosure were granted in *Prosecutor v. Milan Martić*, Case No. IT-95-11-PT, Order on Prosecution’s Motion for Non-Disclosure of Materials Provided Pursuant to Rules 66(A)(II) and 68 and For Protective Measures for Witnesses During the Pre-Trial Phase, 18 December 2003.

²⁴ Protective measures for this witness including delayed disclosure were granted in *Prosecutor v. Milan Martić*, Case No. IT-95-11-PT, Decision on Prosecution’s Motion to Amend Its Rule 65 *ter* Witness List, 9 December 2005.

²⁵ Protective measures including delayed disclosure were granted for these witnesses in *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-PT, Decision on Confidential Prosecution Motions for Protective Measures, 26 October 2004.

²⁶ See *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-PT, Decision on Confidential Prosecution Motions for Protective Measures, 26 October 2004, pp. 5-6.

²⁷ *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-PT, Scheduling Order, 11 February 2008.

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consistency and economy, the Appeals Chamber invites the parties to address any further motions in this regard to the *Stanišić and Simatović* Trial Chamber directly.²⁸

12. Furthermore, the Appeals Chamber recalls “that material provided under Rule 70 shall not be released to the Accused in another case unless the provider consents to such disclosure.”²⁹ In the instant case the issue of consent relates to exhibit 787 only, and the Prosecution has already requested the provider of this exhibit to authorize its disclosure to the Applicant. Consequently, access to exhibit 787 is withheld from the Applicant. However, the Prosecution shall report to the Appeals Chamber upon receiving the response of the provider of the exhibit to the Prosecution’s request to disclose it.

13. Finally, the Appeals Chamber agrees with the Prosecution that even though the Applicant’s co-Accused has not joined the Motion, it serves the interests of judicial economy and expediency to grant the same access to Franko Simatović as is provided to the Applicant. The Appeals Chamber notes that its reasoning on the substantial overlap of the cases applies to both co-Accused in the *Stanišić and Simatović* case. Furthermore, Franko Simatović is alleged to have been part of the same joint criminal enterprise together with the Applicant and Milan Martić.³⁰ In light of this, access to confidential witness transcripts and related exhibits in the *Martić* case with the limitations described above is granted to the Applicant and, *proprio motu*, to Franko Simatović.

C. Disposition

For the foregoing reasons, the Appeals Chamber

- 1) **GRANTS** the Motion **IN PART** and allows access, subject to the conditions set forth below, to the Applicant and, *proprio motu*, his co-Accused Franko Simatović to all confidential transcripts and under-seal exhibits in the *Martić* case except exhibit 787;
- 2) **ORDERS** the Prosecution to report to the Appeals Chamber upon receiving a response from the provider of exhibit 787 to its request to disclose it to the Applicant and his co-Accused Simatović;
- 3) **ORDERS** that the Applicant, his co-Accused Franko Simatović, their respective Counsel and any employees who have been instructed or authorized by Counsel to have access to the confidential material described above shall not, without express leave of the Appeals Chamber

²⁸ See *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Order Regarding Rule 75 Motion by Mićo Stanišić, 22 August 2007, p. 1.

²⁹ *Krajišnik* Decision, *supra* note 17, p. 5, quoting *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-R, Decision on “Defence Motion on Behalf of Rasim Delić Seeking Access to All Confidential Material in the *Blaškić* Case, 1 June 2006, p. 8.

³⁰ See *supra* note 21.

finding that it has been sufficiently demonstrated that third party disclosure is absolutely necessary for the preparation of the defence of the Applicant:

- (a) 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;
- (b) 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
- (c) contact any witness whose identity was subject to protective measures.

If, for the purposes of preparing the defence of the Applicant or his co-Accused Franko Simatović, non-public material is disclosed to third parties – pursuant to authorization by the Appeals Chamber – 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 publicize, 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, his co-Accused Franko Simatović, their respective Counsel or any authorized employees of Counsel as soon as it is no longer needed for the preparation of his defence.


For the purposes of sub-paragraph 2, third parties exclude: (i) the Applicant and his co-Accused Franko Simatović; (ii) their Counsel; (iii) any employees who have been instructed or authorized by Counsel to have access to confidential material; and (iv) personnel from the International Tribunal, including members of the Prosecution.

If Counsel for the Applicant or his co-Accused Franko Simatović or any members of their Defence team who are authorized to have access to the above-described confidential material from the *Martić* case should withdraw from the *Stanišić and Simatović* case, any confidential material to which access is granted in this Decision that is in their possession shall be returned to the Registry of the International Tribunal;

4) **DISMISSES** the Motion in all other respects.

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

Dated this 22nd day of February 2008,
At The Hague, The Netherlands.


Fausto Pocar
Presiding Judge

[Seal of the International Tribunal]