

4-03-69-T
D 17678 - D 17670
17 July 2009

17678
9B.



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: 16 July 2009
Original: English

IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 16 July 2009

PROSECUTOR

v.

JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ

PUBLIC

**DECISION ON MOTION BY RADOVAN KARADŽIĆ FOR ACCESS
TO CONFIDENTIAL MATERIALS IN THE STANIŠIĆ AND SIMATOVIĆ CASE**

Prosecutor v. Stanišić and Simatović

Prosecutor v. Karadžić

Office of the Prosecutor

Mr Dermot Groome
Ms Doris Brehmeier-Metz

Office of the Prosecutor

Mr Alan Tieger
Ms Hildegard Uertz-Retzlaff

Counsel for Mr Stanišić

Mr Geert-Jan Knoops
Mr Wayne Jordash

The Accused

Mr Radovan Karadžić

Counsel for Mr Simatović

Mr Zoran Jovanović
Mr Vladimir Domazet

I. PROCEDURAL HISTORY AND SUBMISSIONS

1. On 14 April 2009, Mr Radovan Karadžić (“the Applicant”) requested access to the following confidential and *inter partes* material from the *Stanišić and Simatović* case: (i) all closed and private session testimony transcripts; (ii) all closed session hearing transcripts; (iii) all confidential exhibits; and (iv) all confidential *inter partes* filings, submissions, and Chamber decisions in the present case.¹ On 28 April 2009, the Prosecution responded, requesting that the Motion be denied.²

2. The Applicant claims that the confidential information sought could be important for the effective investigation and preparation of his defence, and would materially assist his case.³ He argues that there is a significant geographical overlap between his case and the *Stanišić and Simatović* case, since the *Karadžić* Indictment and the *Stanišić and Simatović* Indictment both involve crimes alleged to have occurred in Doboj, Sanski Most, Trnovo, Zvornik, and Srebrenica.⁴ He submits that there is also a temporal overlap between the two cases, specifying that he faces charges covering the period from 1991 to November 1995⁵, while *Stanišić and Simatović* are charged with crimes that allegedly took place at Doboj in May 1992, at Trnovo in June and July 1995, and at Srebrenica in July 1995.⁶ The Applicant further argues that he should be granted access to the requested materials on the basis of the principle of equality of arms.⁷

3. The Applicant assures the Chamber that he would respect all protective measures placed on him by the operation of Rule 75 of the Tribunal’s Rules of Procedure and Evidence (“Rules”), should the Chamber grant the Motion.⁸ Finally, the Applicant clarifies that he seeks disclosure of the requested material on a continuous basis, as the *Stanišić and Simatović* case is ongoing.⁹

¹ Motion by Radovan Karadžić for Access to Confidential Materials in the *Stanišić and Simatović* case, 14 April 2009 (“Motion”), paras 1, 13. In this Decision, unless otherwise indicated, the Chamber will refer to the material sought as “confidential”, rather than “*inter partes* and confidential”.

² Prosecution Response to Motion by Radovan Karadžić for Access to Confidential Materials in the *Stanišić and Simatović* case, 28 April 2009 (“Response”), paras 1-3, 8-16.

³ Motion, paras 6, 10-11, 13.

⁴ Motion, paras 6-7.

⁵ The Motion makes an incorrect reference to “2005” in para. 8, *cf.* Third Amended Indictment against *Karadžić and Mladić* (IT-95-5/18), 27 February 2009, para. 6.

⁶ Motion, paras 6, 8.

⁷ Motion, paras 6, 11.

⁸ Motion, para. 5.

⁹ Motion, para. 14.

4. The Prosecution concurs with the Applicant that the *Stanišić and Simatović* case and that of the Applicant overlap both temporally and geographically.¹⁰ However, the Prosecution submits that access should not be granted to the Applicant insofar as it relates to “non-evidentiary materials”, namely categories (ii) and (iv) mentioned above.¹¹ Furthermore, the Prosecution opposed the Motion, submitting that it was premature, since no evidentiary materials had been entered into the record at the time of the Motion.¹²

5. The Prosecution objects to the Applicant’s immediate access to material subject to Rule 70 of the Rules, for which the consent of the provider is necessary.¹³ It will, however, seek consent of the Rule 70 providers to facilitate the Applicant’s subsequent access.¹⁴

6. The Prosecution also requests that it be allowed to withhold material from the Applicant that may relate to protected witnesses in the *Stanišić and Simatović* case, who may be called in the *Karadžić* case and for whom delayed disclosure may be justified.¹⁵ The Prosecution submits that decisions from the *Karadžić* Trial Chamber would govern the timing of disclosure related to witnesses in the *Karadžić* case who also appear on the witness list in the *Stanišić and Simatović* case.¹⁶ It further submits that if the Prosecution subsequently decides not to call one or more protected witnesses from this case in the *Karadžić* case, it will notify the Registry to allow access to the relevant materials in this case.¹⁷

II. APPLICABLE LAW

7. When requesting access to confidential *inter partes* material, the applicant must identify or describe the material he or she seeks by its general nature and show a legitimate forensic purpose for gaining access to it.¹⁸ Such purpose may be established by showing the existence of a geographical and temporal nexus between the applicant’s case and the case

¹⁰ Response, paras 2, 8.

¹¹ Response, paras 3, 15.

¹² Response, paras 2, 8.

¹³ Response, para. 11.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Response, footnote 29.

¹⁷ Ibid.

¹⁸ *Prosecutor v. Mrkšić et al.*, Appeals Chamber, Decision on Veselin Šljivančanin’s Motion Seeking Access to Confidential Material in the *Kordić and Čerkez* Case, 22 April 2008 (“*Mrkšić* Decision”), para. 7; *Prosecutor v. Krajišnik*, Appeals Chamber, Decision on “Motion by Mićo Stanišić for Access to All Confidential Materials in the Krajišnik Case” (“*Krajišnik* Decision”), 21 February 2007, p. 4.

from which the material is sought.¹⁹ Furthermore, the Chamber must be satisfied that there is a good chance that access to the material would materially assist the applicant in his or her case.²⁰

8. As for material that has been provided pursuant to Rule 70 of the Rules, the Prosecutor must obtain the consent of the provider before the material or its source can be disclosed to another accused before the Tribunal.²¹ This is the case even where the Rule 70 provider has consented to the disclosure of the material in one or more prior cases.²²

9. Pursuant to Rule 75 (F) (i) of the Rules, protective measures that have been ordered for a witness or victim in any proceedings before the Tribunal shall continue to have effect *mutatis mutandis* in any other proceedings, unless and until they are rescinded, varied, or augmented.

III. DISCUSSION

10. The Chamber is satisfied that the Applicant identified the material sought with sufficient specificity. The Chamber finds that there is a geographical and temporal nexus between the two cases as regards crimes alleged to have been committed in Bosnia and Herzegovina (“BiH”). While the Accused in this case are charged with crimes alleged to have occurred in Croatia and BiH, the *Karadžić* Indictment is geographically limited in scope to BiH.²³ Therefore, the Chamber considers that the Applicant failed to show a geographical overlap between his case and the *Stanišić and Simatović* case as far as the latter is concerned with events in Croatia.

11. The Prosecution pointed out that a legitimate forensic purpose had not been established, submitting that without any evidence tendered by the time the Motion was filed, the access to the confidential material in this case would not materially assist the Applicant in the preparation of his own case. However, the Chamber considers that the Applicant seeks access to confidential material on an ongoing basis, and that the presentation of evidence has recently commenced in this case. Accordingly, the Chamber finds that the Applicant has

¹⁹ *Mrkšić* Decision, para. 7; *Krajišnik* Decision, pp. 4-5.

²⁰ *Mrkšić* Decision, para. 7; *Krajišnik* Decision, p. 4.

²¹ *Krajišnik* Decision, pp. 5-6.

²² *Krajišnik* Decision, p. 6.

shown a legitimate forensic purpose for being granted access to categories (i) and (iii) as described above, namely all closed and private session testimony transcripts, as well as all confidential exhibits, as long as they do not relate to crimes that allegedly took place in Croatia.

12. As regards categories (ii) and (iv), the Chamber finds that the Applicant will be able to better understand and make use of confidential exhibits and transcripts of testimony in the *Stanišić and Simatović* case if he has access to the filings, submissions, decisions, and hearing transcripts related to such material. In this respect, the Chamber recalls that the applicable standard is that there be a “good chance” that the confidential materials will materially assist the case of the party seeking access and that it does not require an accused seeking access to confidential materials “to establish a specific reason that each individual item is likely to be useful”.²⁴ The principle of equality of arms also supports giving the Applicant a similar possibility to understand the proceedings and evidence, and evaluate their relevance to his own case, in common with the Prosecution, which has access to all *inter partes* filings.²⁵ Accordingly, as stated by the Appeals Chamber, once an applicant has been granted access to confidential exhibits and confidential closed and private session testimony transcripts of another case before the Tribunal, he or she should not be prevented from accessing filings, submissions, decisions, and hearing transcripts which may relate to such confidential material.²⁶

13. As is the practice of the Tribunal, the Prosecution and the Accused in this case will have the opportunity to request the Chamber to grant any additional protective measures or redactions²⁷, or withhold certain specifically identified material²⁸ showing that there is no basis to establish even a “good chance” that the specified material would materially assist the case of the Applicant, should they deem it necessary.

²³ See Third Amended Indictment against *Karadžić and Mladić* (IT-95-5/18), 27 February 2009.

²⁴ *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Appeals Chamber, Decision on Motion by Radivoje Miletić for Access to Confidential Information, 9 September 2005 (“*Miletić Decision*”), p. 4.

²⁵ *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Appeals Chamber, Decision on Motions for Access to Confidential Materials, 16 November 2005 (“*Nikolić and Gvero Decision*”), para. 11.

²⁶ *Prosecutor v. Dragomir Milošević*, Appeals Chamber, Decision on Radovan Karadžić’s Motion for Access to Confidential Materials in the *Dragomir Milošević* Case, 19 May 2009, para. 11.

²⁷ *Prosecutor v. Dragomir Milošević*, Appeals Chamber, Decision on Momčilo Perišić’s Request for Access to Confidential Material in the *Dragomir Milošević* Case, 27 April 2009, paras 15, 19; *Nikolić and Gvero Decision*, paras 16, 19(c).

²⁸ *Prosecutor v. Momčilo Perišić*, Trial Chamber, Decision on Motion by Radovan Karadžić for Access to Confidential Material in the Perišić Case, 26 May 2009, para. 20.

14. The Chamber agrees with the Prosecution's approach with respect to witnesses for whom delayed disclosure may be justified in the *Karadžić* case. Mindful of any order for delayed disclosure pursuant to Rule 69 of the Rules issued in the *Karadžić* case, and any pending or future application under that rule, the Chamber allows the Prosecution to withhold the relevant material until the Trial Chamber seized of the *Karadžić* case has decided on the matter.

15. Finally, the Chamber holds that no confidential material 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. Consequently, the Prosecution and Defence in the *Stanišić and Simatović* case shall approach the providers of such material with a view to obtaining their consent.

IV. DISPOSITION

16. For the foregoing reasons and pursuant to Rules 54, 70, and 75 of the Rules, the Chamber

GRANTS the Motion in part;

DENIES the Motion to the extent that it relates to alleged crimes that took place in Croatia (hereinafter, "material" does not refer to crimes which allegedly took place in Croatia);

ORDERS the Prosecution and the Defence, on an ongoing basis, to identify to the Registry the following confidential material in the case of *Prosecutor v. Stanišić and Simatović* which is not subject to Rule 70, or any delayed disclosure ordered by the *Karadžić* Trial Chamber pursuant to Rule 69 of the Rules, for disclosure to the Applicant:

- (i) all closed and private session transcripts;
- (ii) all confidential exhibits;
- (iii) all confidential filings and submissions (including all confidential Chamber decisions);

ORDERS the Prosecution and the Defence to determine without undue delay which of the requested material is subject to the provisions of Rule 70 of the Rules, and 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;

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, all of his legal associates and any employees who have been instructed or authorised by the Applicant and his legal associates the following material:
 - (a) the confidential, non-Rule 70 material once it has been identified by the Prosecution and Defence in accordance with this decision; and
 - (b) the Rule 70 material once the Prosecution and Defence have identified such material upon receiving consent from the Rule 70 providers;
- (ii) to withhold from disclosure to the Applicant, all of his legal associates and any employees who have been instructed or authorised by the Applicant and his legal associates 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 the Applicant's case, file a motion to the Chamber seeking such disclosure. For the purpose of this decision, "the public" means and includes all persons, governments, organisations, entities, clients, associations, and groups, other than the Judges of the Tribunal, the staff of the Registry, the Prosecutor and his representatives, and the Applicant, his legal associates and any employees who have been instructed or authorised by the Applicant and his legal associates to have access to the 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; the media; and journalists;

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 legal associates as soon as the information is no longer needed for the preparation of his defence;

ORDERS that the Applicant, his legal associates and any employees who have been instructed or authorised by the Applicant and his legal associates 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 them to be identified and would breach the confidentiality of the protective measures already in place;
- (ii) disclose to any members of the public any documentary evidence or other evidence, or any written statement of a witness or the contents, in whole or in part, of any confidential evidence, statement of prior testimony; or
- (iii) contact any witness whose identity was subject to protective measures;


ORDERS that any persons for whom disclosure of the confidential material from this case is granted by a separate decision shall return to the Applicant or his legal associates 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 the Applicant, his legal associates and any employees who have been instructed or authorised by the Applicant and his legal associates 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; and

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

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



Judge Alphons Orié
Presiding Judge

Dated this sixteenth day of July 2009
At The Hague
The Netherlands

[Seal of the Tribunal]