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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 IT-08-91-T
		Date:	10 March 2011
		Original:	English

IN TRIAL CHAMBER I

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

Registrar: **Mr John Hocking**

Decision of: **10 March 2011**

PROSECUTOR

v.

JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ

PUBLIC

DECISION ON MOTIONS OF MIĆO STANIŠIĆ AND STOJAN ŽUPLJANIN FOR ACCESS TO ALL CONFIDENTIAL MATERIALS IN THE STANIŠIĆ AND SIMATOVIĆ CASE

Prosecutor v. Stanišić & Simatović

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I. PROCEDURAL HISTORY AND SUBMISSIONS

1. On 10 March 2010, Mićo Stanišić ("Applicant Stanišić") requested access to the following confidential materials from the *Stanišić and Simatović* case: (i) all documents collected from investigations carried out by the Prosecution in preparation of its case; (ii) confidential transcripts of all closed and private session from the trial; (iii) all confidential filings made during the trial; and (iv) all confidential exhibits from the trial relating to the Indictment.[1] On 19 March 2010, Stojan Župljanin ("Applicant Župljanin") applied to join Applicant Stanišić's motion for access.[2] On 24 March 2010, the Prosecution partly opposed the Stanišić Motion,[3] and on 6 April 2010, it partly opposed the Župljanin Motion.[4] On 19 April 2010, the Prosecution identified categories of confidential filings for which it believed there can be no expectation that Applicant Stanišić and Applicant Župljanin (together, "Applicants") could have a legitimate forensic purpose for obtaining access.[5] On 7 May 2010, the Chamber, through an informal communication, invited Applicants to file replies to the Responses to the Motions and the Addendum. On 18 May 2010, Applicant Stanišić filed its reply.[6] Applicant Župljanin did not file his reply. On 9 February 2011, the "Request by Mićo Stanišić for the Trial Chamber to Decide on the Motion by Mićo Stanišić for Access to All Confidential Materials in the Stanišić and Simatović Case" was filed, wherein Applicant Stanišić urged the Chamber to decide on the matter. On 21 February 2011, Applicant Župljanin filed the "Request by Stojan Župljanin for the Trial Chamber to Decide on the Motion by Stojan Župljanin Joining Mićo Stanišić's Motion For Access To All Confidential Materials in The Stanišić & Simatović case Case".

2. Applicant Stanišić submits that access to the confidential material sought is "essential to the preparation of [. . .] [his] defence".[7] He contends that the events and facts alleged in the Indictment against him are "closely related" to those in the *Stanišić and Simatović* case.[8] Specifically, Applicant Stanišić asserts that there is significant geographic and temporal overlap between the two

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1 Motion by Mićo Stanišić for Access to All Confidential Materials in the *Stanišić & Simatović* Case, 10 March 2010 ("Stanišić Motion"), paras 3, 14.

2 Motion on Behalf of Stojan Župljanin Joining Mićo Stanišić's Motion for Access to All Confidential Materials in the *Stanišić & Simatović* Case, 19 March 2010 ("Župljanin Motion"), paras 1-3.

3 Prosecution Response to Motion by Mićo Stanišić for Access to All Confidential Materials in the *Stanišić & Simatović* Case, 24 March 2010 ("Response to the Stanišić Motion"), para. 50.

4 Prosecution Response to Stojan Župljanin Motion for Access to All Confidential Materials in the *Stanišić & Simatović* Case, 6 April 2010 ("Response to the Župljanin Motion"), para. 12.

5 Addendum to Prosecution Response to Access Motions by Mićo Stanišić and Stojan Župljanin, 19 April 2010 ("Addendum"), paras 5-6.

6 Reply by Mićo Stanišić to the Prosecution's Response and Addendum to Motion by Mićo Stanišić for Access to All Confidential Material in the Stanišić and Simatović case, 18 May 2010 ("Reply").

7 Stanišić Motion, para. 12.

8 Stanišić Motion, para. 4.

cases.[9] He highlights that the indictments in both cases allege crimes in the Bijeljina, Bosanski Šamac, Doboj, Sanski Most, and Zvornik municipalities.[10] Furthermore, Applicant Stanišić notes that the allegations in both indictments cover the common time period of 1 April 1991 to 20 December 1992.[11] He also asserts that both indictments allege the existence of a joint criminal enterprise ("JCE") with the objective of permanently removing Bosnian Muslims and Bosnian Croats from large areas of Bosnia-Herzegovina.[12]

3. Applicant Stanišić vows to respect all protective measures currently applicable in the *Stanišić and Simatović* case as well as those that the Chamber orders in the future.[13]

4. Applicant Župljanin requests access to all confidential materials in the *Stanišić and Simatović* case and adopts all arguments set forth in the Stanišić Motion.[14] He contends that there is a "good chance" that the confidential material sought will assist in his defence because there is considerable subject matter and temporal overlap among the indictments in both cases.[15] Specifically, Applicant Župljanin asserts that the alleged crimes, alleged JCE members, and time periods are highly similar in both indictments.[16] However, he concedes that there is little geographical overlap, as only the Sanski Most municipality is common to both indictments.[17]

5. At the outset of its Response to the Stanišić Motion, the Prosecution requests leave to exceed the word limit in order to fully explain its arguments to the Chamber.[18]

6. In its Response to the Stanišić Motion, the Prosecution requests that the Chamber alter its current approach to assessing access motions filed pursuant to Rule 75(G)(i) of the Rules of Procedure and Evidence of the Tribunal (respectively, "access regime" and "Rules").[19]

7. The Prosecution argues that the jurisprudence governing this issue has created a new form of disclosure under Rule 75(G)(i) that runs contrary to the plain reading and underlying intention of the Rules. It submits that the Rules provide for the disclosure of all evidence necessary to ensure a fair trial, and thus in the present circumstances there is no need for access requests.[20] According to

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9 Stanišić Motion, paras 7-8, 12.
10 Stanišić Motion, para. 8.
11 Stanišić Motion, paras 7-8.
12 Stanišić Motion, para. 10.
13 Stanišić Motion, para. 14.
14 Župljanin Motion, paras 3, 6.
15 Župljanin Motion, para. 4.
16 Ibid.
17 Ibid.
18 Response to the Stanišić Motion, para. 3.
19 Ibid.
20 Response to the Stanišić Motion, paras 8-9.

the Prosecution, Rule 75 "does not create an additional legal basis for disclosure".[21] Rather, the Prosecution maintains that the Rule, and specifically provisions (F) and (G), merely sets out the mechanisms for disclosing material subject to protective measures to a party who cannot access it through the disclosure regime embodied in Rules 66 and 68.[22] According to the Prosecution, successive Chambers have impermissibly allowed applicants to engage in "fishing expeditions" by granting them access to all confidential materials in a case based upon a shared geographical and temporal nexus, without requiring them to specify the material they actually need.[23]

8. Specifically, the Prosecution stresses that through access motions, accused persons routinely request materials that have already been disclosed pursuant to Rules 66 and 68.[24] Accordingly, it argues that the proper method for Applicant Stanišić to seek additional material that he feels would materially assist in his defence is via Rule 66(B), rather than through the access regime.[25] The Prosecution notes that both Applicants have already made Rule 66(B) requests to which it has responded.[26] However, the Prosecution concedes in its Addendum that confidential defence exhibits and confidential defence witness transcripts and statements would most likely not be included in a Prosecution response to a request pursuant to Rule 66(B).[27] The Prosecution contends that if the Applicants suspect the Prosecution's disclosure to be incomplete, they should seek a remedy through their own Trial Chamber, which is responsible for managing and ensuring the fairness of their trial.[28]

9. The Prosecution further submits that Applicant Stanišić's access request is too broad because it covers categories that do not have forensic value for him.[29] In this vein, the Prosecution asserts that access to the closed and private session transcripts and confidential filings and exhibits relating to alleged crimes in Croatia as well as those concerning Jovica Stanišić's health would not serve a legitimate forensic purpose for Applicant Stanišić.[30] In its Addendum, the Prosecution adds that confidential filings related to the following subject matter categories do not have forensic value for Applicant Stanišić or Applicant Župljanin: remuneration, provisional release, fitness to stand trial, weekly reports of the Reporting Medical Officer, Registry submissions of expert report (as these also relate to the health of the Accused), notices of non-attendance in court, modalities of trial,

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21 Response to the Stanišić Motion, para. 15.
22 Ibid.
23 Response to the Stanišić Motion, paras 34-35.
24 Response to the Stanišić Motion, paras 12-13.
25 Response to the Stanišić Motion, paras 16, 37.
26 Response to the Stanišić Motion, fn. 9.
27 Addendum, para. 10.
28 Response to the Stanišić Motion, paras 21-22.
29 Response to the Stanišić Motion, paras 28-30, 38.
30 Response to the Stanišić Motion paras 29-30, 39-40.

protective measures, subpoenas, video-conference links, and orders to redact the public transcript and the public broadcast of a hearing.[31]

10. The Prosecution notes that Rule 70(A) protects its internal work product, which is not subject to Rule 68 disclosure.[32] Therefore, it submits that Applicant Stanišić should not be permitted access to Prosecution work product, such as investigation plans and administrative paperwork related to investigations, should the Chamber choose to grant his request for materials collected in the course of investigations for the *Stanišić and Simatović* case.[33]

11. The Prosecution argues that the protective measures regime is compromised by the disclosure of all private and closed session testimony from one case to the accused in another case.[34]

12. Finally, the Prosecution purports that it will be subject to an onerous burden if it must review and disclose the extensive materials that Applicant Stanišić has requested.[35] Furthermore, the Prosecution argues that granting the requested access will cause a delay in the *Stanišić and Župljanin* trial, as Applicant Stanišić will likely successfully argue he requires additional time to review the materials from the *Stanišić and Simatović* case.[36]

13. In its Response to the Župljanin Motion, the Prosecution incorporates by reference the submissions contained in its Response to the Stanišić Motion.[37] It reiterates that access requests should only be permitted for materials not subject to the disclosure regime embodied in Rules 66 through 68.[38] Accordingly, the Prosecution contends that Applicant Župljanin should review the publicly available material related to Sanski Most, which is the only crime base that his case and the *Stanišić and Simatović* case have in common, as well as the material disclosed pursuant to Rules 66 and 68 and that on the Electronic Disclosure System ("EDS").[39] The Prosecution asserts that if Applicant Župljanin still feels that he needs additional material following this review, he should make specific requests to the Prosecution pursuant to Rule 66(B).[40]

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31 Addendum, para. 6.
32 Response to Stanišić Motion, para. 26.
33 Ibid.
34 Response to the Stanišić Motion, para. 31.
35 Response to the Stanišić Motion, paras 18, 36.
36 Response to the Stanišić Motion, para. 18, fn. 12.
37 Response to the Župljanin Motion, para. 4.
38 Ibid.
39 Response to the Župljanin Motion, para. 11.
40 Ibid.

14. In his Reply, Applicant Stanišić limits himself to asserting that he has satisfied the test for access to confidential materials as set out by the law of the Tribunal.[41] He also concedes that several categories of confidential filings enumerated by the Prosecution in the Addendum indeed do not have any forensic value for him.[42]

II. APPLICABLE LAW

15. The case law of the Tribunal accepts 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".[43] The identification requirement, as found in the case law of the Tribunal, is not particularly onerous and Defence requests for "all confidential material" are generally considered sufficiently specific to meet this standard.[44] A legitimate forensic purpose may be established by showing the existence of a geographical and/or temporal nexus between the applicant's case and the case from which the material is sought.[45] 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.[46] However, the "good chance" standard does not require an accused seeking access to confidential materials "to establish a specific reason that each individual item is likely to be useful".[47]

16. Requests for access to *ex parte* confidential material in another case must meet specific criteria developed in the Tribunal's case law. The Appeals Chamber has held that "*ex parte* material, being of a higher degree of confidentiality, by nature contains information which has not been disclosed *inter partes* because of security interests of a State, other public interests, or privacy interests of a person or institution" and that "consequently, 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

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41 Reply, para. 2.

42 Reply, para. 3.

43 *Prosecutor v. Milan Martić*, Case No. IT-95-11-A, Decision on Motion by Jovica Stanišić for Access to Confidential Testimony and Exhibits in the Martić case Pursuant to Rule 75(G)(i), 22 February 2008, para. 9.

44 *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Decision on Motion by Stanišić for Access to All Confidential Materials in the *Brđanin* case, 24 January 2007 ("*Brđanin* Decision"), para. 11, as referred to by *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on Momčilo Perišić's Motion for Access to Confidential Materials in the *Radovan Karadžić* Case, 14 October 2008 ("*Karadžić* Decision"), para. 18, with further references.

45 *Prosecutor v. Mile Mrkšić et al.*, Case No. IT-95-13/1-A, 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. Momčilo Krajišnik*, Case No. IT-00-30-A, Decision on Motion of Mićo Stanišić for Access to All Confidential Materials in the Krajišnik case, 21 February 2007 ("*Krajišnik* Decision"), pp. 4-5.

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

47 *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Decision on Motion by Radivoje Miletić for Access to Confidential Information, 9 September 2005, p. 4.

disclosed".[48] It follows that an applicant must meet a higher standard when proving a legitimate forensic purpose in order to justify such disclosure.[49]

17. 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.[50] This is the case even when the Rule 70 provider has consented to the disclosure of the material in one or more prior cases.[51]

18. Once an applicant has been granted access to confidential exhibits and confidential closed and private session testimony transcripts from 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.[52]

19. The Chamber recalls that the Appeals Chamber has held that, in relation to Defence requests for disclosure of evidence pursuant to Rules 66 and 68, the Defence carries the burden of proof and is required to cumulatively (i) prove that the document requested is in the Prosecution's custody or control, (ii) set forth a *prima facie* case for its relevance to the presentation of the Defence case, and (iii) specifically identify the requested documents.[53]

20. An obligation for the Prosecution under Rule 66(B) arises only with respect to sufficiently specific Defence requests.[54] The Defence may not rely on a mere general description of the requested information but is required to define the parameters of its inspection request with sufficient detail.[55] Suitable parameters for such specification may be an indication of a specific event or group of witnesses on which the request focuses, a time period and/or geographic location to which the material refers, or any other features defining the requested items with sufficient

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48 *Krajišnik* Decision, p. 5.

49 See *Brđanin* Decision, para. 14. See also *Karadžić* Decision, para. 12.

50 *Krajišnik* Decision, pp. 5-6.

51 *Krajišnik* Decision, p. 6.

52 *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Decision on Radovan Karadžić's Motion for Access to Confidential Materials in the *Dragomir Milošević* Case, 19 May 2009, para. 11.

53 *Prosecutor v. Édouard Karamera et al.,* Case No. ICTR-98-44-AR73.18, Decision on Joseph Nzirorera's Appeal from Decision on Alleged Rule 66 Violation, 17 May 2010 ("*Karamera* Decision"), paras 12-13 and 32 citing *Prosecutor v. Karamera et al.,* Case No. ICTR-98-44-AR73.11, Decision on Prosecution's Interlocutory Appeal Concerning Disclosure Obligations, 23 January 2008, para. 12; *Jean de Dieu Kamuhanda v. Prosecutor*, Case No. ICTR-98-54A-R68, Decision on Motion for Disclosure, 4 March 2010, para. 14; *Prosecutor v. Théoneste Bagosora et al.*, Case No. ICTR-98-41-AR73, Decision on Interlocutory Appeal Relating to Disclosure Under Rule 66 (B) of the Tribunal's Rules of Procedure and Evidence, 25 September 2006, ("*Bagosora* Decision"), paras 10-11; *Prosecutor v. Ljube Boškoski & Johan Tarčulovski*, Case No. IT-04-82-T, Decision on Boškoski Defence Urgent Motion for an Order to Disclose Material pursuant to Rule 66(B), 31 January 2008 ("*Boškoski* Decision"), para. 7; see also *Ferdinand Nahiman et al. v. Prosecutor*, Case No. ICTR-99-52-A, Decision on Prosecution's Motion for Leave to Call Rebuttal Material, 13 December 2006.

54 See *Bagosora* Decision, para. 10; *Boškoski* Decision, para. 9.

precision.[56] A request may also refer to a category of documents[57] defined by criteria which apply to a distinct group of individuals.[58] The scope of what constitutes a "discrete group of individuals" for the purpose of an inspection request, as well as the determination whether the required level of specificity has been met, is to be considered in light of the specific framework of the case.[59]

21. The material requested pursuant to Rule 66 must (1) be relevant or possibly relevant to an issue in the case; (2) raise or possibly raise a new issue the existence of which is not apparent from the evidence the Prosecution proposes to use; (3) hold out a real, as opposed to fanciful, prospect of providing a lead on evidence which goes to (1) or (2).[60] The materiality of the evidence sought to be inspected may be determined by assessing whether it is necessary for the preparation of the cross-examination of a witness or by reference to the indictment.[61]

III. DISCUSSION

22. The Chamber acknowledges the complexity of the Prosecution's arguments and understands the need to exceed the word limit in its Response to the Stanišić Motion.

A. Access to the Prosecution's Internal Work Product

23. With respect to the Prosecution's concern over the Applicants' access to its internal work product pursuant to the requests for "all documents collected from investigations carried out by the Prosecution in preparation of their case," the Chamber finds that disclosure of such material is excluded pursuant to Rule 70(A) of the Rules.

B. Reassessment of the Applicability of the Access Regime

24. The Prosecution requests the Chamber to reassess its current approach towards the access regime by limiting the regime's applicability to material that is otherwise non-disclosable pursuant to Rules 66 and 68 of the Rules. Moreover, with regard to the access regime in relation to such material, the Prosecution seeks adoption of a higher standard of specificity that requires the Applicants to identify the material to which they seek access.

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55 *Karamera* Decision, para. 32; *Boškoski* Decision, para. 9.
56 See *Bagosora* Decision, para. 10.
57 Ibid.
58 *Karamera* Decision, para. 32.
59 Ibid.
60 *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Decision on Motion by the Accused Zejnil Delalić for the Disclosure of Evidence, 26 September 1996, paras 6-8.
61 *Prosecutor v. Karamera et al.,* Case No. ICTR-98-44-T, Decision on Defence Motions for Disclosure of Information Obtained from Juvénal Uwilingiyimana, 27 April 2006, para. 15.

1. System of Disclosure vis-à-vis the Applicants

25. The Chamber recalls that the access regime applied by the current jurisprudence to confidential *inter partes* material, as stated in the Applicable Law section above, covers the following categories of material:

1) Non-exculpatory statements placed under seal and non-exculpatory transcripts of private/closed sessions of testimonies of Prosecution witnesses being common to the case of the applicant and that from which the material is sought ("original proceedings");

2) Exculpatory confidential material including exhibits (coming from both the Prosecution as well as the Defence in the original proceedings);

3) Non-exculpatory statements placed under seal and non-exculpatory transcripts of private/closed sessions of testimonies of Prosecution witnesses not being common to the case of the applicant and that of the accused in the original proceedings;

4) Confidential non-exculpatory Prosecution exhibits in the original proceedings other than statements and transcripts;

5) Non-exculpatory statements placed under seal and non-exculpatory transcripts of private/closed sessions of testimonies of Defence witnesses being common to the case of the applicant and that of the accused in the original proceedings;

6) Non-exculpatory statements placed under seal and non-exculpatory transcripts of private/closed sessions of testimonies of Defence witnesses in the original proceedings not being common to the case of the applicant and that of the accused in the original proceedings;

7) Non-exculpatory exhibits coming from the Defence from the original proceedings other than statements and transcripts;

8) Confidential filings in the original proceedings;

9) Private/closed session transcripts of hearings in the original proceedings other than testimonies of Prosecution or Defence witnesses.

26. The Chamber notes that the present jurisprudence, by covering all abovementioned categories of material by the access regime, has created a system resulting in a significant overlap

with the system of disclosure. It appears that material specified above under 1) through 5) is covered simultaneously by both regimes.

27. The Prosecution team in an applicant's proceedings is obliged to disclose to the applicant material under categories 1) and 5) above pursuant to Rule 66(A); as well as material under category 2) pursuant to Rule 68(i). In relation to material under category 4), pursuant to Rule 68(ii) an accused is to be provided with access to the EDS containing all material in electronic form held by the Prosecutor, other than witness-related and Rule 70 material. It follows that all material under category 4) is accessible to the applicant via the EDS.

28. In relation to material under category 3), the Chamber notes that the access regime introduces a concurrent and in practice competing system to the one provided for in Rule 66(B). Under Rule 66(B), an applicant is required to specifically identify the material sought and to demonstrate
are met, the Prosecution is required to allow the applicant access to such material. Pursuant to Rule 75(F)(ii), protective measures imposed on such material are not an obstacle to disclosing it to the applicant. If, however, the applicant requests such material through the access regime, the requirement of specificity under Rule 66(B) no longer plays a role. Instead, the applicant has to show he has a legitimate forensic purpose in seeking the material by demonstrating that there is a temporal and geographical overlap between the cases. As a result, by seeking material through the access regime and by submitting similar requests for access to material in several partly overlapping cases, the applicant can successfully search for material without being subjected to the onerous requirements under Rule 66(B).

29. In other words, in seeking disclosure from the Office of the Prosecutor of confidential non-exculpatory statements and transcripts of private/closed sessions of testimonies of Prosecution witnesses not covered by Rules 66(A) and 68, the applicant can pursue two procedural avenues – one before his own Chamber pursuant to Rule 66(B), which requires him to fulfil resource consuming, strict criteria of specificity and materiality, and another before a different Chamber which requires him to show an overlap between his case and the case before that other Chamber.

30. In practical terms, the overlap between the access regime and the system of disclosure pursuant to Rules 66 and 68 leads to several consequences. First, it provides several advantages to the Defence; the standard for access to evidentiary material that otherwise would be subject to the more stringent criteria of Rule 66(B) is lowered, and the application itself is less cumbersome and

resource-consuming than an application pursuant to Rule 66(B).[63] The applicant seeking material in an overlapping case is also provided with an exact selection of confidential exhibits that were considered relevant and *used* in the similar case, which obviates the need to independently search for them in the EDS. Second, by duplicating the disclosure of exculpatory material, it introduces a possibility for the applicant to additionally verify how accurately the Prosecution has discharged its disclosure duties under the Rules. The Chamber is aware that such duplication may lead to disclosure to the applicant of a significant amount of confidential material that may not have any forensic value for him or her.[64] Moreover, the widening of the circle of persons privy to such confidential, protected information raises the chances of the protective measure system being compromised. These concerns, however, may be remedied by the right of the Prosecution to apply for non-disclosure of specific material or for additional protective measures or redactions prior to disclosure.[65] As a result, the Prosecution is obliged to engage in meticulous "micro-management" of the evidence disclosable via the access regime.

31. In weighing these considerations, the Chamber recalls that the material disclosable pursuant to Rules 66(A) and 68 forms a necessary minimum to guarantee a fair trial to the accused. This system, however, does not in every respect ensure that the applicant has access to the totality of materials able to assist him. The Chamber notes that the vast part of the material used in other cases relevant to the applicant's defence is public or otherwise subject to disclosure pursuant to Rules 66 and 68, and is hence already accessible to him. Nevertheless, the Chamber considers that based on provision of those materials alone, the applicant would not be able to *sufficiently* identify material under category 3).

32. The Chamber considers that the benefits given to the applicant by the current regime of access to confidential materials in another case outweigh the additional burden on the resources of the Prosecution, including duplication of some of its disclosure duties.

33. The Chamber considers that the role of the Prosecution as a source of material potentially relevant to an accused's person's defence may be complemented by an additional source, namely the Defence in the substantively similar proceedings, being the source of materials falling within categories 6) and 7) above. This source partly escapes the regime of disclosure as set out in Rules 66 and 68, and thus an access regime becomes necessary to fill the gap.

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62 See supra, paras 19-21.
63 Ibid.
64 The private/closed session transcripts under category 9) in the present case often contain information not relevant to the applicant, for example in relation to Jovica Stanišić's health or procedural issues.
65 See e.g. *Karadžić* Decision, p. 7.

34. Another category that is not covered by Rules 66 and 68, and which potentially can be of use to the defence of the applicant, are confidential fillings in the original proceedings (*i.e.* material under 8)).

35. The Chamber notes that in every case one can find the private/closed session hearings concerning issues other than witness testimonies. These often concern trial management related information (material under 9).

2. Standard of Specificity in the Access Motions

36. As stated earlier, the present jurisprudence materially abolishes the requirement of specificity and waters down the proof of legitimate forensic purpose by limiting it to the showing of temporal and geographical overlap – often partial – between the cases. This system, however, should be always viewed together with the duty of both the Prosecution and the Defence in the original proceedings to responsibly micro-manage the material covered by the access regime, and to apply for its partial non-disclosure if considerations of victim and witness protection outweigh the forensic value of evidence.

37. Although undoubtedly time- and resource-consuming for the Prosecution and the Defence in the original proceedings, the present low standard of specificity applied to the access regime is, in the Chamber's view, a necessary feature to ensure that an applicant has access to the totality of available material under categories 3), 6) and 7) above that may assist in his defence.

3. Applicants Requests

(a) *Inter partes* material

38. The Chamber is satisfied that the Applicant Stanišić has 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") and, more specifically, in the municipalities of Bijeljina, Bošanski Šamač, Doboj, Sanski Most and Zvornik, in 1992.

39. Similarly, Applicant Župljanin has sufficiently identified the material sought. The Chamber finds that there is a geographical and temporal nexus between the two cases as regards crimes alleged to have been committed in BiH and, more specifically, in the municipality of Sanski Most, in 1992.

40. While the Accused in this case are charged with crimes alleged to have occurred in Croatia and BiH, the Stanišić and Župljanin Indictment is geographically limited in scope to BiH.[66] Therefore, the Chamber considers that the Applicants have failed to show a geographical overlap between their cases and the *Stanišić and Simatović* case, to the extent the latter is concerned with events in Croatia (SAO Krajina and SAO SBWS). Moreover, in relation to closed and private session testimony transcripts, as well as all confidential exhibits, there are several categories of such evidence in relation to which, as a general rule, this Chamber considers that the Applicants do not have a forensic purpose for access. These categories include: 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. The Applicants are therefore granted access to all closed and private session testimony transcripts, as well as all confidential exhibits, as long as they do not primarily relate to crimes that allegedly took place in Croatia and do not fall within the abovementioned categories of issues.

41. In relation to confidential filings (including the Chamber's decisions) and closed session hearing transcripts other than testimonies, the Chamber holds a similar view and allows for disclosure to the Applicants of only those transcripts that do not concern the abovementioned categories of issues.

42. Due to only partial temporal and geographical overlap between the present case and those of the Applicants, the Chamber urges the Prosecution and the Defence in the present proceedings before it, should they deem it necessary, to file a request with the Chamber to withhold specifically identified material[67] or for additional protective measures or redactions,[68] showing that there is no basis to establish even a "good chance" that the specified material would materially assist the case of either of the Applicants.

43. Finally, the Chamber holds that no confidential material used in the present case as evidence but provided to the Prosecution or Defence under Rule 70 of the Rules should be disclosed to the Applicants unless the provider of such material has consented to disclosure in the Applicants' case.

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66 See Second Amended Consolidated Indictment, 10 September 2009.

67 *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.

68 *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).

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.

(b) *Ex parte* material

44. The Applicants request access to *all* confidential material in the *Stanišić and Simatović* case. This category necessarily includes also *ex parte* confidential documents.

45. In relation to *ex parte* confidential material, the Chamber recalls that the jurisprudence of the Tribunal requires a party seeking access to such material to meet a higher threshold.[69] The Chamber notes that the Applicants have failed to advance any arguments demonstrating a legitimate forensic purpose in this regard. Consequently, the Applicants' request for access to *ex parte* confidential material in the *Stanišić and Simatović* case is to be denied.

IV. DISPOSITION

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

GRANTS the Prosecution leave to exceed the word limit in its Response to the Stanišić Motion;

GRANTS the Stanišić Motion in part;

GRANTS the Župljanin Motion in part;

DENIES the Motions to the extent that they relate 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 *inter partes* confidential material in the case of *Prosecutor v. Stanišić and Simatović*, which is not subject to Rule 70, for disclosure to the Applicant:[70]

(i) all closed and private session testimony transcripts;

(ii) all confidential exhibits;

(iii) all confidential filings and submissions (including all confidential Chamber decisions);

(iv) all closed session hearing transcripts other than testimonies;

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[69] See supra, para. 16.

ORDERS that material including documents, audio and video files and/or transcripts concerning the following issues should be excluded from the scope of the present decision: 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;

ORDERS the Prosecution and the Defence to determine without undue delay which of the requested material used as evidence in the present case is subject to the provisions of 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;

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 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, 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 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 Counsel and any persons involved in the preparation of the case who have been instructed or

[70] For the purpose of the disposition, the term "Applicant" shall refer to both Applicant Stanišić and Applicant Župljanin.

authorised by the Applicant and/or his Counsel 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 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 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;

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 Counsel 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 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; and

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;

DENIES the remainder of the Stanišić Motion;

DENIES the remainder of the Župljanin Motion.

Judge Alphons Orie
Presiding Judge

Dated this tenth day of March 2011
At The Hague
The Netherlands

[Seal of the Tribunal]