



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: 24 March 2011
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IN TRIAL CHAMBER I

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

Registrar: Mr John Hocking

Decision of: 24 March 2011

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION ON REQUESTS OF JOVICA STANIŠIĆ FOR
ACCESS TO CONFIDENTIAL MATERIALS IN THE
KRAJIŠNIK AND THE *SIMIĆ et al.* CASES**

Prosecutor v. Stanišić & Simatović

Prosecutor v. Krajišnik IT-00-39-A

Office of the Prosecutor

Mr Dermot Groome

Mr Momčilo Krajišnik

Prosecutor v. Simić et. al. IT-95-9-A

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Mr Vladimir Petrović

I. PROCEDURAL HISTORY

1. On 27 September 2010, Jovica Stanišić (“Applicant”) requested access to all confidential *inter partes* material from the *Krajišnik* case.¹ On the same day, the Applicant filed a similar motion regarding confidential *inter partes* material in the *Prosecutor v. Simić et al.* case.² The Prosecution asked for two additional weeks to respond³ and with leave of the Chamber⁴ filed its response on 26 October 2010, partly opposing the Applicant’s motions.⁵ With leave of the Chamber, the Applicant replied to the Response on 2 November 2010.⁶

II. SUBMISSIONS

1. Motions

2. As the trial and appeal proceedings in the *Krajišnik* and the *Simić et al.* cases have concluded, the Motion in the *Krajišnik* case and the Motion in the *Simić et al.* case (collectively “Motions”) were made to the present Chamber under Rule 75(G)(ii).⁷ The Applicant submits that Momčilo Krajišnik is named as a co-perpetrator along with him in a joint criminal enterprise.⁸ The *Krajišnik* indictment includes at least three areas where the alleged crimes were committed – Zvornik, Bosanski Šamac and Dobož – that fall within the geographic and temporal scope of the case against the Applicant.⁹ Similarly, the Applicant submits that the Indictment against him, in its part relating to the events in Bosanski Šamac in April and May 1992, overlap temporally and geographically with the allegations in the indictment in the *Simić et al.* case.¹⁰

3. The Applicant asserts that confidential material in the *Krajišnik* and the *Simić et al.* cases is likely to be highly relevant to the factual allegations and evidence being presented against him.¹¹

¹ Request of Jovica Stanišić for Access to Confidential Materials in the *Prosecutor v. Krajišnik*, 27 September 2010 (“Motion regarding the *Krajišnik* case”), paras 1, 8.

² Request of Jovica Stanišić for Access to Confidential Materials in the *Prosecutor v. Simić et al.*, 27 September 2010 (“Motion regarding the *Simić et al.* case”), paras 1, 8.

³ Prosecution Request for Extension to Respond to Stanišić Defence Motions for Access to Confidential Materials in the *Simić* and *Krajišnik* Cases, 26 October 2010 (“Consolidated Response”).

⁴ T. 7876.

⁵ Prosecution Response to Stanišić Defence Motions for Access to Confidential Materials In the *Simić et al.* and *Krajišnik* Cases, 26 October 2010 (“Response”).

⁶ Request for Leave to Reply to Prosecution Response to Stanišić Requests for Access to Confidential Materials in the *Krajišnik* and *Simić* Cases, 2 November 2010. The Trial Chamber granted leave by informal communication of 5 November 2010. Reply to Prosecution Response to Stanišić Requests for Access to Confidential Materials in the *Krajišnik* and *Simić* Cases, 12 November 2010 (“Consolidated Reply”).

⁷ Motion regarding the *Krajišnik* case, para. 3; Motion regarding the *Simić et al.* case, para. 3.

⁸ Motion regarding the *Krajišnik* case, para. 4.

⁹ Ibid.

¹⁰ Motion regarding the *Simić et al.* case, para. 4.

¹¹ Motion regarding the *Krajišnik* case, para. 5; Motion regarding the *Simić et al.* case, para. 5.

4. The Applicant leaves it to the Chamber's discretion whether to order the disclosure of material pertaining to provisional release.¹² Moreover, he requests that confidential material be disclosed in a form that may be efficiently searched. In this respect the Applicant requests, in addition to the usual electronic disclosure, that the Prosecution disclose transcripts through Livenote and exhibits through e-Court.¹³

2. Consolidated Response

5. The Prosecution incorporates its previous submissions before the Chamber on the issue of access contained in its responses to motions by Mićo Stanišić and Stojan Župljanin.¹⁴

6. 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").¹⁵

7. The Prosecution argues that the access regime should not be applied to confidential materials that are subject to the disclosure regime under Rules 66(A), 66(B), 68 and 75(F)(ii) of the Rules, such as private session transcripts and confidential prosecution exhibits.¹⁶ Thus, the access regime should be limited to confidential filings and material coming from the Defence.¹⁷ When a Defence team seeks material that falls outside the usual disclosure made by the Prosecution pursuant to Rules 66(A) and 68, it is for the Defence to demonstrate that access is warranted pursuant to Rule 66(B).¹⁸ The Prosecution submits that by reviewing the public evidence in other cases, such as judgements, testimonies, exhibits and filings, the Defence could make such a showing.

8. The Prosecution submits that there are certain categories of material that do not have forensic value for the Applicant.¹⁹ They include: remuneration, provisional release, fitness to stand trial, Registry submissions of expert reports (insofar as they relate to the health of an accused), notices of non-attendance in court, modalities of trial, protective measures, subpoenas, applications

¹² Motion regarding the *Krajišnik* case, para. 6; Motion regarding the *Simić et al.* case, para. 6.

¹³ Motion regarding the *Krajišnik* case, para. 7; Motion regarding the *Simić et al.* case, para. 7.

¹⁴ Response, para. 4, referring to Prosecution Response to Motion by Mićo Stanišić for Access to All Confidential Materials in the *Stanišić & Simatović* Case, 24 March 2010; Prosecution Response to Stojan Župljanin Motion for Access to All Confidential Materials in the *Stanišić & Simatović* Case, 6 April 2010; Addendum to Prosecution Response to Access Motions by Mićo Stanišić and Stojan Župljanin, 19 April 2010.

¹⁵ Response, para. 21.

¹⁶ Response, paras 5-6.

¹⁷ Response, para. 10.

¹⁸ Response, paras 7, 18.

¹⁹ Response, para. 13.

for video-conference links, as well as orders to redact the public transcript and the public broadcast of a hearing.²⁰

9. Finally, the Prosecution points out that there is only minimal overlap between the *Krajišnik* case and the Applicant's case.²¹

3. Reply

10. The Applicant argues that the Prosecution's proposed approach is impractical,²² in that available public information may not be adequate to identify all relevant material.²³ Moreover, the proposed approach would impose a massive administrative burden on the Defence and multiply the issues for litigation.²⁴ The Applicant points out that under the present access regime, the Prosecution is not precluded from identifying specific sub-categories of material that may not be relevant to an applicant.²⁵

11. The Applicant also submits that the Prosecution understates the overlap with the *Krajišnik* case.²⁶ He stresses that the relationship between the civilian authorities inside the Republika Srpska in respect of certain paramilitary groups is relevant to his case regardless of the municipality where it occurred.²⁷ Finally, he submits that the requested material may show that the Prosecution offered inconsistent submissions or evidence in different cases before the Tribunal.²⁸

III. APPLICABLE LAW

12. The Chamber recalls the applicable law governing access to confidential material in another case as set out in its previous decision and refers to it.²⁹

IV. DISCUSSION

13. 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

²⁰ Response, ft. 8.

²¹ Response, paras 14-16.

²² Reply, para. 9.

²³ Ibid.

²⁴ Ibid.

²⁵ Reply, para. 10.

²⁶ Reply, paras 11-13.

²⁷ Reply, para. 12.

²⁸ Reply, para. 13.

material, the Prosecution seeks adoption of a higher standard of specificity that requires the Applicant to identify the material to which he seeks access.

14. The Chamber recalls its analysis of the appropriateness of the present access regime and the standard of specificity applicable therein as set out in its previous decision and refers to it.³⁰

1. Applicant's Requests

15. The Chamber is satisfied that the Applicant has identified the material sought with sufficient specificity. The Chamber finds that there is a geographical and temporal nexus between the *Stanišić and Simatović* case on the one side and the *Krajišnik* and *Simić et al.* cases on the other with regard to crimes alleged to have been committed in Bosnia and Herzegovina ("BiH") in the municipalities of Bijeljina, Doboj, Sanski Most, Trnovo, Zvornik and Bosanski Šamač.

16. 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 Applicant does not have a forensic purpose for access. These categories include: remuneration; provisional release; fitness to stand trial; Registry submission of expert reports on health issues; notices of non-attendance in court; modalities of trial; protective measures; subpoenas; applications for video-conference links; as well as orders to redact the public transcript and the public broadcast of a hearing. The Applicant is therefore granted access to all closed and private session testimony transcripts, as well as all confidential exhibits, as long as they do not fall within the abovementioned categories of issues.

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

18. Due to only partial temporal and geographical overlap between the Applicant's case and the *Krajišnik* case, the Chamber urges the Prosecution and Mr Momčilo Krajišnik, should they deem it necessary, to file a request with the Chamber to withhold specifically identified material³¹ or for

²⁹ Decision on Motions of Mićo Stanišić and Stojan Župljanin for Access to all Confidential Materials in the Stanišić and Simatović Case, 10 March 2011, (10 March 2011 Decision"), paras 15-21.

³⁰ 10 March 2011 Decision, paras 24-37.

³¹ *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-T, Decision on Motion by Radovan Karadžić for Access to Confidential Material in the Perišić Case, 26 May 2009, para. 20.

additional protective measures or redactions,³² showing that there is no basis to establish even a “good chance” that the specified material would materially assist the case of the Applicant.

19. Finally, confidential material used as evidence in the *Krajišnik* case and the *Simić et al.* case but provided under Rule 70 of the Rules shall not be disclosed to the Applicant unless the provider of such material has consented to disclosure in the Applicant’s case. Consequently, the Prosecution, Mr Momčilo Krajišnik and the Defence in the *Simić et al.* case (“Defence”) shall approach the providers of such material with a view to obtaining their consent.

2. Form of Disclosure

20. Following the Applicant’s request, the Chamber has consulted the Registry on whether, in addition to the regular electronic disclosure, it is possible to disclose the requested material through e-Court and Livenote. In light of this, the Chamber notes the following. Both e-Court and e-Trans (Livenote) are display tools giving access to *working* versions of exhibits and transcripts, together with notes made thereto by each group of users of these programs. The only source of *official* court records is the Judicial Database, where the revised transcripts and exhibits are uploaded by the Registry, and where the material disclosed to the applicants through the access regime originates. Moreover, there is no technical possibility to micro-manage access rights to e-Court or e-Trans (Livenote). As a consequence, even if an applicant is granted access rights as a member of one of the groups using e-Court or e-Trans (Livenote), it would not be possible to exclude certain categories of material from the total body of material placed there, such as *ex parte* or Rule 70 material. Finally, the Chamber notes that neither the parties in the *Krajišnik* case nor those in the *Simić et al.* case used e-Court or e-Trans applications that were not in existence at the time. Although both of these cases made use of an old transcript management system - Livenote SR – this system too suffers from all of the limitations mentioned above.

21. For these reasons, the Chamber finds that the Applicant cannot be granted access to confidential material in the *Krajišnik* and the *Simić et al.* cases through e-Court and Livenote.

V. DISPOSITION

22. For the foregoing reasons and pursuant to Rules 54 and 75 of the Rules, the Chamber **GRANTS** the Motion regarding the *Krajišnik* case in part;

³² *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Decision on Momčilo Perišić’s Request for Access to

GRANTS the Motion regarding the *Simić et al.* case in part;

ORDERS the Prosecution, Mr Momčilo Krajišnik and the Defence, on an ongoing basis, to identify to the Registry the following *inter partes* confidential material in the cases of *Prosecutor v. Krajišnik* and *Prosecutor v. Simić et al.*, respectively, which is not subject to Rule 70, for disclosure to the Applicant:

- (i) all closed and private session testimony transcripts;
- (ii) all confidential exhibits;
- (iii) all confidential filings and submissions (including all confidential decisions of the relevant Chambers);
- (iv) all closed session hearing transcripts other than testimonies;

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, Registry submission of expert reports on health issues, notices of non-attendance in court, modalities of trial, protective measures, subpoenas, applications for video-conference links, and orders to redact the public transcript and the public broadcast of a hearing;

ORDERS the Prosecution, Mr Momčilo Krajišnik and the Defence to determine without undue delay which of the requested material used as evidence in the *Krajišnik* and the *Simić et al.* cases respectively, 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, Mr Momčilo Krajišnik 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:

Confidential Material in the *Dragomir Milošević* Case, 27 April 2009, paras 15, 19; *Nikolić and Gvero* Decision, paras 16, 19(c).

- (a) the confidential, non-Rule 70 material once it has been identified by the Prosecution, Mr Momčilo Krajišnik and the Defence in accordance with this decision; and
 - (b) the Rule 70 material once the Prosecution, Mr Momčilo Krajišnik and the 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 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;

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 *Krajišnik* and the *Simić et al.* cases shall continue to have effect in the case against the Applicant;

DENIES the remainder of the Motion regarding the *Krajišnik* case; and

DENIES the remainder of the Motion regarding the *Simić et al.* case.



Judge Alphons Orie
Presiding Judge

Dated this twenty-fourth day of March 2011
At The Hague
The Netherlands

[Seal of the Tribunal]