

UNITED
NATIONS



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-08-91-T
Date: 15 April 2011
Original: English

IN TRIAL CHAMBER II

Before: Judge Burton Hall, Presiding
Judge Guy Delvoie
Judge Frederik Harhoff

Registrar: Mr. John Hocking

Decision of: 15 April 2011

PROSECUTOR

v.

MIĆO STANIŠIĆ AND STOJAN ŽUPLJANIN

PUBLIC

**DECISION PARTIALLY GRANTING THE REQUEST OF
JOVICA STANIŠIĆ FOR ACCESS TO CONFIDENTIAL MATERIAL**

The Prosecutor v. M. Stanišić and S. Župljanin

The Prosecutor v. Jovica Stanišić

The Office of the Prosecutor

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Counsel for the Accused

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Mr. Wayne Jordash

I. INTRODUCTION AND SUBMISSIONS

1. Trial Chamber II (“Trial Chamber”) of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“Tribunal”) is seised of the “Request of Jovica Stanišić for access to confidential materials in *The Prosecutor v. Stanišić & Župljanin* [case]”, filed on 27 September 2010 (“Motion”) by the Defence of Jovica Stanišić (“Defence”). The Prosecution responded on 11 October 2010 (“Response”).¹ Neither the Defence of Mićo Stanišić nor the Defence of Stojan Župljanin responded.

A. Applicant

2. The Defence seeks access to “all confidential *inter partes* material” from the present case.² It submits that “this information is likely to be of material assistance to the defence of Mr. [Jovica] Stanišić as the allegations against him are closely related to, and substantially overlap with, those in the *Stanišić & Župljanin* case.”³ The Defence submits that both Jovica Stanišić and Mićo Stanišić, in the Prosecution’s respective indictments, are alleged to have been co-perpetrators “in a joint criminal enterprise to remove ‘the majority of non-Serbs [...] from large areas of Croatia and BiH’”⁴ and that “[s]ome of the specific incidents are the same as those enumerated in the *Stanišić & Simatović* Indictment, in particular, allegations regarding events in 1992 at Bosanski Šamac and Doboj.”⁵

3. The Defence requests an order for access to confidential material “on an ongoing basis.”⁶ The Defence submits that it does not object to material protected by Rule 70 “being withheld pending a request by the Prosecution to the providers thereof for permission for its disclosure.”⁷ It also “leaves to the Chamber’s discretion whether to order disclosure of material pertaining to provisional release.”⁸ However, the Defence proposes that rather than ordering the Prosecution or Registrar to identify protected confidential material, it would “as a matter of administrative convenience and efficiency [be] more practical” for the Defence to “undertake to keep all such material confidential.”⁹

¹ *Prosecutor v. Stanišić and Župljanin*, Case No. IT-08-91-T, Prosecution’s response to Jovica Stanišić’s request for access to confidential materials in *The Prosecutor v. Stanišić and Župljanin*, 11 Oct 2010.

² Motion, para. 1.

³ *Ibid.*

⁴ *Id.*, para. 4.

⁵ *Ibid.*

⁶ *Id.*, para. 6.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*

4. The Defence requests, in addition to “the usual electronic disclosure”, that transcripts of the instant proceedings “be disclosed through Livenote, and that exhibits be disclosed through e-court.”¹⁰ This, the Defence submits, would make the material more searchable, an element essential to the material’s usefulness.¹¹

B. Prosecution

5. The Prosecution “recognises the existence of a partial overlap between the two cases” and does not object to granting the Defence access to confidential *inter partes* filings, transcripts from closed and private sessions, and prosecution exhibits admitted into evidence under seal.¹²

6. Regarding the Defence’s submissions on material subject to Rule 70, the Prosecution submits that this rule applies to the Defence and requires that any information provided under the rule may not be released to an applicant “unless and before the providers give their consent”.¹³ The Prosecution “takes no position on the disclosure of material pertaining to provisional release.”¹⁴

7. The Prosecution supports the Defence’s request “that the material be in a convenient electronic format,” but submits that this is a matter for the Registry to decide upon.¹⁵

II. APPLICABLE LAW

8. A party is entitled to apply for material from any source, including from another case before the Tribunal, to assist in the preparation of its case if the applicant has identified or described the material sought by its general nature and if the applicant has shown a legitimate forensic purpose for such access.¹⁶

9. The applicant must demonstrate a legitimate forensic purpose by establishing that the requested material “is likely to assist the [party’s] case materially, or at least [that] there is a good chance that it would.”¹⁷ To establish a “good chance,” the applicant may show a factual nexus

¹⁰ Motion, para. 7.

¹¹ *Ibid.*

¹² Response, para. 3.

¹³ *Id.*, paras 5, 6.

¹⁴ *Id.*, para. 7.

¹⁵ *Id.*, para. 8.

¹⁶ *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Decision on Momčilo Perišić’s request for access to confidential material in the Dragomir Milošević Case, 27 Apr 2009 (“*Dragomir Milošević* decision of 27 April 2009”), para. 4, referring to *Prosecutor v. 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 Feb 2008, para. 9. See also *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, Decision on “Motion by Mićo Stanišić for access to all confidential testimony and exhibits in the Krajišnik case”, 21 Feb 2007 (“*Krajišnik* decision”), p. 4.

¹⁷ *Prosecutor v. Naletilić and Martinović*, Case No. IT-98-34-A, Decision on Slobodan Praljak’s motion for access to confidential testimony and documents in *Prosecutor v. Naletilić and Martinović* and Jadranko Prlić’s notice of joinder to Slobodan Praljak’s motion for access, 13 Jun 2005, p. 6.

between his case and the case from which he seeks material, such as a “geographical, temporal or otherwise material overlap”¹⁸ although a mere overlap may be neither sufficient nor necessary.¹⁹ The applicant may not engage in a “fishing expedition,”²⁰ but need not “establish a specific reason that each individual item is likely to be useful.”²¹

10. Should a chamber grant an accused access “to confidential exhibits and confidential or closed session testimonies of another case before the Tribunal, he should not be prevented from accessing filings, submissions, decisions and hearing transcripts which may relate to such confidential evidence.”²² The Trial Chamber must, however, “strike a reasonable balance between the rights of the accused [...] and the protection of witnesses and victims.”²³

11. Material provided under Rule 70 may not be released to an accused in another case unless the provider of the material consents to the disclosure.²⁴ This limitation applies to all material provided under Rule 70 and does not depend on whether or not such material was previously used as evidence.²⁵

III. DISCUSSION

12. The present case and the case against Jovica Stanišić overlap geographically, temporally and materially. Jovica Stanišić and Mićo Stanišić are both charged with participation in a joint criminal enterprise to permanently remove the non-Serb population from the Bosnian Serb republic of Bosnia and Herzegovina.²⁶ Additionally, the timeframe of the indictment against Jovica Stanišić includes the timeframe in which the Prosecution alleges that Mićo Stanišić and Stojan Župljanin participated in the joint criminal enterprise.²⁷ The Defence has, therefore, shown a factual nexus

¹⁸ *Dragomir Milošević* decision of 27 April 2009, para. 5; *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Decision on motion by Hadžihasanović, Alagić and Kubura for access to confidential supporting material, transcripts and exhibits in the Kordić and Čerkez case, 23 Jan 2003, p. 4.

¹⁹ *Prosecutor v. Limaj et al.*, Case No. IT-03-66-A, Decision on Haradinaj motion for access, Balaj motion for joinder, and Balaj motion for access to confidential materials in the Limaj case, 31 Oct 2006, para. 7.

²⁰ *Prosecutor v. Hadžihasanović and Kubura*, Case No. IT-01-47-AR73, Decision on appeal from refusal to grant access to confidential material in another case, 23 Apr 2002, p. 3.

²¹ *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-A, Decision on motion by Radivoje Miletić for access to confidential information, 9 Sep 2005, p. 4; *Prosecutor v. Dragomir Milošević*, IT-98-29/1-A, Decision on Radovan Karadžić’s motion for access to confidential material in the Dragomir Milošević case (“*Dragomir Milošević* decision of 19 May 2009”), 19 May 2009, para. 11.

²² *Dragomir Milošević* decision of 19 May 2009, para. 11.

²³ *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Decision on “Prosecution’s preliminary response and motion for clarification regarding decision on joint motion of Hadžihasanović, Alagić and Kubura of 24 January 2003” (“*Blaškić* decision”), 26 May 2003, para. 26.

²⁴ *Krajišnik* decision, p. 5, citing *Prosecutor v. 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 Jun 2006, p. 8; *Martić* decision, para. 12.

²⁵ *Krajišnik* decision, p. 6.

²⁶ *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-PT, Prosecution notice of filing third amended indictment, 10 Jul 2008 (“*Jovica Stanišić* indictment”), paras 12-13; *Prosecutor v. Stanišić and Župljanin*, Case No. IT-08-91-T, Second amended consolidated indictment, 23 Nov 2009 (“*Stanišić & Župljanin* indictment”), para. 7.

²⁷ *Jovica Stanišić* indictment, para. 11; *Stanišić & Župljanin* indictment, para. 10.

between the two cases and established a forensic purpose, which justifies granting it access to certain *inter partes* material in the present case.

13. The Trial Chamber will grant access to the following two categories of confidential *inter partes* material, subject to the conditions below: first, all transcripts of testimony heard in closed or private session, and secondly, all confidential trial exhibits. The Trial Chamber notes that material provided pursuant to Rule 70 remains subject to its conditions and that consent by the provider must be obtained prior to each instance of disclosure.

14. The Trial Chamber is not satisfied that the following categories of *inter partes* material would generally stand a “good chance” of assisting Jovica Stanišić with his defence:

- a) other transcripts of closed or private session hearings;
- b) confidential filings by the parties; and
- c) confidential decisions.

The Trial Chamber nonetheless remains mindful that because it grants the Defence access to transcripts of testimony heard in closed or private session and confidential trial exhibits, the Defence “should not be prevented from accessing filings, submissions, decisions and hearing transcripts which may relate to such confidential evidence.”²⁸ The Trial Chamber, therefore, would consider ordering disclosure of material in these categories upon an additional reasoned application. Any such application for access must identify, with reasonable scope and clarity, items or categories of items which may relate to specific evidentiary matters and must show a legitimate forensic purpose for access.

15. The Trial Chamber is advised by the Registry that, for technical reasons, the release of confidential material to the Defence through E-Court is not feasible. Accordingly, the Registry will provide the materials electronically.

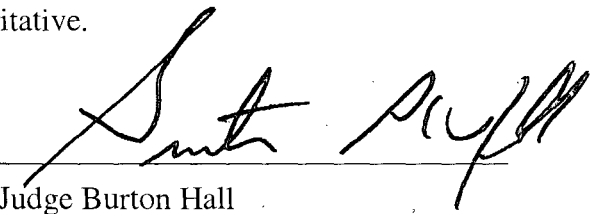
²⁸ *Dragomir Milošević* decision of 19 May 2009, para. 11.

IV. DISPOSITION

15. Pursuant to Rules 54, 70 and 75, the Trial Chamber:
- 1) **GRANTS** the Motion **IN PART**;
 - 2) **ORDERS** each of the parties to this case to identify for the Registrar on an ongoing basis the following *inter partes* material in the present case for disclosure to the Defence of Jovica Stanišić:
 - a) all closed and private session testimony transcripts;
 - b) all confidential trial exhibits, which are not subject to Rule 70;
 - 3) **ORDERS** each of the parties to this case to identify for the Registrar, without delay, which of the evidentiary material presented in their case is subject to the provisions of Rule 70, and thereafter immediately to contact the providers of such material to seek their consent for its confidential disclosure to the Defence of Jovica Stanišić and, where Rule 70 providers consent to such disclosure, to notify the Registrar periodically of this consent;
 - 4) **ORDERS** the Registrar to withhold any material under provision 2), above, which pertains to any witness protected by an order for delayed disclosure of identity until the requirement for delayed disclosure has ceased to apply;
 - 5) **ORDERS** the Registrar to provide to the Defence of Jovica Stanišić on an ongoing basis:
 - a) all confidential *inter partes* material identified by the parties in accordance with provision 2), above; and
 - b) material subject to Rule 70 once the relevant party has informed the Registrar that consent of the provider(s) has been obtained in accordance with provision 3), above;
 - 6) **ORDERS** Jovica Stanišić and any person associated with his defence not to disclose to the public or to any third party any confidential or non-public material disclosed from the *Stanišić and Župljanin* case, including witness identities or whereabouts, statements or transcripts, except solely to the limited extent that such disclosure is directly and specifically necessary for the preparation and presentation of Jovica Stanišić's case;

- 7) **ORDERS** that any person to whom confidential or non-public material is disclosed is forbidden to copy, reproduce or publicise confidential or non-public information or to disclose it to any other person or to any third party, that any such person shall be informed of this prohibition, and that he or she must return the material to the Defence of Jovica Stanišić as soon as it is no longer needed for the preparation of the case; and
- 8) **DENIES** the Motion in all other respects.

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



Judge Burton Hall
Presiding

Dated this fifteenth day of April 2011
At The Hague
The Netherlands

[Seal of the Tribunal]