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19 July 2011

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IN TRIAL CHAMBER II

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

Registrar: Mr. John Hocking

Decision of: 19 July 2011

PROSECUTOR

v.

MIĆO STANIŠIĆ AND STOJAN ŽUPLJANIN

PUBLIC

**DECISION PARTIALLY GRANTING MOTION BY FRANKO
SIMATOVIĆ FOR ACCESS TO CONFIDENTIAL MATERIALS IN THE
STANIŠIĆ CASE**

The Prosecutor v. M. Stanišić and S. Župljanin

The Prosecutor v. Franko Simatović

The Office of the Prosecutor

Ms. Joanna Korner
Mr. Thomas Hannis

The Office of the Prosecutor

Mr. Dermot Groome

Counsel for the Accused

Mr. Slobodan Zečević and Mr. Slobodan Cvijetić for Mićo Stanišić
Mr. Dragan Krgović and Mr. Aleksandar Aleksić for
Stojan Župljanin

Counsel for the Accused

Mr. Mihajlo Bakrač
Mr. Vladimir Petrović



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 “Motion by Franko Simatović for access to confidential materials in the Stanišić case”, filed publicly on 2 June 2011 (“Motion”) by the Defence of Franko Simatović (“Defence”). The Prosecution responded on 9 June 2011 (“Response”).¹ Neither the Defence of Mićo Stanišić nor the Defence of Stojan Župljanin responded.

A. Applicant

2. The Defence for Franko Simatović (“Defence”) seeks access to all confidential *inter partes* and *ex parte* material from the present case.² In particular, the Defence seeks access to:

- a) All confidential closed and private session transcripts;
- b) All confidential exhibits;
- c) All confidential filings and submissions, including all confidential Trial Chambers decisions; and
- d) All documentary evidence submitted by the parties.³

3. The Defence submits that there exists a clear nexus between the *Stanišić & Župljanin* case and the *Simatović* case demonstrating a legitimate forensic purpose which justifies access to the confidential materials.⁴ It asserts that it has “good cause to believe that access to the said material is necessary and will be of significant assistance for the preparation of its case”, and that “the alleged events and facts in the Indictment of the *Simatović* case are closely related to the charges against the accused in the *Stanišić & Župljanin* case”.⁵ The Defence further submits that the confidential materials requested “will be essential for the preparation of the defence case” given the existence of a “substantive geographical and temporal overlap” between the *Stanišić & Župljanin* case and the case against Franko Simatović (“the Applicant”).⁶

¹ *Prosecutor v. Stanišić and Župljanin*, Case No. IT-08-91-T, Prosecution’s response to Franko Simatović’s motion for access to confidential materials in the Stanišić case; 9 Jun 2011.

² Motion, para. 1.

³ Motion, paras 2, 13.

⁴ Motion, paras 6-10.

⁵ Motion, para. 3.

⁶ Motion, para. 11.

4. The Defence submits that the documents it seeks relate to the political and military background to the armed conflict, alleged by the Prosecution in the indictments of both the *Simatović* case and the *Stanišić and Župljanin* case.⁷ The Defence notes that the Applicant has been indicted for being a member of a Joint Criminal Enterprise (“JCE”), together with other alleged participants, including Mr. Stanišić and Mr. Župljanin, in relation to events said to have occurred between April 1991 and December 1995 in Bosnia and Herzegovina (“BiH”).⁸ The Defence asserts that the indictment against Mr. Stanišić and Mr. Župljanin “concerns alleged events, which occurred in the year 1992, for similar crimes as in the *Simatović* case” and that “[t]hey have been indicted for crimes within [certain] BiH municipalities which are also part of the indictment against Mr. Simatović.”⁹

5. The Defence notes that the Prosecution in the *Simatović* case alleges that the Applicant, in his role as commander of the Special Operations Unit of the State Security Service of the Ministry of the Internal Affairs of the Republic of Serbia, helped “to establish training centres in Serb-held parts of BiH and operated in coordination with other ‘Serb Forces’, which include the police and special police forces of the Serbian Ministry of Internal Affairs in BiH”, of which Mr. Stanišić was the Minister and Mr. Župljanin the Chief of the Regional Services Centre of Banja Luka.¹⁰

B. Prosecution

6. The Prosecution “recognises the existence of a partial overlap between the two cases” and does not object to granting the Applicant access to the following categories of *inter partes* confidential material:

- a) Confidential *inter partes* filings submitted by the Prosecution;
- b) Transcripts from closed and private sessions;
- c) Prosecution exhibits under seal admitted into evidence;¹¹

7. However, the Prosecution does object to the granting of access to confidential *ex parte* material, Rule 70 material,¹² and other categories of confidential material which it sees as having little evidentiary value to the Applicant.¹³

⁷ Motion, para. 7. See also *Prosecutor v. Stanišić and Simatović*, Case No. IT-03-69-PT, Third Amended Indictment, 9 Jul 2008, para. 19 (“*Simatović* Indictment”); *Prosecutor v. Stanišić and Župljanin*, Case No. IT-08-91-PT, Second Amended Consolidated Indictment, 10 Sep 2009, para. 43 (“*Stanišić and Župljanin* Indictment”).

⁸ Motion, para. 8. See also *Simatović* Indictment, para. 12; *Stanišić & Župljanin* Indictment, para. 8.

⁹ Motion, para. 9. Municipalities of Bijeljina, Bosanski Šamac, Dobo, Sanski Most and Zvornik.

¹⁰ Motion, para. 10. See also *Simatović* Indictment para. 2.

¹¹ Response, para. 3.

8. In respect of confidential *ex parte* material, the Prosecution submits that the “case law of the Tribunal has established that a party requesting access to *ex parte* confidential material must meet a higher standard when proving a legitimate forensic purpose in order to justify such disclosure.”¹⁴ The Prosecution maintains that the Defence has “failed to advance any arguments demonstrating a legitimate forensic purpose” which would meet this higher standard and justify the granting of such confidential *ex parte* material.¹⁵

9. In respect of Rule 70 material, the Prosecution objects to granting access to the Applicant “unless, and until, the providers’ consent is obtained.”¹⁶ It submits that any material which has been provided to the Prosecution under Rule 70(B) of the Rules, in addition to material provided to the Stanišić & Župljanin Defence under Rule 70 (F) of the Rules, shall not be released without the consent of the providers.¹⁷

10. In respect of other material, the Prosecution submits that the following have little or no evidentiary value and should not be released to the Applicant:

- a) Materials relating to the enforcement of sentences;
- b) Materials relating to fitness to stand trial;
- c) Materials relating to witness protective measures;
- d) Materials relating to subpoenas;
- e) Applications for video-conference links;
- f) Orders to redact public transcript and/or public broadcast of a hearing;
- g) Materials relating to the provisional release of other materials related to the medical matters of the accused; and

¹² Rules of Procedure and Evidence (“Rules”).

¹³ Response, paras 4, 7 and 10.

¹⁴ Response, para. 4. See also *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Decision on motion by Štanišić for access to all confidential materials in the Brđanin case, 24 Jan 2007, para 14; *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 Oct 2008, para. 12.

¹⁵ Response, para. 6.

¹⁶ Response, para. 7.

¹⁷ Response, para. 9.

h) Internal memoranda assessing state cooperation.¹⁸

11. In conclusion, the Prosecution submits a list of conditions it requests be attached to various categories of confidential material for which it has no objection to release to the Applicant.¹⁹

II. APPLICABLE LAW

12. 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.²⁰

13. 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.”²¹ To establish a “good chance,” the applicant may show a factual nexus between his case and the case from which he seeks material, such as a “geographical, temporal or otherwise material overlap”²² although a mere overlap may be neither sufficient nor necessary.²³ The applicant may not engage in a “fishing expedition,”²⁴ but need not “establish a specific reason that each individual item is likely to be useful.”²⁵

14. 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

¹⁸ Response, para. 10.

¹⁹ Response, paras 12, 13, 14, 15, 16 and 17.

²⁰ *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) (“*Martić* decision”), 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.

²¹ *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.

²² *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.

²³ *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.

²⁴ *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.

²⁵ *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.

confidential evidence.”²⁶ The Trial Chamber must, however, “strike a reasonable balance between the rights of the accused [...] and the protection of witnesses and victims.”²⁷

15. 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.²⁸ 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.²⁹

III. DISCUSSION

16. Addressing first the requirement of the applicant to demonstrate a legitimate forensic purpose for access to the requested material, the Trial Chamber notes the existence of a factual nexus between the *Simatović* case and the *Stanišić and Župljanin* case. The Applicant is charged with being a member of a JCE, along with other alleged participants, including Mr. Stanišić and Mr. Župljanin³⁰ with the intent to forcibly and permanently remove the majority of non-Serbs from large areas of BiH, through the commission of various crimes including persecution, murder and deportation.³¹ The Prosecution in the *Simatović* case alleges that the Applicant acted in coordination with, *inter alia*, the Police and the special police forces of the Serbian Ministry of Internal Affairs in BiH, to establish training centres in which to organise and train personnel for the purpose of undertaking special military action in Croatia and BiH.³² The *Stanišić and Župljanin* Indictment alleges that Mr. Stanišić was the highest authority in the RS MUP, whilst Mr. Župljanin exercised control over the CSB Banja Luka, subordinated to the RS MUP.³³ Combined with the common state of armed conflict that is asserted in the indictments of both the *Simatović* case and the *Stanišić and Župljanin* case, a material overlap is established between the two cases. Additionally, there exists both a temporal and geographical overlap, in as much as the Applicant is charged with similar crimes to Mr. Stanišić and Mr. Župljanin in several of the same BiH municipalities, and for crimes which occurred in 1992.³⁴

²⁶ *Dragomir Milošević* decision of 19 May 2009, para. 11.

²⁷ *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.

²⁸ *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.

²⁹ *Krajišnik* decision, p. 6.

³⁰ *Simatović* Indictment, para. 12.

³¹ *Simatović* Indictment, para. 13.

³² *Simatović* Indictment, paras 3, 4 and 6.

³³ *Stanišić & Župljanin* Indictment, paras 17 and 18.

³⁴ *Stanišić & Župljanin* Indictment, paras 4, 5 and 10-12.

17. The Trial Chamber is satisfied that there is a “good chance” that the granting of access to certain confidential materials is likely to assist the Applicant’s case materially. Moreover, the Trial Chamber is satisfied that access to such materials does not constitute a “fishing expedition”, and that the foregoing elements evince a geographical, temporal and material overlap between the *Simatović* case and the *Stanišić and Župljanin* case.

18. Noting this factual nexus, the Trial Chamber now moves to the categories of confidential material which it will release to the Defence of Mr. Simatović. The Trial Chamber recalls that the Defence of Mr. Simatović requests all *ex parte* confidential material relating to the *Stanišić and Župljanin* case. The Trial Chamber remains mindful of the elevated degree of confidentiality which is inherent to this category of material, and the higher degree of trust on behalf of the party for whom *ex parte* status has been granted that the material will not be disclosed.³⁵ The Defence has not advanced any good reasons as to how access to this more highly protected category of material would likely assist in the material preparation of its case. The Trial Chamber therefore denies the Motion in respect of *ex parte* confidential material.

19. In respect of *inter partes* confidential material requested by the Defence, the Trial Chamber will grant access, subject to the conditions stipulated below, to all transcripts of testimony heard in closed or private session, as well as all confidential trial exhibits. However, the Trial Chamber is not satisfied that transcripts of closed or private hearings other than testimony, confidential filings by the parties and confidential decisions stand a “good chance” of assisting the Applicant with his defence.

20. Other than those limited occasions involving a protected witness, hearings which are held in closed session concern mostly trial management and procedural issues and rarely invoke confidential evidence which could be of assistance to the Applicant. Despite the Prosecution raising no objection to the release of its own confidential *inter partes* filings, such filings and the related confidential decisions often contain information wholly unrelated to the evidentiary basis of the case, including personal information relating to victims and witnesses in these proceedings, such as medical conditions and the ability to travel.³⁶ The Trial Chamber therefore denies the Motion in this respect.

21. The Trial Chamber remains mindful that some of the confidential *inter partes* material to be disclosed by this Decision may have been provided pursuant to Rule 70. Material provided pursuant

³⁵ *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 Feb 2007, p. 5.

³⁶ *Blaskić* decision, para. 26.

to this Rule remains subject to its conditions and consent must be obtained by the provider prior to each instance of disclosure.

22. The Trial Chamber is also 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."³⁷ 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. The Trial Chamber notes that access to the material was not requested by the Defence on an ongoing basis. Nonetheless, in the interests of justice and for the sake of judicial economy, in particular in light of the fact that the presentation of evidence is expected to continue in both cases for some time, the Trial Chamber will grant access to the confidential materials the subject of release on an ongoing basis until the close of presentation of evidence in the *Stanišić and Župljanin* case.

IV. DISPOSITION

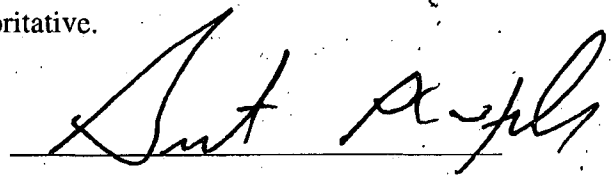
Pursuant to Rules 54, 70 and 75, the Trial Chamber:

- 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 Franko Simatović:
 - 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 Franko Simatović and, where Rule 70 providers consent to such disclosure, to notify the Registrar periodically of this consent;

³⁷ *Dragomir Milošević* decision of 19 May 2009, para. 11.

- 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 Franko Simatović 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** Franko Simatović 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 Franko Simatović'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 Franko Simatović 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 nineteenth day of July 2011

At The Hague

The Netherlands

[Seal of the Tribunal]

