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16 February 2015

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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 Nos. IT-03-69-A & IT-95-5/18-T

Date: 16 February 2015

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Carmel Agius
Judge Liu Daqun
Judge Arlette Ramaroson
Judge Koffi Kumelio A. Afande

Registrar: **Mr. John Hocking**

Decision of: **16 February 2015**

PROSECUTOR

v.

JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ

PUBLIC

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

The Office of the Prosecutor:

Stanišić and Simatović Appeal
Ms. Michelle Jarvis
Mr. Mathias Marcussen

Karadžić Trial
Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

Counsel for the Defence:

Mr. Wayne Jordash and Mr. Scott Martin for Mr. Jovica Stanišić
Mr. Mihajlo Bakrač and Mr. Vladimir Petrović for Mr. Franko Simatović

The Accused in the *Karadžić* Trial:

Mr. Radovan Karadžić

THE APPEALS CHAMBER of the 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 ("Appeals Chamber" and "Tribunal", respectively);

RECALLING the decision issued by Trial Chamber I of the Tribunal ("Trial Chamber") on 17 July 2009, in which the Trial Chamber denied Radovan Karadžić ("Karadžić") access to confidential material in the *Stanišić and Simatović* case "to the extent that it relates to alleged crimes that took place in Croatia", while granting him access to the rest of the confidential material sought in the said case;[1]

RECALLING that, in the Impugned Decision, the Trial Chamber found that, while Jovica Stanišić ("Stanišić") and Franko Simatović ("Simatović") were charged with crimes alleged to have occurred in Croatia and Bosnia and Herzegovina, the indictment in the *Karadžić* case is geographically limited in scope to Bosnia and Herzegovina and Karadžić had therefore failed to show a geographical overlap between his case and the *Stanišić and Simatović* case as far as the latter is related to events in Croatia;[2]

BEING SEISED OF the "Motion for Reconsideration of Access Decision" filed by Karadžić on 3 November 2014 ("Motion"), in which Karadžić requests that the Appeals Chamber reconsider the Impugned Decision and grant him access to the *inter partes* confidential material from the *Stanišić and Simatović* case relating to Croatia ("Requested Relief");[3]

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[1] *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-T, Decision on Motion by Radovan Karadžić for Access to Confidential Materials in the Stanišić and Simatović Case, 17 July 2009 ("Impugned Decision"), para. 16. With regard to confidential material in the *Stanišić and Simatović* case that does not relate to crimes which allegedly took place in Croatia, the Trial Chamber, subject to certain conditions, granted Karadžić access to the following material as requested: (i) all closed and private session transcripts; (ii) all confidential exhibits; and (iii) all confidential filings and submissions (including all confidential Trial Chamber decisions). See Impugned Decision, para. 16. See also Decision on the Prosecution's Motion Regarding the Terms of Access by Radovan Karadžić to Confidential Materials, 2 May 2014.

[2] Impugned Decision, paras 10, 16, referring to *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Third Amended Indictment, 27 February 2009 ("*Karadžić* Indictment").

[3] Motion, paras 1, 2, 15. The Appeals Chamber notes that Karadžić also states that, although he is entitled to all *inter partes* confidential material from the *Stanišić & Simatović* case including that relating to Croatia, "he would be amenable to more limited access if required by the Appeals Chamber", such as: (i) all the evidence of contact between Stanišić and Karadžić or anyone in the Bosnian Serb Ministry of Interior, the Army of the Bosnian-Serb Republic also known as the VRS, the Serb Democratic Party also known as the SDS, the Republika Srpska Assembly, or the local organs within the Republika Srpska; (ii) all the evidence indicating that Stanišić acted as an intermediary for Slobodan Milošević ("Milošević"); (iii) all the evidence concerning the existence of a goal of uniting "Serb lands"; (iv) all the evidence of the activities of units allegedly belonging to Željko Ražnatović ("Arkan") or Vojislav Šešelj ("Šešelj"); (v) all the evidence concerning Stanišić's alleged control over Arkan or Šešelj's men, including the evidence of his relationship with Radoslav Kostić ("Kostić") and the evidence of Kostić's activities relating to Arkan or Šešelj's men; (vi) all the evidence of activities of Ratko Mladić ("Mladić") in Croatia; (vii) all the evidence of steps taken in Croatia to expel non-Serbs from Serb-controlled areas; (viii) all the evidence concerning whether Stanišić led the parallel structure including paramilitaries in Croatia; and (ix) all the evidence concerning whether Arkan's activities were authorised by Milošević. See Motion, para. 11. The Appeals Chamber observes that, geographically speaking, some of the material on these specific issues concerns both Croatia and Bosnia and Herzegovina. However, from the wording of

NOTING that Karadžić argues that it would be unfair to continue to limit his access to confidential material in the *Stanišić and Simatović* case by excluding material relating to Croatia, given that the Office of the Prosecutor ("Prosecution") in his case relies on events relating to Stanišić which took place in Croatia in order to link him, Stanišić, Milošević, Mladić, and Arkan to the alleged joint criminal enterprise ("JCE") to expel Muslims and Croats from Serb-held areas of Bosnia and Herzegovina;[4]

NOTING the "Prosecution Response to Karadžić's Motion for Reconsideration of Access Decision" filed on 13 November 2014 ("Response"), in which the Prosecution submits that the Appeals Chamber does not have the authority to reconsider a trial chamber's decision but that it would not oppose that Karadžić be provided with access to "all confidential *inter partes* material from the *Stanišić and Simatović* case relating to alleged crimes that took place in Croatia", should the Appeals Chamber, in the interest of judicial economy, decide to consider the Motion as a new request for access to confidential material;[5]

NOTING that neither Stanišić nor Simatović responded to the Motion;

CONSIDERING that a request for reconsideration, by definition, has to be made before the chamber that rendered the impugned decision and that Karadžić therefore erred in requesting that the Appeals Chamber "reconsider" the Impugned Decision;[6]

CONSIDERING, however, that in the interest of judicial economy it is appropriate to consider exceptionally the Motion to have been brought before the Appeals Chamber as a new request for access pursuant to Rule 75(G) of the Rules of Procedure and Evidence of the Tribunal ("Rules") since, in fact, Karadžić seeks to vary the protective measures ordered in the *Stanišić and Simatović* case which the Appeals Chamber is now seised of;[7]

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paragraph 11 of the Motion read together with the remaining parts of the Motion, the Appeals Chamber understands that, *in the alternative* to his request for access to the *inter partes* confidential material in the *Stanišić and Simatović* case relating to Croatia without further limitation by issues or topics, Karadžić seeks access to *inter partes* confidential material in the *Stanišić and Simatović* case concerning the above-listed specific issues only in relation to Croatia.

[4] Motion, paras 3-6, referring to *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Prosecution's Final Trial Brief, 29 August 2014 (confidential with confidential appendices; public redacted version filed on 24 September 2014) ("Prosecution Final Trial Brief"), paras. 51, 85, 102-104, 463-464; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, T. 47623-47624 (29 September 2014) ("Closing Arguments").

[5] Response, paras 2-3.

[6] See *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-A, Decision on the Prosecution's "Motion for Reconsideration and Rescission of the Order to Disclose Issued in Trial Chamber's 'Decision on Motion by Radovan Karadžić for Access to Confidential Materials in the Lukić and Lukić Case' of 10 July 2009", 7 December 2009, para. 4.

[7] See Rule 75(G)(i) of the Rules: "A party to the second proceedings seeking to rescind, vary, or augment protective measures ordered in the first proceedings must apply [...] to any Chamber, however constituted, remaining seised of the first proceedings".

RECALLING that a party is entitled to seek material from any source, including from another case before the 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;[8]

RECALLING FURTHER that the Appeals Chamber may grant access to confidential material wherever the party seeking access has demonstrated that such material may be of material assistance to its case, and that the requesting party may demonstrate the relevance of the material sought by showing the existence of a nexus between the applicant's case and the cases from which such material is sought, *i.e.* if the cases stem from events alleged to have occurred in the same geographic area and at the same time;[9]

CONSIDERING that, although the *Karadžić* Indictment is geographically limited in scope to Bosnia and Herzegovina,[10] the Prosecution relies on events in Croatia to support its case against Karadžić – specifically linking him, Stanišić, Milošević, Mladić, and Arkan to the alleged JCE to expel Muslims and Croats from Serb-held areas of Bosnia and Herzegovina – and that, as a result, there is a considerable evidentiary overlap between the *Karadžić* case and the *Stanišić and Simatović* case in relation to the events in Croatia as well as Bosnia and Herzegovina;[11]

CONSIDERING that Karadžić has demonstrated a geographical and temporal[12] overlap in relation to particular events in both cases and that this overlap amounts to a sufficient nexus between both cases not only in relation to the events in Bosnia and Herzegovina but also in Croatia;

CONSIDERING that, in light of this nexus, Karadžić has shown that having access to the confidential material from the *Stanišić and Simatović* case in relation to the events in Croatia may materially assist him in the preparation of his defence;

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[8] See, *e.g.*, Decision on Goran Hadžić's Urgent Motion for Access to Audio Recordings in the *Stanišić and Simatović* Case, 28 August 2014 ("28 August 2014 Decision"), p. 2 and references cited therein.
[9] See, *e.g.*, 28 August 2014 Decision, p. 2 and references cited therein.
[10] See also Impugned Decision, para. 10.
[11] See, *e.g.*, Prosecution Final Trial Brief, paras 51, 85, 102-103, 463-464; Closing Arguments. The Appeals Chamber notes that, in the *Karadžić* case, the Prosecution articulated the extent to which it relies upon events in Croatia in the Prosecution Final Trial Brief and in the Closing Arguments in 2014, that is after the Trial Chamber rendered the Impugned Decision in 2009.
[12] The Appeals Chamber is satisfied that a temporal overlap exists between both cases, as a number of events relating to Croatia relied upon by the Prosecution in the *Karadžić* case also form part of the Prosecution's case in the *Stanišić and Simatović* case. Moreover, the Appeals Chamber notes that the *Karadžić* Indictment claims that the alleged JCE lasted from at least October 1991 until 30 November 1995, while Stanišić and Simatović were charged with having participated in a JCE that was alleged to have existed between April 1991 and at least 31 December 1995. See *Karadžić* Indictment, para. 6; *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-PT, Third Amended Indictment, 10 July 2008, para. 11. Thus, the Appeals Chamber considers that the fact that the respective alleged JCEs in both cases existed during similar time periods further indicates that a temporal overlap exists between both cases.

FINDING THEREFORE that Karadžić has demonstrated a legitimate forensic purpose for access to the requested *inter partes* confidential material in the *Stanišić and Simatović* case relating to Croatia and has identified the material sought in the Requested Relief with sufficient specificity;

CONSIDERING that part of the material sought might fall into the category of material provided pursuant to Rule 70 of the Rules and that such material, if any, shall not be released to the accused in another case unless the provider consents to such disclosure;[13]

PURSUANT TO Rules 54, 75, and 107 of the Rules

FOR THE FOREGOING REASONS,

HEREBY GRANTS the Motion;

ALLOWS Karadžić, subject to the conditions set forth below, access to *inter partes* confidential material in the trial record in the *Stanišić and Simatović* case related to events in Croatia with the exception of material provided under Rule 70 of the Rules;

ORDERS the Prosecution, Stanišić, and Simatović:

1. to file before the Appeals Chamber and the Registry of the Tribunal ("Registry"), within ten working days from the date of this decision, lists identifying any material provided under Rule 70 of the Rules;

2. to seek leave from the Rule 70 providers to disclose this material to Karadžić, within 15 working days from the date of this decision;

3. to notify the Registry, without undue delay and on an ongoing basis, of the consent of providers to the disclosure of Rule 70 material to Karadžić received by the Prosecution, Stanišić, or Simatović pursuant to point no. 2 above;

4. to apply to the Appeals Chamber for additional protective measures or redactions, if required, within ten working days from the date of this decision;

REQUESTS the Registry:

1. to withhold any material provided pursuant to Rule 70 of the Rules, as identified by the Prosecution, Stanišić or Simatović, until the responses of the providers have been relayed;

[13] See, *e.g.*, *Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, Decision on Vlastimir Đorđević's Motion for Access to Transcripts, Exhibits and Documents, 16 February 2010, para. 18.

2. where the providers have consented to further disclosure, to provide Karadžić with all such material, in electronic format where possible;

3. where the providers have refused consent to further disclosure, to withhold that material;

4. to provide Karadžić with all *inter partes* confidential material described above, in electronic format where possible, if: (i) no additional protective measures or redactions are requested within the relevant deadline; and (ii) material has not, within the relevant deadline, been identified by the Prosecution, Stanišić, or Simatović as material having been provided pursuant to Rule 70 of the Rules;

5. where additional protective measures or redactions are requested, to withhold that material until the Appeals Chamber has issued a decision on the request;

ORDERS, unless otherwise required by this decision, that the *inter partes* confidential material provided by the Registry shall remain subject to any protective measures in effect;

ORDERS that Karadžić and any persons involved in the preparation of his case who have been instructed or authorised by him to have access to the *inter partes* confidential material described above, shall not, without the Appeals Chamber expressly finding that third party disclosure is necessary for the preparation of Karadžić's defence and granting the appropriate leave:

1. disclose to any third party the names of witnesses, their whereabouts, transcripts of witness testimonies, exhibits, or any information which would enable them to be identified and would breach the confidentiality of the protective measures already in place;

2. disclose to any third party any documentary evidence or other evidence, or any written statement of a witness or the contents, in whole or in part, of any non-public evidence, statement or prior testimony; or

3. contact any witness whose identity was subject to protective measures;

ORDERS that if, for the purposes of the preparation of Karadžić's defence, confidential material is disclosed to third parties[14] – pursuant to authorisation by the Appeals 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 Karadžić as soon as the information is no longer needed for the preparation of Karadžić's case; and

ORDERS that if any persons who are authorised to have access to confidential material should withdraw from the case, any confidential material to which access is granted in this decision and that remains in their possession – and copies thereof – shall be returned to the Registry.

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

Dated this sixteenth day of February 2015,
at The Hague,
The Netherlands.

Judge Fausto Pocar
Presiding Judge

[Seal of the Tribunal]

[14] For the purposes of this paragraph, third parties exclude: (i) Karadžić; (ii) any other person involved in the preparation of his case who has been instructed or authorised by Karadžić to have access to confidential material; and (iii) personnel of the Tribunal, including members of the Prosecution.