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Case Name/ Affaire :	Prosecutor v. Jovica Stanišić & Franko Simatović	Case Number/ Affaire n° :	MICT-15-96-PT MICT-14-82
Date Created/ Daté du :	24 January 2017	Date transmitted/ Transmis le :	24 January 2017
		No. of Pages/ Nombre de pages :	6
Original Language / Langue de l'original :	<input checked="" type="checkbox"/> English/ <i>Anglais</i>	<input type="checkbox"/> French/ <i>Français</i>	<input type="checkbox"/> Kinyarwanda <input type="checkbox"/> B/C/S <input type="checkbox"/> Other/ <i>Autre</i> (specify/préciser) :
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Mechanism for International Criminal Tribunals

Case Nos.: MICT-15-96-PT
MICT-14-82

Date: 24 January 2017

Original: English

IN THE TRIAL CHAMBER

Before: Judge Burton Hall, Presiding

Registrar: Mr. Olufemi Elias

Decision of: 24 January 2017

PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**DECISION ON STANIŠIĆ'S REQUEST FOR ACCESS TO
CONFIDENTIAL MATERIALS IN THE *MARTIĆ* CASE**

The Office of the Prosecutor:

Mr. Serge Brammertz
Mr. Douglas Stringer

Counsel for Mr. Jovica Stanišić:

Mr. Wayne Jordash
Mr. Scott Martin

Mr. Milan Martić

Counsel for Mr. Franko Simatović:

Mr. Mihajlo Bakrač
Mr. Vladimir Petrović

I, **BURTON HALL**, Judge of the Trial Chamber of the International Residual Mechanism for Criminal Tribunals (“Mechanism”) and Presiding Judge in this case;¹

BEING SEISED OF the “Stanišić Defence Request for Access to Confidential Materials in the *Prosecutor v. Martić* Case”, filed on 29 November 2016 (“Motion”), in which Jovica Stanišić, pursuant to Rule 86(G)(ii) of the Rules, seeks access to all confidential *inter partes* material in the case of *Prosecutor v. Milan Martić*, Case No. IT-95-11 (“*Martić* case”) before the International Criminal Tribunal for the former Yugoslavia (“ICTY”), and requests that such access be provided in the most searchable format available to the Registry;²

NOTING Stanišić’s submission that the material sought is likely to be of material assistance to his defence due to the substantial geographical and material overlap between his case and the *Martić* case;³

NOTING the Prosecution’s response that Stanišić was previously granted access to all confidential transcripts and exhibits in the *Martić* case,⁴ and that it does not oppose the request for access to confidential *inter partes* filings, subject to the exclusion of categories of confidential material for which Stanišić does not have a legitimate forensic purpose for access;⁵

NOTING that, on 22 February 2008, the ICTY Appeals Chamber granted Stanišić access to all confidential transcripts and under-seal exhibits in the trial proceedings of the *Martić* case, except Exhibit 787,⁶ which was, at the time, the only material subject to Rule 70 of the ICTY Rules of Procedure and Evidence (“ICTY Rules”);⁷

NOTING that the proceedings in the *Martić* case concluded on 8 October 2008;⁸

¹ Order Assigning Judges to a Case Before a Trial Chamber, 17 December 2015, p. 1. In accordance with Rule 86(K) of the Mechanism’s Rules of Procedure and Evidence (“Rules”), an application to a Chamber to rescind, vary, or augment protective measures in respect of a victim or witness may be dealt with either by the Chamber or by a Judge of that Chamber.

² Motion, paras. 1, 4, 13, 14.

³ Motion, para. 11.

⁴ Prosecution Response to Stanišić Defence Request for Access to Confidential Materials in the *Prosecutor v. Martić* Case, 9 December 2016 (“Response”), para. 1. The Prosecution further submits that it has complied with the decision granting access to Stanišić. See Response, para. 1.

⁵ Response, para. 2.

⁶ *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 (“Decision of 22 February 2008”), paras. 12, 13, p. 5. I observe that the ICTY Appeals Chamber ordered, *inter alia*, that the Prosecution report to the Appeals Chamber upon receiving a response from the provider of Exhibit 787 to its request to disclose it to Stanišić. See Decision of 22 February 2008, p. 5. On 28 March 2008, the Prosecution, having received the consent of the provider, disclosed Exhibit 787 to Stanišić. See *Prosecutor v. Milan Martić*, Case Nos. IT-03-69-PT, IT-95-11-A, Prosecution Report pursuant to the Decision of 22 February 2008 on Stanišić’s Motion for Access to Confidential Testimony and Exhibits in the *Martić* Case pursuant to Rule 75(G)(i), 28 March 2008, p. 2.

⁷ I note that Rule 70 of the ICTY Rules is equivalent to Rule 76 of the Rules.

⁸ See *Prosecutor v. Milan Martić*, Case No. IT-95-11-A, Judgement, 8 October 2008.

CONSIDERING that, pursuant to Rule 86(F) of the Rules, protective measures ordered in proceedings before the ICTY continue to have effect *mutatis mutandis* in any other proceedings before the Mechanism unless and until they are rescinded, varied or augmented;

CONSIDERING, therefore, that, since there has been no rescission, variation, or augmentation of the protective measures applicable to the material from the trial proceedings in the *Martić* case to which Stanišić has already been granted access by the ICTY Appeals Chamber, his access to such material continues under the same terms and conditions;⁹

NOTING that Stanišić has not been granted access to confidential *inter partes* filings and decisions in the trial proceedings, nor access to confidential *inter partes* material in the appeal proceedings in the *Martić* case;¹⁰

CONSIDERING that a party is entitled to seek material from any source, including from another case before the ICTY, 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;¹¹

CONSIDERING that the requesting party must establish that such material is likely to assist its case materially, or that there is at least a good chance that it would, and that this standard may be met by showing the existence of a nexus between the applicant's case and the cases from which such material is sought;¹²

CONSIDERING that Stanišić has sufficiently identified the material sought¹³ and has shown the existence of a nexus between the two cases in that Jovica Stanišić and Milan Martić are alleged to have been members of a joint criminal enterprise, which existed between 1991 and 1995, with the purpose to forcibly remove non-Serb inhabitants from various areas in Croatia and Bosnia and Herzegovina and, through their participation in this joint criminal enterprise, are being held accountable for crimes committed in the Serbian Autonomous Region of Krajina;¹⁴

⁹ See Decision on Stanišić's Request for Access to Confidential Materials in the *Krajišnik* Case, 29 September 2016, p. 2; Decision on Radovan Karadžić's Motion for Access to Confidential Materials, 5 April 2016, p. 2.

¹⁰ See Decision of 22 February 2008, p. 5.

¹¹ See, e.g., Decision on Stanišić's Request for Access to Confidential Matters in the *Stanišić & Župljanin* Case, 19 October 2016, pp. 1, 2 and references cited therein.

¹² See, e.g., *Prosecutor v. Radovan Karadžić*, Case Nos. MICT-13-55-A & MICT-14-83, Decision on Stanislav Galić's Motion for Access to Confidential Materials in the *Karadžić* Case, 9 June 2016, para. 8; *Prosecutor v. Radovan Karadžić*, Case No. MICT-13-55-A, Decision on a Motion for Access to *Ex Parte* Filings in Completed Cases, 10 May 2016, p. 3.

¹³ See Motion, paras. 1, 14.

¹⁴ See Motion, paras. 1, 5-11, referring to *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-PT, Third Amended Indictment, 10 July 2008, paras. 1, 3-6, 12, 13, 27, 28, 31, 32, 35; *Prosecutor v. Milan Martić*, Case No.

FINDING THEREFORE that Stanišić has demonstrated that access to material from the appeals proceedings in the *Martić* case is likely to assist his case materially, or that there is at least a good chance that it would;

CONSIDERING that, once access is granted to confidential exhibits and confidential or closed session testimonies in another case before the ICTY, the applicant should not be prevented from accessing filings, submissions, decisions and hearing transcripts which may relate to such confidential evidence;¹⁵

CONSIDERING that, unless a legitimate forensic purpose can be demonstrated, no access should be granted to confidential filings or transcripts concerning remuneration, provisional release, fitness to stand trial, weekly reports of the reporting medical officer, expert reports on health issues submitted by the Registry, notices of non-attendance in court, modalities of appeal, protective measures, subpoenas, video-conference links, and orders to redact the public transcript and the public broadcast of a hearing;¹⁶

CONSIDERING that materials provided pursuant to Rule 76 of the Rules shall not be disclosed to another accused in another case unless the Prosecution obtains the consent of the provider;¹⁷

PURSUANT TO Rules 55, 76, and 86 of the Rules,

HEREBY GRANT the Motion in part, and;

ALLOW Stanišić, subject to conditions set forth below, access to *inter partes* confidential material from the appeal proceedings and the trial proceedings, which Stanišić was not granted access to pursuant to the Decision of 22 February 2008, in the *Martić* case with the exception of material: (i) provided under Rule 76 of the Rules; (ii) not forming part of the trial or appeals record; (iii) related to health and personal information about Milan Martić and his family members; and (iv) having no forensic purpose, namely material related to: remuneration of counsel, provisional

IT-95-11-T, Judgement, 12 June 2007, paras. 140, 141, 144; *Prosecutor v. Milan Martić*, Case No. IT-95-11-PT, Amended Indictment, 9 September 2003, paras. 4, 6, 7, 23a, 25-36. I note that the ICTY Appeals Chamber determined the existence of a nexus between the two cases and found that Stanišić met the requirements for access to the requested confidential material from the *Martić* case. See Decision of 22 February 2008, para. 10.

¹⁵ See Decision on Stanišić's Request for Access to Confidential Materials in the *Stanišić & Župljanin* Case, p. 3, referring to *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Decision on Radovan Karadžić's Motion for Access to Confidential Material in the *Dragomir Milošević* Case, 19 May 2009, para. 11.

¹⁶ See *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case Nos. IT-03-69-A & IT-95-5/18-T, Decision on the Prosecution's Motion Regarding the Terms of Access by Radovan Karadžić to Confidential Materials, 2 May 2014, p. 2. I note that Stanišić "leaves to the Chamber's discretion whether to order disclosure of material pertaining to provisional release". See Motion, para. 12.

¹⁷ See *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case Nos. IT-03-69-A & IT-95-5/18-T, Decision on Motion by Radovan Karadžić for Reconsideration of Decision on Motion for Access to Confidential Materials in the *Stanišić*

release, fitness to stand trial, conditions of detention, reports of the reporting medical officer, Registrar's submissions on expert reports on health issues, notices of non-attendance in court, modalities of trial or appeal, protective measures, subpoenas, video-conference links, orders to redact transcripts and broadcasts of hearings, witness scheduling, witness appearance, witness attendance, execution of arrest warrant, internal memoranda assessing state cooperation, enforcement of sentences, and notices of compliance filed in respect of other access decisions;

ORDER the Prosecution and Milan Martić:

- a) to file with the Registry, within twenty (20) days of the issuance of this Decision, a list identifying any material provided under Rule 76 of the Rules;
- b) to ascertain whether the Rule 76 providers consent to disclosing the material to Stanišić within twenty-five (25) days of the issuance of this Decision;
- c) to notify the Registry, without undue delay and on an ongoing basis, of the consent of Rule 76 providers to the disclosure of the materials to Stanišić pursuant to Order 2 above; and
- d) to apply to the Trial Chamber for additional protective measures or redactions, if required, following a review of the material to be disclosed;

REQUEST the Registry:

- a) to withhold any material related to health and personal information about Milan Martić and his family members as identified by Milan Martić;
- b) to withhold any material provided pursuant to Rule 76 of the Rules as identified by the Prosecution, until the responses of the providers have been relayed;
- c) where the Rule 76 providers have consented to further disclosure, to provide Stanišić with all such material, in electronic format where possible or in the means available to the Registry;
- d) where the Rule 76 providers have refused consent to further disclosure, to withhold that material;

and Simatović Case, 16 February 2015, p. 4. I note that Stanišić does not object to materials provided under Rule 76 of the Rules being temporarily withheld pending permission to disclose from the providers. *See Motion*, para. 12.

- e) where no additional protective measures or redactions are requested and where material has not been identified by the Prosecution as containing sensitive information that has little or no evidentiary value to Stanišić or having been provided pursuant to Rule 76 of the Rules, to provide Stanišić with all *inter partes* confidential material described above, in electronic format where possible or in the means available to the Registry; and
- f) where non-disclosure, additional protective measures, or redactions are requested, to withhold that material until the Trial Chamber has issued a decision on the request;

ORDER, 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;

ORDER that Stanišić, his Counsel, and any persons involved in the preparation of his case who have been instructed or authorized by Stanišić or his Counsel to have access to the *inter partes* confidential material described above, shall not, save upon leave expressly granted by the Trial Chamber on a particular application that third party disclosure is necessary for the preparation of Stanišić's defence:

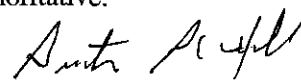
- a) disclose to any third party the names of witnesses, their whereabouts, transcripts of witness testimonies, exhibits, or any information which would enable them to be identified and would breach the confidentiality of the protective measures already in place;
- b) disclose to any third party any 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
- c) contact any witness whose identity was subject to protective measures;

ORDER that if any persons who are authorized 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; and

DENY the Motion in all other respects.

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

Done this 24th day of January 2017,
At The Hague,
The Netherlands.


Judge Burton Hall
Presiding Judge

[Seal of the Mechanism]