

MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS

Case No. MICT-15-96-T

IN THE TRIAL CHAMBER

Before: Judge Burton Hall, Presiding
Judge Joseph E. Chiondo Masanche
Judge Seon Ki Park

Registrar: **Mr. Olufemi Elias**

Date: **7 June 2018**

THE PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

-Public-

SIMATOVIĆ DEFENCE REQUEST FOR ACCESS TO CONFIDENTIAL MATERIAL
IN THE *HADŽIĆ* CASE, THE *KRAJIŠNIK* CASE, THE *BRĐANIN* CASE,
THE *ORIĆ* CASE, THE *JELIŠIĆ* CASE,
AND THE *SIMIĆ ET AL.* CASE

The Office of the Prosecutor
Mr. Douglas Stringer

Counsel for Mr. Stanišić
Mr. Wayne Jordash QC
Mr. Iain Edwards

Counsel for Mr. Simatović
Mr. Mihajlo Bakrač
Mr. Vladimir Petrović

I. INTRODUCTION

1. The Defence for Mr. Franko Simatović (“Defence”) respectfully requests, pursuant to Rule 86(G) of the Rules of Procedure and Evidence (“RPE”),¹ access to all *inter partes* confidential material from a number of completed cases, as listed below, which are interrelated to the charges against, and case of Mr. Simatović.
2. The Defence seeks access to the confidential material from the pre-trial, trial, and, if applicable, appeal proceedings of the completed cases listed below, including: (i) all the confidential² trial transcripts; (ii) all the confidential exhibits; (iii) all the confidential filings and submissions as well as all the confidential Trial Chamber decisions; and (iv) all the documentary evidence submitted by the parties (collectively, “Confidential Material”).
3. The completed cases (collectively, “Completed Cases”) from which the Confidential Material is being sought are:
 - (i) *Prosecutor v. Hadžić*, Case No. IT-04-75;
 - (ii) *Prosecutor v. Krajišnik*, Case No. IT-00-39;
 - (iii) *Prosecutor v. Brđanin*, Case No. IT-99-36;
 - (iv) *Prosecutor v. Orić*, Case No. IT-03-68;
 - (v) *Prosecutor v. Jelisić*, Case No. IT-95-10; and
 - (vi) *Prosecutor v. Simić et al.*, Case No. IT-95-09.

II. APPLICABLE LAW

4. The Defence contends that it has met all of the requirements set forth in Rule 86 of the RPE to be allowed access to the confidential material from the Completed Cases, as stated in Rule 86:
 - (F) Once protective measure have been ordered in respect of a victim or witness in any proceedings before ICTY, the ICTR, or the Mechanism (the “first proceedings”), such protective measures:

¹ MICT/1/Rev.3, 9 April 2018.

² Closed and private.

- (i) shall continue to have effect *mutatis mutandis* in any other proceedings before the Mechanism (“second proceedings”) or another jurisdiction unless and until they are rescinded, varied, or augmented in accordance with the procedure set out in this Rule; but
 - (ii) shall not prevent the Prosecutor from discharging any disclosure obligation under the Rules in the second proceedings, provided that the Prosecutor notifies the Defence to whom the disclosure is being made of the nature of the protective measures ordered in the first proceedings.
- (G) A Party to the second proceedings seeking to rescind vary, or augment protective measures ordered in the first proceedings must apply:
- (i) to any Chamber, however, constituted, remaining seised of the first proceedings; or
 - (ii) if no Chamber remains seised of the first proceedings, to the Chamber seised of the second proceedings.

III. ARGUMENTS

5. Pursuant to the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”), a party is entitled to seek confidential material from another case in order to assist in the preparation of its case if the material sought is described by its general nature, and if a legitimate forensic purpose for such access is shown.³
6. In this regard, consideration must be given to the relevance of the material sought, which may be demonstrated by showing the existence of a nexus between the applicant’s case and the case from which such material is sought.⁴ To establish such a nexus, the Defence accentuates, a “geographical, temporal or otherwise material overlap” between the two proceedings must be demonstrated by the applicant.⁵

³ *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 February 2008, para. 9; *Prosecutor v. Krajišnik*, Case No. IT-00-39-A, Decision on “Motion by Mićo Stanišić for Access to All Confidential Materials in Krajišnik Case”, 21 February 2007, p. 4.

⁴ *Protais Zigiranyirazo v. Prosecutor*, Case No. ICTR-01-73-A, Decision on Michel Bagaragaza’s Motion for Access to Confidential Material, 14 May 2009, para. 7; *Muvunyi v. Prosecutor*, Case No. ICTR-2000-55A-A, Decision on Ildephonse Nizeyimana’s Request for Access to Closed Session Transcripts, 31 March 2011, para. 3; *Prosecutor v. Nyiramasuhuko*, Case No. ICTR-98-42-A, Decision on Jacques Mungwarere’s Motion for Access to Confidential Material, 17 May 2012, para. 17.

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,

7. Further, “a party [...] may seek access to confidential material in another case if it is able to describe the documents sought by their general nature as clearly as possible even though it cannot describe them in detail, and if it can show that such access is likely to assist his case materially.”⁶ At this juncture, the Defence draws attention to the fact that a geographical, temporal, or substantive overlap between the cases in question suffices to conclude that access is likely to be of material assistance.⁷ Still further, the Appeals Chamber of the ICTY has accepted that requests for access to “all confidential material” qualify as sufficiently specific requests.⁸
8. The Defence hereby proceeds to demonstrate that there exist (i) a significant geographical and temporal overlap between the Completed Cases and the charges against, and case of Mr. Simatović, and (ii) an interrelation between the factual bases for the allegations against the accused in the Completed Cases and Mr. Simatović.
9. Mr. Simatović was indicted for Crimes against Humanity and Violations of the Laws or Customs of War committed in the territory of Croatia and Bosnia and Herzegovina,⁹ as a member of the Joint Criminal Enterprise (“JCE”)¹⁰ between April 1991 and December 1995.¹¹
10. In terms of the *Hadžić* case, the *Krajišnik* case, and the *Brđanin* case, a significant geographical overlap emanates since Mr. Hadžić, Mr. Krajišnik, and Mr. Brđanin were

23 January 2003, p. 4; *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Decision on Appellants Dario Kordić and Mario Čerkez’s Request for Assistance of the Appeals Chamber in Gaining Access to Appellate Briefs and Non-Public Post Appeal Pleadings and Hearing Transcripts Filed in *the Prosecutor v. Blaškić*, 16 May 2002, para. 15; *Prosecutor v. Đorđević*, Case No. IT-05-87/1-PT, Decision on Vlastimir Đorđević’s Motion for Access to All Material in *Prosecutor v. Limaj et al.*, Case No. IT-03-66, 6 February 2008, para 7; *Prosecutor v. Mile Mrkšić et al.*, Case No. IT-95-13/1-A, Decision on Veselin Šljivančanin’s Motion Seeking Access to Confidential Material in the *Kordić and Čerkez Case*, 22 April 2008, para. 7; *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T IT-02-54-T, Decision on the Accused’s Motion for Access to *Ex Parte* Filings in the Slobodan Milošević Case (Srebrenica Intercepts), 28 February 2011, para. 13.

⁶ *Prosecutor v. Hadžihasanović et al.*, Case No. IT-01-47-AR73, Decision on Appeal from Refusal to Grant Access to Confidential Material in Another Case, 23 April 2002, p. 3 (emphasis added).

⁷ *Ibid.*

⁸ *Prosecutor v. Blagojević & Jokić*, Case No. IT-02-60-A, Decision on Momčilo Perišić’s Motion Seeking Access to Confidential Material in the *Blagojević and Jokić Case*, 18 January 2006, para. 8; *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 June 2006, p.12; *Prosecutor v. Brđanin*, Case No. IT-99-36-A, Decision on Mičo Stanišić’s Motion for Access to All Confidential materials in the *Brđanin Case*, 24 January 2007, para. 11.

⁹ *Prosecutor v. Stanišić & Simatović*, Case No. IT-03-69-PT, (“*Stanišić & Simatović*”) Prosecution Notice of Filing of Third Amended Indictment, 10 July 2008, (“*Stanišić & Simatović Indictment*”) paras. 13-14, 18, 21.

¹⁰ *Ibid.*, paras. 12-13.

¹¹ *Ibid.*, para. 11.

charged, *inter alia*, with the same acts¹² committed in the same areas during the same period.¹³

11. In this respect, a significant temporal overlap transpires with considerable ease since Mr. Hadžić, Mr. Krajišnik, Mr. Brđjanin, and Mr. Simatović are alleged members of the same JCE¹⁴ and the periods of their participation in it also overlap.¹⁵
12. With regard to the *Orić* case, a significant geographical and temporal overlap emanates since Mr. Orić was charged, *inter alia*, with the same acts¹⁶ committed in common areas during the same period.¹⁷ This geographical and temporal overlap is all the more evident from the Prosecution's Pre-Trial Brief in the case of Mr. Simatović.¹⁸
13. With regard to the *Jelisić* case, a significant geographical and temporal overlap emerges since Mr. Jelisić was charged, *inter alia*, with acts¹⁹ committed in a common area, namely Brčko,²⁰ during the same period.²¹
14. In terms of the *Simić et al.* case, a significant geographical and temporal overlap transpires since Mr. Simić was charged, *inter alia*, with the same acts²² committed in a common area, namely Bosanski Šamac,²³ during the same period.²⁴ On this note, the Defence indicates that, although in 2005 a decision was pronounced by the then-Chamber allowing it access to all *inter partes* confidential transcripts, exhibits, documentary

¹² *Prosecutor v. Hadžić*, Case No. IT-04-75-PT, First Amended Indictment, 22 March 2012, (“Hadžić Indictment”) paras. 22, 39, 43, 46; *Prosecutor v. Krajišnik*, Case No. IT-00-39-I, Amended Indictment, 21 March 2000, (“Krajišnik Indictment”) paras. 10, 20, 23; *Prosecutor v. Brđjanin*, Case No. IT-99-36-T, Sixth Amended Indictment, 9 December 2003, (“Brđjanin Indictment”) paras. 46-48, 58-60; Stanišić & Simatović Indictment, paras. 25, 63, 66.

¹³ Hadžić Indictment, paras. 6, 19-20, 23, 40-41, 44; Krajišnik Indictment, para. 5; Brđjanin Indictment, paras. 27.2.

¹⁴ Hadžić Indictment, para. 10; Brđjanin Indictment, para. 27.2; Stanišić & Simatović Indictment, para. 12.

¹⁵ Hadžić Indictment, para. 6-7; Krajišnik Indictment, para. 5; Brđjanin Indictment, para. 27.2; Stanišić & Simatović Indictment, para. 12.

¹⁶ *Prosecutor v. Orić*, Case No. IT-03-68-PT, Third Amended Indictment, 17 June 2005, (“Orić Indictment”) para. 26; Stanišić & Simatović Indictment, para. 63.

¹⁷ Orić Indictment, para. 19.

¹⁸ *Stanišić & Simatović*, Prosecution Notice of Rule 70(E) Filing Pursuant to the Trial Chamber's Decision of 2 February 2017, 9 March 2017, Annex A (“Stanišić & Simatović Prosecution Revised Pre-Trial Brief”), paras. 78, 85, 93, 111.

¹⁹ *Prosecutor v. Jelisić & Češić*, Case No. IT-95-10-PT, Second Amended Indictment, 19 October 1998, (“Jelisić Indictment”) paras. 14-36.

²⁰ *Ibid.*, paras. 1-4, 12; Stanišić & Simatović Prosecution Revised Pre-Trial Brief, paras. 78, 112; *Stanišić & Simatović*, Simatović Defence Revised Pre-Trial Brief, 30 March 2017, para. 67.

²¹ Jelisić Indictment, paras. 1-4, 12.

²² *Prosecutor v. Simić et al.*, IT-95-09, Fifth Amended Indictment, 30 May 2002, (“Simić Indictment”) paras. 16, 20; Stanišić & Simatović Indictment, paras. 25, 66.

²³ Simić Indictment, paras. 1, 9; Stanišić & Simatović Indictment, paras. 9, 22, 26, 46-50, 64-65.

²⁴ Simić Indictment, paras. 1, 5, 9.

evidence, and motions,²⁵ no decision was pronounced on its motion²⁶ for access to confidential materials in the *Simić et al.* case filed in 2011.

15. In light of the above, first it emanates that the geographical and temporal requirements are met, then it accordingly emerges that the factual bases for the allegations against the accused in the Completed Cases and the charges against, and case of Mr. Simatović are clearly interrelated. To this end, the Defence concludes that the Completed Cases and the charges against, and case of Mr. Simatović are unequivocally intertwined.
16. Ultimately, the Defence recalls that Mr. Stanišić was granted access to confidential material in (i) the *Hadžić* case,²⁷ and (ii) the *Krajišnik* case and the *Simić et al.* case.²⁸

IV. RELIEF SOUGHT

17. The Defence submits that, with this analysis, it has demonstrated and established the existence of a nexus between the Completed Cases and the charges against, and case of Mr. Simatović. Considering the existence of a geographical, temporal, and material overlap between the Completed Cases and the charges against, and case of Mr. Simatović, the Defence respectfully submits that the Confidential Material will be essential for the preparation of its case and thereby respectfully requests access to the same Confidential Material.

Respectfully submitted,

Counsel for the Accused:

²⁵ *Stanišić & Simatović*, Decision on Defence Motion by Franko Simatović for Access to Transcripts, Exhibits, Documentary Evidence and Motions Filed by the Parties in the *Simić et al.* Case, 12 April 2005, p. 4.

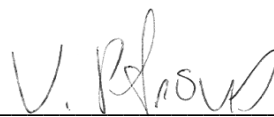
²⁶ *Stanišić & Simatović*, Motion for Access to Confidential Materials in the *Simić et al.* Case, 11 June 2011.

²⁷ *Prosecutor v. Stanišić & Simatović*, Case No. MICT-15-96/MICT-16-101, Decision on Stanišić's Request for Access to Confidential Materials in the *Hadžić* Case, 29 September 2016.

²⁸ *Stanišić & Simatović*, Decision on Requests of Jovica Stanišić for Access to Confidential Materials in the *Krajišnik* and the *Simić et al.* Cases, 24 March 2011.



Mihajlo Bakrač, Lead Counsel



Vladimir Petrović, Co-Counsel

The Hague, 7 June 2018

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