



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-03-67-T
IT-04-75-PT
Date: 13 March 2012
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French

IN TRIAL CHAMBER III

Before: Judge Jean-Claude Antonetti, Presiding
Judge Frederik Harhoff
Judge Flavia Lattanzi

Registrar: Mr John Hocking

Decision of: 13 March 2012

THE PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC DOCUMENT

With separate opinion of Presiding Judge Jean-Claude Antonetti in public annex

**DECISION ON MOTION OF GORAN HADŽIĆ SEEKING ACCESS TO
CONFIDENTIAL MATERIAL RELATED TO CROATIA IN ŠEŠELJ CASE
(IT-03-67)**

The Office of the Prosecutor

Mr Mathias Marcussen
Mr Douglas Stringer

The Accused

Mr Vojislav Šešelj

Counsel for Goran Hadžić

Mr Zoran Živanović
Mr Christopher Gosnell

I. INTRODUCTION

1. Trial Chamber III (“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 (“Tribunal”) is seized of a motion filed as a public document on 2 February 2012 on behalf of Goran Hadžić (“Applicant”) – the accused in Case No. IT-04-75, *The Prosecutor v. Goran Hadžić* (“*Hadžić Case*”) – seeking disclosure of all the confidential material on the events that took place in Croatia between 1991 and 1993 in the file of the present case.¹

2. On 16 February 2012, the Office of the Prosecutor (“Prosecution”) filed a public response to the Motion.² Vojislav Šešelj (“Accused”) did not reply to the Motion.³

II. ARGUMENTS OF THE PARTIES

A. Arguments Presented in the Motion

3. The Applicant seeks disclosure of all confidential material related to the events that took place in Croatia between 1991 and 1993 in the file of the present case, namely: (i) confidential documents disclosed pursuant to Rule 66 (A) (i) of the Rules of Procedure and Evidence (“Rules”), (ii) transcripts from all closed and private sessions, (iii) confidential exhibits and exhibits not available through the judicial database of the Tribunal (“JDB”), and (iv) all confidential documents filed in the present case and documents not available through the JDB.⁴

4. The Applicant claims that access to these documents is required for the preparation of his defence since: (i) the crimes alleged in the Indictment drawn up

¹ “Defence Motion on Behalf of Goran Hadžić Seeking Access to All Confidential Material in *Prosecution v. Vojislav Šešelj* Related to Croatia”, 2 February 2012 (public) (“Motion”).

² “Prosecution Response to Motion of Goran Hadžić for Access to Confidential Material Related to Croatia in *Šešelj*”, 16 February 2012 (public) (“Response”). The Accused received the BCS translation of the Response on 7 March 2012 (*see Procès-verbale* of Reception filed on 13 March 2012).

³ The Accused received the BCS translation of the Motion on 7 February 2012 (*see Procès-verbale* of Reception filed on 10 February 2012) and therefore had until 21 February 2012 to reply.

⁴ Motion, paras 2 and 3.

against the Applicant⁵ cover the same geographic area and same span of time as some of the crimes alleged against the Accused in the present case;⁶ (ii) the Prosecution alleges that the Applicant and the Accused were both members of the same joint criminal enterprise (“JCE”) and that their participation in this enterprise covers a period which overlaps in part;⁷ (iii) the Applicant is equally charged as the hierarchic superior because of the effective control he had over the volunteers of the Serbian Chetnik Movement (“SČP”) and/or the Serbian Radical Party, known under the name of “Chetniks” or “Šešeljevci”, even though it is alleged that the Accused was the leader of the SČP from 23 February 1991 to 28 April 1994.⁸

B. Arguments Presented in the Response

5. The Prosecution does not oppose the disclosure to the Applicant of the confidential *inter partes* material of the file in the present case for which he has demonstrated that there is legitimate forensic purpose.⁹ The Prosecution submits that the Applicant should be granted access subject to the following conditions:¹⁰ (i) the confidential material provided under Rule 70 of the Rules may be disclosed to the Applicant only if the provider consents,¹¹ and (ii) documents relating to protected witnesses in the present case for whom the Prosecution intends to seek delayed disclosure of their identity in the *Hadžić* Case must not, pending a decision of the Trial Chamber seized of this case, be accessible to the Applicant.¹²

6. Moreover, the Prosecution claims that some categories of confidential *inter partes* documents are not liable to assist the Applicant in the preparation of his defence and should not, therefore, be disclosed to him, namely, confidential *inter partes* documents relating to: the health of the Accused; protective measures; the redactions of public transcripts; subpoenas; correspondence from the Registry of the

⁵ *The Prosecutor v. Goran Hadžić*, Case No. IT-04-75-I, “First Amended Indictment”, 22 July 2011 (public); see also “Corrigendum to Prosecution’s First Amended Indictment”, 3 August 2011 (public) (“*Hadžić* Indictment”).

⁶ Motion, paras 6 and 7 referring to the “Third Amended Indictment”, 7 December 2007 (public) (“*Šešelj* Indictment”), paras 5 and 6, 15 to 17, 20 to 21.

⁷ Motion, para. 8 referring to the *Hadžić* Indictment, paras 10 to 16; *Šešelj* Indictment, para. 8.

⁸ Motion, paras 9 and 10 referring to the *Hadžić* Indictment, paras 11-g and 16; *Šešelj* Indictment, para. 4.

⁹ Response, paras 1, 5 and 6.

¹⁰ Response, paras 1, 5 and 6.

¹¹ Response, paras 2 and 7.

¹² Response, paras 8 and 9.

Tribunal (“Registry”) or state representatives; and orders or memoranda concerning witness scheduling.¹³

7. Finally, the Prosecution opposes the disclosure of *ex parte* documents to the Applicant on the grounds that the criteria, of a higher standard for this category of documents, have not been met in this case.¹⁴

III. APPLICABLE LAW

8. In order to assist in the preparation of his defence, a party is entitled to request to consult material, regardless of its origin, in particular when filed in another case before the Tribunal, on condition that it identifies the material needed or specifies its general nature, and that it shows a legitimate forensic purpose for it.¹⁵

A. *Inter Partes* Material

9. With respect to confidential *inter partes* material, the requesting party must show that there is a legitimate forensic purpose by proving that the material in question is likely to assist substantially in the presentation of the case or, at least, that there is a fair chance that it will,¹⁶ without, however, needing to explain in detail how each of these documents could be of use.¹⁷ This condition is met when the requesting party establishes the “existence of a factual nexus between the two cases such as a

¹³ Response, paras 5, 10.

¹⁴ Response, paras 1, 4 and 11.

¹⁵ *The 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 (public) (“*Šainović et al.* Decision of 16 February 2010”), para. 9; *The Prosecutor v. Rasim Delić*, Case No. IT-04-83-A, “Decision on Motion by Radovan Karadžić for Access to Confidential Materials in the Rasim Delić Case”, 19 May 2009 (public) (“*Delić* Decision of 19 May 2009”), para. 7; *The 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 (public) (“*D. Milošević* Decision of 19 May 2009”), para. 7; *The 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 April 2009 (public) (“*D. Milošević* Decision of 27 April 2009”), para. 4; *The Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, 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 (public) (“*Mrkšić and Šljivančanin* Decision of 22 April 2008”), para. 7.

¹⁶ *D. Milošević* Decision of 19 May 2009, para. 8; *D. Milošević* Decision of 27 April 2009, para. 5; *The Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, “Decision on Motion by Mićo Stanišić for Access to All Confidential Materials in the *Krajišnik* Case”, 21 February 2007 (public) (“*Krajišnik* Decision of 21 February 2007”), p. 4.

¹⁷ *The Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, “Decision on Motion by Radivoje Miletić for Access to Confidential Information”, 9 September 2005 (public) (“*Blagojević and Jokić* Decision of 9 September 2005”), p. 4.

'geographical, temporal or otherwise material overlap'".¹⁸ In this respect, the Appeals Chamber emphasised that the relevance of the requested documents could be established in cases which "stem from events alleged to have occurred in the same geographical area and at the same time".¹⁹

10. The Chamber, moreover, recalls that the principle of equality of arms assumes that the accused is in a similar position to that of the Prosecution, which has access to all submissions filed *inter partes* in order to understand the procedure and the evidence and to comprehend their relevance to his own case.²⁰ Consequently, once an accused has been granted permission to consult confidential evidence or testimony that is confidential or heard in closed session in another case before the Tribunal, he must also be given the opportunity to consult the motions, submissions, decisions and transcripts from hearings that may be relevant.²¹

B. *Ex parte* and sensitive material

11. With regard to confidential *ex parte* material that has a degree of higher confidentiality, there are "more rigorous" requirements to show proof of a legitimate forensic purpose, and access to this category of documents should only be granted exceptionally.²²

12. The Chamber recalls in this respect that the *ex parte* material "by nature contains information which has not been disclosed *inter partes* because of security

¹⁸ *D. Milošević* Decision of 19 May 2009, para. 8; *see also Šainović et al.* Decision of 16 February 2010, para. 9; *Delić* Decision of 19 May 2009, para. 7; *D. Milošević* Decision of 27 April 2009, para. 5; *Mrkšić and Šljivančanin* Decision of 22 April 2008, para. 7; *The Prosecutor v. Dario Kordić and Mario 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 & Čerkez* Case", 23 January 2003 (public), p. 4; *The 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 (public), para. 9.

¹⁹ *Šainović et al.* Decision of 16 February 2010, para. 9; *Delić* Decision of 19 May 2009, para. 7; *Krajišnik* Decision of 21 February 2007, p. 4; *see also The Prosecutor v. Tihomir 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 (public), para. 15.

²⁰ *Šainović et al.* Decision of 16 February 2010, para. 11; *D. Milošević* Decision of 19 May 2009, para. 11; *Blagojević and Jokić* Decision of 9 September 2005, p. 4.

²¹ *Šainović et al.* Decision of 16 February 2010, para. 11; *D. Milošević* Decision of 19 May 2009, paras 11 to 12.

²² For *ex parte* documents *see: Šainović et al.* Decision of 16 February 2010, para. 10; *Krajišnik* Decision of 21 February 2007, p. 5.

interests of a State, other public interests, or privacy interests of a person or institution” and, therefore, “the party on whose behalf *ex parte* status has been granted enjoys a protected degree of trust that the *ex parte* material will not be disclosed”.²³

13. With regard to sensitive material, the Chamber notes that it contains information that was communicated in a restricted way to specifically designated parties and through an exceptional procedure all for the purpose of protection,²⁴ so that the stricter criteria applicable to the disclosure of *ex parte* material are, by analogy, applicable to the disclosure of sensitive material.

C. Material Provided Under Rule 70 of the Rules

14. Documents may be considered confidential because their use is subject to restrictions under Rule 70 of the Rules. In such cases, neither the information disclosed in a case to the Prosecution nor to the Defence pursuant to Rule 70 nor its origin may be revealed to an accused in another case without the approval of the provider, regardless of whether it was used as evidence in the first case.²⁵

IV. DISCUSSION

A. Access to Confidential *Inter Partes* Material

15. The Chamber firstly considers that the confidential *inter partes* material for which the Applicant request disclosure has been properly identified and that its general nature has been clearly specified.

16. With respect to the link between the *Hadžić* Case and the present case, the Chamber finds, in the first instance, that the *Šešelj* Indictment covers the period from 1 August 1991 to the month of September 1993 and that the Indictment against the Applicant concerns the period from around 25 June 1991 to 31 December 1993.²⁶ The

²³ *Šainović et al.* Decision of 16 February 2010, para. 10; *Krajišnik* Decision of 21 February 2007, p. 5.

²⁴ See “Directive for the Court Management and Support Services Section, Judicial Support Services, Registry”, 19 January 2011, IT/121/REV.2, Article 3, which defines sensitive filing as a “filing which, due to the particular subject matter, will have restricted distribution, will temporarily not be linked to the JDB, and will only be filed and distributed in hard copy to specified recipients”. See also *ibid.*, Article 23 (2).

²⁵ *Krajišnik* Decision of 21 February 2007, p. 6.

²⁶ *Šešelj* Indictment, paras 8 (a), 15, 18, 28, 31, 34; *Hadžić* Indictment, paras 6, 16, 19, 23, 40, 44 and 47.

Chamber therefore deems that there is a partial but sufficient temporal overlap between the two cases.

17. The Chamber notes, in the second instance, that the Applicant and the Accused are being prosecuted for the commission of crimes such as persecution, murder, expulsions and inhumane acts (forcible transfers), that were committed as part of a JCE, joining together the Applicant, the Accused and other participants, including Slobodan Milošević, Milan Martić, Milan Babić, Jovica Stanišić, Franko Simatović and Željko Ražnatović, aka Arkan.²⁷ The Chamber considers that there is therefore a sufficient material overlap.

18. The Chamber, finally, notes that like the Accused, the Applicant is being prosecuted for crimes that are alleged to have been committed in Croatia and, in particular, in the Serbian Autonomous Region of Slavonia, Baranja and Western Srem and in the Republic of Serbian Krajina.²⁸ Consequently, the Chamber notes that a geographic overlap exists between the two cases which, although only partial, is sufficient.

19. The Chamber therefore considers that there is a “good chance”²⁹ that the confidential *inter partes* material in the present case relating to events that took place in Croatia between 1991 and 1993 could help the Applicant to prepare his defence.

20. In conclusion, the Chamber deems that conditions have been met to grant the Applicant access to all the confidential *inter partes* material relating to the events that took place in Croatia between 1991 and 1993 and which are part of the case file in the present case, subject to the conditions of access set out below.³⁰

B. Access to *Ex Parte* Material and Sensitive Material

21. The Applicant does not show that, in order to guarantee the respect for his right to a fair trial, he would need to consult the documents filed as *ex parte* or sensitive material in this case. The Chamber therefore concludes that the more

²⁷ *Šešelj* Indictment, paras 8, 15 to 34; *Hadžić* Indictment, paras 6 to 13 and 19 to 48.

²⁸ See for example the *Hadžić* Indictment, paras 7, 16, 19, 23, 44; *Šešelj* Indictment, paras 15, 18, 29, 31 and 34.

²⁹ See *supra*, para. 9.

³⁰ See *infra*, paras 23 to 42.

rigorous conditions attached to the consultation of *ex parte* material and sensitive material in the present case have not been met in this instance.

22. The Chamber recalls that, should the *ex parte* or sensitive material in the present file contain elements of an exculpatory nature for the Applicant or counter Prosecution evidence, the Prosecution is obliged, pursuant to Rule 68 of the Rules and subject to Rule 70 of the Rules, to disclose this material to the Applicant or to seek relief from the disclosure obligation from the Trial Chamber seized of the *Hadžić* Case.³¹

C. Conditions for Access

1. With regard to confidential material provided under Rule 70 of the Rules

23. The Chamber considers that the confidential *inter partes* material concerning the events that took place in Croatia between 1991 and 1993 tendered into evidence in the present case by the parties pursuant to Rule 70 of the Rules may be disclosed to the Applicant only if consent is obtained from the providers thereof. Therefore, the Chamber grants the Applicant access to this material provided that the required consents are first obtained.

2. With regard to the delayed disclosure of the identity of witnesses that may be called to testify in the *Hadžić* Case

24. The Chamber takes note of the Prosecution's request not to disclose immediately to the Applicant the material relating to protected witnesses in the present case who could be called to testify in the *Hadžić* Case and for which the Prosecution may seek the measure of delayed disclosure of their identity.³² The Prosecution seeks permission to defer the disclosure of this material until the decision of the Trial Chamber seized of the *Hadžić* Case, ruling on the granting of such protective measures.³³ The Chamber grants this Prosecution request in order to avoid undermining the protective measures that the Prosecution intends to seek in the *Hadžić* case.

³¹ *The Prosecutor v. Radoslav Brdanin*, Case No. IT-99-36-A, "Decision on Mićo Stanišić's Motion for Access to All Confidential Materials in the *Brdanin* Case", 24 January 2007 (public), para. 14.

25. The Chamber deems in this respect that the Trial Chamber seized of the *Hadžić* Case is best placed to determine, pursuant to Rule 69 of the Rules, whether there are exceptional circumstances that justify the deferral of the disclosure of the material relating to the said Prosecution witnesses. Consequently, the Chamber allows the Prosecution to delay disclosure of the material relating to these Prosecution witnesses until the Trial Chamber has ruled on the requests presented by the Prosecution in order to obtain deferral of the disclosure of confidential *inter partes* documents in the present case.³⁴ In this respect, the Chamber notes that the Trial Chamber seized of the *Hadžić* case ordered the Prosecution to submit any such requests prior to 19 June 2012.³⁵

D. Other Protective Measures

26. The Chamber recalls that the protective measures ordered in the case “shall continue to have effect *mutatis mutandis* in any other proceedings before the Tribunal”.³⁶ Moreover, it recalls that once “access to confidential materials from another case is granted, the Appeals Chamber determines if and what additional protective measures are necessary in order to 'strike a balance between the rights of a party to have access to material to prepare its case and guaranteeing the protection and integrity of confidential information’”.³⁷

27. Consequently, the protective measures ordered in the present case continue to be applied *mutatis mutandis* to any document disclosed to the Applicant. The parties in the present case may, if they so wish, file any requests for additional protective measures.

³² Response, paras 8 and 9.

³³ Response, para. 9.

³⁴ Cf. *D. Milošević* Decision of 19 May 2009, para. 14.

³⁵ *The Prosecutor v. Goran Hadžić*, Case No. IT-04-74-PT, “Order on Pre-Trial Work Plan”, 16 December 2011 (public), annex.

³⁶ Rule 75 (F) (i) of the Rules.

³⁷ *D. Milošević* Decision on 19 May 2009, para 16 citing in particular *The Prosecutor v. Mladen Naletilić, alias “Tuta” and Vinko Martinović, alias “Štela”*, 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 June 2005 (public), p. 7; see also the *Šainović et al.* Decision of 16 February 2010, para. 19; *D. Milošević* Decision of 27 April 2009, para. 14.

V. DISPOSITION

28. For the foregoing reasons, the Chamber **GRANTS IN PART** the Motion and allows the Applicant to consult, subject to the conditions set out in the present decision, all the confidential material filed *inter partes* in the present case relating to the events that took place in Croatia between 1991 and 1993, in particular the transcripts of testimony heard in closed session and private session, confidential exhibits, confidential submissions of the parties and confidential decisions in the case file.

29. The Chamber **ORDERS** the Prosecution to:

(a) inform the Registry by 30 March 2012 at the latest, which confidential *inter partes* documents in the file of the present case relating to the events that took place in Croatia between 1991 and 1993 may be disclosed immediately to the Applicant as they are not likely to be the subject of requests for possible delayed disclosure (“Documents to be disclosed immediately”);

(b) seize the Trial Chamber dealing with the *Hadžić* Case of any potential requests for the delayed disclosure of confidential *inter partes* documents from the file in the present case by 19 June 2012 at the latest (“Documents subject to a motion for delayed disclosure”).

A. On Documents to be Disclosed Immediately

30. The Chamber **ORDERS** the Prosecution and the Accused to:

(a) inform the Registry within 10 working days following the date of the identification of the Documents to be Disclosed Immediately of the exhibits that were provided, if any, pursuant to Rule 70 of the Rules;

(b) request, within 15 working days of the date of the identification of the Documents to be Disclosed Immediately, from the persons who provided the documents pursuant to Rule 70 of the Rules, permission to disclose them to the Applicant.

31. The Chamber **REQUESTS** the Chamber:

(a) not to disclose the confidential *inter partes* documents in the present case provided under Rule 70 of the Rules and identified as such by the Prosecution and the Accused without receiving approval to disclose them from the persons or entities who supplied them;

(b) to disclose to the Applicant, his counsel and all his other associates approved by them, the confidential *inter partes* documents in the present case provided under Rule 70 of the Rules when the persons or entities who provided these documents have given their consent to them being disclosed;

(c) not to disclose confidential *inter partes* documents in the present case provided under Rule 70 of the Rules if the persons or entities who provided these documents do not consent to their disclosure.

32. The Chamber **ORDERS** the Prosecution and the Accused to present, if needed, any requests for additional protective measures within 15 working days from the date of identification of the Documents to be Disclosed Immediately.

33. Moreover, the Chamber **ORDERS** that:

(a) if no additional protective measures are requested within the 15 working days following the date of identification of the Documents to be Disclosed Immediately and if the Prosecution or the Accused have not identified, within 10 working days, that these document have been submitted pursuant to Rule 70 of the Rules, the Registry shall disclose to the Applicant and to his counsels and all his associates who have received instruction from the former or have been approved by them, all the Documents to be Disclosed Immediately;

(b) if additional protective measures have been requested, the Registry will refrain from disclosing the said documents until the Chamber rules on the requests.

B. On the Documents for Which Delayed Disclosure Has Been Sought

34. The Chamber **ORDERS** the Prosecution and the Accused to:

(a) inform the Registry within the 10 working days after the date on which the Trial Chamber seized of the *Hadžić* Case has rendered a decision on any potential request for delayed disclosure of confidential *inter partes* documents in the present case brought by the Prosecution (“Decision of the Trial Chamber Seized of the *Hadžić* Case”), of the material provided pursuant to Rule 70 of the Rules;

(b) request, within 15 working days of the date of the Decision of the Trial Chamber Seized of the *Hadžić* Case, from the persons or entities who provided the material pursuant to Rule 70 of the Rules, permission to disclose them to the Applicant;

35. The Chamber **REQUESTS** the Registry to:

(a) refrain from disclosing all the material obtained pursuant to Rule 70 of the Rules and identified as such by the Prosecution or the Accused without receiving approval to disclose them from the persons or entities who provided them;

(b) disclose to the Applicant, his counsels or any other associates approved by them, the confidential *inter partes* documents in the present case provided under Rule 70 of the Rules when the persons or entities who provided this material have consented to their disclosure;

(c) refrain from disclosing confidential *inter partes* documents in the present case provided under Rule 70 of the Rules if the persons or entities who provided them have refused permission to disclose them;

36. The Chamber **ORDERS** the Prosecution and the Accused to present, if needed, any requests for additional protective measures within 15 working days of the date of the Decision of the Trial Chamber Seized of the *Hadžić* Case;

37. Moreover, the Chamber **ORDERS** that:

(a) if no additional protective measures are sought within 15 working days of the date of the Decision of the Trial Chamber Seized of the *Hadžić* Case and if the said documents have not been identified within 10 working days of the Decision of the Trial Chamber Seized of the *Hadžić* Case by the Prosecution and Accused as having been provided pursuant to Rule 70 of the Rules, the Registry shall disclose to the Applicant and his counsel and any other associate approved by them, all the Documents for which delayed disclosure has been sought;

(b) if additional protective measures have been sought, the Registry shall refrain from disclosing the documents in question until the Chamber rules on these requests.

C. On All the Material to Be Disclosed

38. The Chamber **ORDERS** that all the protective measures ordered previously in the present case continue to apply to the confidential material filed *inter partes* disclosed by the Registry.³⁸

39. The Applicant, his counsel and all other associates who have been authorised to examine the said material, shall refrain from:

(a) disclosing to third parties the identity of witnesses, their address, their written statements, transcripts of their testimony, exhibits or any other information that could lead to their identification and that would contravene the existing protective measures;

(b) disclosing to third parties any confidential evidence, either documents or other material, or from revealing, in its entirety or in part, the content of any confidential material in the present case;

(c) contacting any witnesses whose identity is protected.

40. Should the confidential material be disclosed to a third party, for the purposes of the preparation of the Applicant's defence, with the approval of the Chamber, any

³⁸ See *supra*, para. 27.

person who receives it must be informed by the Applicant or his counsel that they are not permitted to copy, reproduce or make public, in its entirety or in part, any confidential information, or to disclose it to any other person. Moreover, if a person receives one of these documents, he must return it to the Applicant, his counsel or any other person approved by them, as soon he no longer needs it for the preparation of his defence.

41. With reference to the preceding paragraphs, third parties exclude: (i) the Applicant; (ii) his counsel; (iii) any associate who has been approved by the counsel to examine the confidential material; and (iv) Tribunal staff, including members of the Prosecution.

42. If the Applicant's Counsel or a member of the Defence team allowed to examine the confidential material withdraws from the *Hadžić* Case, he will return to the Registry all confidential material that was sent to him in accordance with this decision.

43. The Chamber **DENIES** the Motion in all other respects.

44. Presiding Judge Antonetti hereby attaches a separate opinion.

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

/signed/
Jean-Claude Antonetti
Presiding Judge

Done this thirteenth day of March 2012
At The Hague
The Netherlands

[Seal of the Tribunal]

**ANNEX: SEPARATE OPINION OF
PRESIDING JUDGE JEAN-CLAUDE ANTONETTI**

The motion of the Defence of **Goran Hadžić** is a purely technical motion like the motions of other accused who seek access to transcripts or documents admitted in other cases.

For several years now the Chambers have been seized of this type of motion and have rendered many decision on this matter.³⁹

In the present case, the Prosecutor has noted in his submission that a number of measures should be adopted in order to ensure better protection of witnesses and the Prosecution case in the *Hadžić* Case. Therefore, firstly, the Prosecutor does not oppose the disclosure of the confidential information in *The Prosecutor v. Šešelj* Case to the Accused for which he has shown a legitimate forensic purpose, on condition that the Chamber amends the existing protective measures and establishes clear conditions to protect the safety of witnesses and to prevent “un-authorized” disclosure to third parties.

However, the Prosecutor opposes access to the Accused of confidential material that has no probative value in this case and that is not likely to assist the Accused in the preparation of his case.

It also opposes access to any *ex parte* documents. The motion does not show that it has reached the high standard required to establish a legitimate forensic purpose.

In particular, the Prosecutor has requested that the Chamber denies the Accused temporary access to *inter partes* documents that were disclosed confidentially pursuant to Rule 70 of the Rules, which require the prior consent of the person who provided them, and material that requires delayed disclosure pursuant to Rules 69 and

³⁹ Decision of 20 June 2011 on the motion by Radovan Karadžić for release of confidential materials in the *Šešelj* Case (IT-03-67); Decision of 9 September 2008 on the motion filed by Vlastimir Đorđević for access to materials in the *Milutinović et al.* Case (IT-05-87-T and IT-05-87/1-PT); Decision of 7 March 2011 on the motion of Mićo Stanišić and Stojan Župljanin for disclosure of confidential material in the *Prlić et al.* Case (IT-04-74-T); Decision of 30 September 2010 on Zdravko Tolimir’s urgent request for disclosure of confidential materials from the *Perišić* Case (IT-04-81-T).

75 (H) of the Rules. The protective measures granted to witnesses in *The Prosecutor v. Šešelj* Case must continue to apply in this case.

The Prosecutor's concern is quite legitimate since he does not wish to be hindered in the presentation of Prosecution evidence in *this case*, while preserving the safety of witnesses.

In the present decision to which I fully subscribe, the Trial Chamber **unanimously** replied to the Office of the Prosecutor on these points.

As far as I am concerned, I hope through this *separate opinion* to make an additional contribution to the consolidation of international justice aiming to provide maximum protection to witnesses in such a way that justice can operate impartially and that the trial proceeds smoothly.

For a few years now we have been dealing in a number of trials with problems linked to the refusal of witnesses to appear to testify, leading to prosecution for contempt of court which are *costly* in terms of time and energy and to standstill situations; with some witnesses not wanting to testify in certain cases, the Prosecution is consequently obliged to withdraw them.⁴⁰

In addition, we have been confronted with some reasonably novel situations in which witnesses called by the Prosecution suddenly declare themselves to be Defence witnesses. In this muddle, the Judges have sought solutions most appropriate to the situations thus created, by using means available in the Rules.

The solutions found do not, however, seem to me satisfactory in respect of the desired aim, the **revelation of the Truth**.

Theoretically, when the Prosecution has chosen to call a witness who, in its opinion, would be a Prosecution witness, it should not be hindered by witnesses changing their

⁴⁰ **Milan Tupajić** was convicted for contempt of court to two months in prison (*The Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18).

mind for unknown reasons and it also has at its disposal, when it deems that a witness may be being harassed or intimidated, protective measures defined under Rule 75 of the Rules including the relocation of the witness so that he can evade any harassment or intimidation.

Despite these measures, we have had in some cases situations where a witness relocated to the United States has created difficulties with regard to testifying. Therefore, there is a real problem here which should be examined in advance in order to discover the true causes.

First, it is clear that, more or less as soon as it has examined the Indictment in detail, the Defence knows the position or identity of witnesses who may have given preliminary statements to the Office of the Prosecutor and may be tempted, as permitted under the common law system, to contact these potential witnesses *formally or informally* without the Office of the Prosecutor even knowing about it.

Equally, because of the 65 *ter* List and the deadlines for the disclosure of documents and the identity of a witness, it is possible that in a very short time span, there is *technically a possibility* that the protected witnesses in question are subjected to intimidation or harassment or not even intimidation or harassment but simply to receiving telephone calls like: “*We hear that you are planning to testify.*”

This type of situation could be avoided if the Rules allowed the Prosecution to reveal the names of protected witnesses and related documents in its possession only **on the day the witness arrives to testify** in order to avoid any interference with him; at that point this would guarantee completely that nobody would be able to approach him before he comes to testify ...

The Council of Europe’s Parliamentary Assembly has dealt with this issue and the report entitled “The Protection of Witnesses as a Cornerstone for Justice and Reconciliation in the Balkans” takes stock of this question.⁴¹ It is also worth noting

⁴¹ Council of Europe “The Protection of Witnesses as a Cornerstone for Justice and Reconciliation in the Balkans”, Report of 12 January 2011, Doc. 12440.

that the case-law of the ECHR⁴² is clear because, according to the Court, to hide the identity of a witness from the Accused does not necessarily constitute a violation of the rights of the Accused to a fair trial as long as he or his attorney have the possibility of questioning the witness.

Moreover, in order to respect the *principle of equality of arms*, this may equally be used on behalf of the Defence, which could equally benefit from the same guarantees for its own witnesses in order for them to be able to testify freely on behalf of the Accused, without being questioned immediately before the hearing by the Office of the Prosecutor in order to test their effective reliability on the day of the hearing.

The reservations expressed by the Prosecutor in his submission are worthy of the Judges' special attention and the Chamber has replied to them. To my mind, I think that this is a very important matter that should, I believe, lead to an amendment of the Rules; this could play a part when the Rules of the Residual Mechanism are adopted.

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

 /signed/
Jean-Claude Antonetti
Presiding Judge

Done this thirteenth day of March 2012
At The Hague
The Netherlands

[Seal of the Tribunal]

⁴² See in particular, ECHR, *Kostovski v. The Netherlands*, 20 November 1989; *Doorson v. The Netherlands*, 26 March 1996.