



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
Date: 29 July 2010
Original: ENGLISH
French

IN TRIAL CHAMBER III

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

Registrar: Mr John Hocking

Order of: 29 July 2010

THE PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC DOCUMENT

**ORDER ON THE MOTION OF THE ACCUSED FOR DISCLOSURE OF
CONFIDENTIAL DOCUMENTS FROM THE BILJANA PLAVŠIĆ CASE (IT-
00-39 & 40/1)**

The Office of the Prosecutor

Mr Mathias Marcussen

The Accused

Mr Vojislav Šešelj

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 seised of the public Motion of Professor Vojislav Šešelj (“Accused”) filed on 18 February 2010 for disclosure of all the confidential documents used in the Biljana Plavšić Case (“Motion”).¹ The Office of the Prosecutor (“Prosecution”) responded to the Motion on 2 March 2010 (“Response”).²

II ARGUMENTS OF THE PARTIES

A. Arguments presented in the Motion

2. In his Motion, the Accused seeks, under Rule 75 (G) of the Rules of Procedure and Evidence of the Tribunal (“Rules”), disclosure of the following material used in the Biljana Plavšić Case (“*Plavšić* Case”): 1) all confidential statements taken and interviews conducted by the Prosecution, 2) all closed session transcripts, 3) all confidential exhibits, and 4) all confidential *inter partes* submissions and annexes, as well as all confidential decisions of the Trial Chamber in charge of the *Plavšić* Case.³

3. In support of his Motion, the Accused argues that, in the light of the indictments brought against him and Biljana Plavšić, the two cases overlap due to the fact that there is a nexus between the factual bases of the allegations brought against him and Biljana Plavšić.⁴ The Accused asserts that a legitimate forensic purpose is demonstrated by the fact that he is charged with participating in a joint criminal enterprise by acting with other participants, including Biljana Plavšić.⁵ The Accused further asserts that there is a geographical overlap between the two cases.⁶

¹ English translation of the BCS original, “Submission 444: Motion of Professor Vojislav Šešelj for Access to Confidential Material in the Case *The Prosecutor v. Biljana Plavšić* (IT-00-39 & 40/1) – ‘Bosnia and Herzegovina’”, submitted on 18 February 2010; English version filed on 24 February 2010 (“Motion”).

² “Prosecution’s Response to the Accused’s Motion for Access to Confidential Material in the Case *The Prosecutor v. Biljana Plavšić* (IT-00-39 & 40/1)”, 2 March 2010 (“Response”).

³ Motion, para. 3.

⁴ Motion, para. 13.

⁵ Motion, para. 12.

⁶ Motion, para. 13.

4. The Accused seeks access to the requested material because of its potential importance for the preparation of his defence.⁷

B. Arguments presented in the Response

5. In its Response, the Prosecution notes, *in limine*, that the Motion is properly brought before the Chamber as no Chamber is currently seised of the *Plavšić* Case.⁸

6. On the merits, the Prosecution does not object to the disclosure of *inter partes* material directly relating to the crimes or the participation of the Accused in the joint criminal enterprise,⁹ except non-evidentiary material, such as confidential filings.¹⁰ Moreover, the Prosecution maintains that the Accused has not demonstrated how access to non-evidentiary material would assist him in preparing his defence.¹¹

7. Furthermore, the Prosecution objects to the disclosure of any *ex parte* material from the *Plavšić* Case.¹²

8. Finally, with regard to confidential material subject to restrictions under Rule 70 of the Rules, the Prosecution maintains that this material will not be disclosed to the Accused until consent is obtained from the providers.¹³

III. APPLICABLE LAW

9. Rule 75 (G) of the Rules provides that:

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.

⁷ Motion, para. 13.

⁸ Response, para. 2.

⁹ Response, paras 4 and 20-A.

¹⁰ Response, paras 5, 17-18.

¹¹ Response, paras 5, 17.

¹² Response, para. 11.

¹³ Response, para. 12.

10. Case law distinguishes three categories of confidential material: 1) *inter partes* material; 2) *ex parte* material; and 3) Rule 70 material. Each of these categories has a separate standard of access.¹⁴

11. As the Motion does not deal with *ex parte* material, the examination of applicable law will focus on *inter partes* material.

12. With regard to *inter partes* confidential material, a party is entitled to seek access to material 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 nature¹⁵ and if a legitimate forensic purpose for such access has been shown.¹⁶ In order for access to confidential material to be granted, the Trial Chamber must be satisfied that the requesting party has established that the material in question “is likely to assist the applicant’s case materially, or that there is at least a good chance that it would”.¹⁷ This condition is met if the requesting party establishes “the existence of a nexus between the applicant’s case and the cases from which the material is sought”, consisting of a geographical, temporal, or otherwise material overlap between the two cases.¹⁸

13. Furthermore, material can be deemed confidential by virtue of the fact that its use is subject to restrictions under Rule 70 of the Rules. In such cases, “neither the material provided under Rule 70 to either the Prosecution or the Defence in a case nor its sources may be released to the accused in another case prior to obtaining consent from the provider of that information, whether or not that material was used as evidence in a previous case.”¹⁹

IV. DISCUSSION

A. Preliminary question of the jurisdiction of the Chamber

¹⁴ “Decision on Stanišić Motion for Access to Confidential Materials in the *Šešelj* Case Pursuant to Rule 75(G)(i)”, 24 April 2008 (“*Stanišić* Decision”), para. 11.

¹⁵ See *Stanišić* Decision, para. 12; *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 (“*Milošević* Decision”), para. 7.

¹⁶ *Milošević* Decision, para. 7; *Stanišić* Decision, para. 12.

¹⁷ *Milošević* Decision, para. 8; *Stanišić* Decision, para. 12.

¹⁸ *Stanišić* Decision, para. 12; *Milošević* Decision, para. 8.

¹⁹ *Stanišić* Decision, para. 14.

14. The Chamber notes that, as no Chamber is currently seised of the *Plavšić* Case, it has, in fact, jurisdiction to rule on the Motion pursuant to Rule 75 (G) (ii) of the Rules.

B. Confidential *inter partes* documents

15. The Chamber notes that the Accused seeks access to four types of *inter partes* confidential material used in the *Plavšić* Case, namely 1) all confidential sections of statements taken and interviews conducted by the Prosecution, 2) all closed session transcripts, 2) all confidential exhibits and 4) all confidential *inter partes* submissions and annexes, as well as all confidential Trial Chamber decisions.²⁰

16. The Chamber finds that the confidential material used in the *Plavšić* Case which the Accused seeks to access has been sufficiently identified and described by its general nature.

17. With regard to the temporal, factual or geographical nexus between this case and the *Plavšić* Case, the Chamber first notes that the Indictment against the Accused covers the period between 1 August 1991 and September 1993²¹, and that the one against Biljana Plavšić concerns the period between 1 July 1991 and 30 December 1992.²² The Chamber is therefore of the opinion that there is a partial but sufficient overlap between the two cases.

18. With regard to the factual overlap, the Chamber notes that the Applicant is charged with participating in a joint criminal enterprise by acting in concert with other participants, including Biljana Plavšić.²³ The Chamber finds that the factual overlap is sufficient.

19. Finally, as regards the existence of a geographical overlap, the Chamber notes that Biljana Plavšić was convicted of crimes committed only in Bosnia and Herzegovina (“BH”).²⁴ The Indictment in this case covers a larger area, since the

²⁰ Motion, para. 3.

²¹ Third Amended Indictment, filed on 7 December 2007, paras 8 (a), 15, 18, 28, 31 and 34 (“Indictment of Vojislav Šešelj”).

²² Amended Consolidated Indictment, filed on 31 January 2002, paras 15, 18, 24 and 27.

²³ Indictment of Vojislav Šešelj, para. 8 (a).

²⁴ Biljana Plavšić Sentencing Judgement, 27 February 2003, para. 8.

crimes alleged were committed not only in BH, but also in Croatia and Vojvodina.²⁵ The Chamber finds that the geographical overlap is partial but sufficient.

20. With regard to non-evidentiary material in the *Plavšić* Case, such as all the *inter partes* confidential filings or confidential decisions, the Chamber recalls that the Tribunal has established that the only condition required for access to *inter partes* confidential material is that there is “a good chance” that the confidential material would greatly assist the applicant’s case, without the requirement to establish a specific reason that each individual item is likely to be useful.²⁶ The Chamber further recalls that the principle of equality of arms supports giving the Accused a similar chance to understand the proceedings and evidence and evaluate their relevance to his own case, in common with the Prosecution which has access to all *inter partes* filings.²⁷ Accordingly, once an accused has been granted 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 confidential evidence.²⁸

21. The Chamber therefore holds that, in accordance with the principle of equality of arms, a general access by the Accused to 1) all confidential statements and interviews, 2) all closed session transcripts, 3) all confidential exhibits and 4) all confidential *inter partes* submissions and annexes, as well as all confidential decisions, can potentially assist him in preparing his defence.

C. Ex parte documents

22. The Chamber notes that the Prosecution objects to the disclosure of confidential *ex parte* documents from the *Plavšić* Case, but the Chamber points out that it is not seised of a motion by the Accused for disclosure of confidential *ex parte* documents and that, therefore, it need not rule on this question.

D. Documents covered by Rule 70 of the Rules

²⁵ See the Indictment against Vojislav Šešelj, paras 6, 12 and 14.

²⁶ *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 (“*Miletić* Decision”), p. 4.

²⁷ *Miletić* Decision, p. 4.

²⁸ *Milošević* Decision, paras. 11-12.

23. The Chamber finds that the confidential material tendered into evidence by the parties in the present case under Rule 70 of the Rules cannot be disclosed to the Accused unless consent is obtained from the persons or entities that provided it. Therefore, the Chamber grants the Accused access to this material provided that the necessary prior consent is obtained.

V. DISPOSITION

24. For the foregoing reasons, pursuant to Rules 70 and 75 of the Rules of Procedure and Evidence, the Chamber **PARTIALLY GRANTS** the Motion and:

- (a) **ORDERS** the Prosecution to indicate to the Registry of the Tribunal (“Registry”), within 30 days of the date of this Decision, accessible Rule 70 *inter partes* material from the pre-trial and trial phase in the *Plavšić* Case, for disclosure to the Accused, to wit:
 - (i) all closed session and private session testimonies and transcripts;
 - (ii) all confidential exhibits;
 - (iii) all confidential *inter partes* submissions; and
 - (iv) all confidential *inter partes* decisions of the Chamber.
- (b) **ORDERS** the Prosecution to identify Rule 70 material and immediately contact the providers of such material to seek their consent for its disclosure, and subsequently inform the Registry of the response of the providers;
- (c) **ORDERS** the Registry of the Tribunal to disclose to the Accused immediately the confidential *inter partes* material identified by the Prosecution in these proceedings in accordance with paragraph (a);
- (d) **ORDERS** the Registry to withhold any Rule 70 material until the Prosecution informs it that it has obtained consent from the providers in accordance with the provisions of sub-paragraph (b) above, even if those providers have consented to the use of the material in a previous case.

Where consent cannot be obtained from the provider of Rule 70 material, the material shall not be disclosed.

(e) **ORDERS** that, without the express authorisation of the Chamber, through a finding that it has been sufficiently demonstrated that third party disclosure of confidential *inter partes* material defined above is absolutely necessary for the preparation of the defence of the Accused, he, his defence team and any associates instructed or authorised to have access to these documents shall not:

- (i) disclose to any third party the identity of witnesses, their whereabouts, their written statements, transcripts of their testimonies, exhibits, or any information which would enable them to be identified and would breach the confidentiality of the protective measures already in place;
- (ii) disclose to any third party any confidential, documentary or other evidence, or reveal, in whole or in part, the contents of any confidential evidence in this case;
- (iii) contact any witness whose identity is protected.

If, for the purposes of preparing the defence of the Accused, confidential material is disclosed to third parties, pursuant to authorisation by the Chamber, any person to whom disclosure of the confidential material in this case 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 material, he or she must return it to the Accused, his defence team or any person authorised by them as soon as it is no longer needed for the preparation of defence.

For the purposes of sub-paragraph (e), third parties exclude: (i) the Accused; (ii) his defence team; (iii) any associates who have been instructed or authorised to have access to confidential material; and (iv) personnel of the Tribunal, including members of the Prosecution.

If any members of the defence team of the Accused who are authorised to have access to the confidential material filed *inter partes* in the *Plavšić* Case should withdraw from this case, any confidential material to which access has been granted under this decision and that is in their possession shall be returned to the Registry.

- (f) **RECALLS** that, without prejudice to the application of this decision, any protective measures that were initially ordered in the *Plavšić* Case shall continue to have effect before this Chamber, pursuant to Rule 75 (F) (i) of the Rules.

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

 /signed/
Jean-Claude Antonetti
Presiding Judge

Done this twenty-ninth day of July 2010
At The Hague (The Netherlands)

[Seal of the Tribunal]