



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: 24 April 2008
Original: English

IN TRIAL CHAMBER III

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

Registrar: Mr. Hans Holthuis

Decision of: 24 April 2008

PROSECUTOR
v.
VOJISLAV ŠEŠELJ

PUBLIC FILING

**DECISION ON STANIŠIĆ MOTION FOR ACCESS TO CONFIDENTIAL
MATERIALS IN THE ŠEŠELJ CASE PURSUANT TO RULE 75(G)(i)**

Office of the Prosecutor

Mr. Daryl Mundis

The Accused

Mr. Vojislav Šešelj

Counsel for Jovica Stanišić

Mr. Geert-Jan Alexander Knoops
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A handwritten signature in black ink, appearing to be 'Franko Simatović', written over a vertical line.

I. INTRODUCTION

1. **TRIAL CHAMBER III** (“Trial 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 “Defence for Stanišić Motion for Access to Confidential Testimony and Exhibits in the *Šešelj* Case Pursuant to Rule 75(G)(i)”, filed on 19 March 2008 (“Motion”).

2. The Motion was filed on 19 March 2008 by Jovica Stanišić (“Applicant”), a co-accused in the case of *Prosecutor v. Stanišić & Simatović* (Case No. IT-03-69-PT). The Prosecution filed a response on 1 April 2008¹ and a *corrigendum* to the response on 3 April 2008² (“Prosecution Response”). On 3 April 2008, Vojislav Šešelj (“Accused”) responded to the Motion by oral submission.³

II. SUBMISSIONS

1. Motion

3. The Applicant submits that there exists a nexus between the cases of *Prosecutor v. Stanišić & Simatović* (“*Stanišić & Simatović* case”) and *Prosecutor v. Šešelj* (“*Šešelj* case”), given the “geographical, temporal and material overlap in the two cases”.⁴ Specifically, the Applicant relies on: the close coordination between the Applicant and the Accused alleged by the Prosecution;⁵ the Prosecution’s Motion for Joinder, which argued that a joint trial of the Applicant and the Accused was warranted;⁶ and the Applicant and the Accused’s alleged involvement in a joint criminal enterprise.⁷

4. The Applicant requests that, given the considerable overlap between the two cases, he be granted access to confidential materials from the *Šešelj* case.⁸ The Trial Chamber notes that the Applicant does not specify the type of confidential material to which he seeks access (*i.e.*, *inter*

¹ Prosecution Response to Stanišić’s Motion for Access to Confidential Testimony and Exhibits in the *Šešelj* Case Pursuant to Rule 75(G)(i), 1 April 2008.

² *Corrigendum* Prosecution Response to Stanišić’s Motion for Access to Confidential Testimony and Exhibits in the *Šešelj* Case Pursuant to Rule 75(G)(i), 3 April 2008, noting an error on the cover page and in paragraph 9 of the Motion.

³ Hearing of 1 April 2008, T. 5496:22-5497:09.

⁴ Motion, para. 20.

⁵ Motion, paras. 10-11, citing *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Prosecution’s Final Pre-Trial Brief and *Corrigendum* to Final Trial Brief, 31 July 2007, para. 19.

⁶ Motion, para. 12, citing *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-PT, Prosecution Motion for Joinder, 1 June 2005.

⁷ Motion, paras. 13-18.

partes, ex parte and/or Rule 70), nor does he consistently delineate the scope of his request.⁹ The Applicant indicates however that at a minimum he should be granted access to confidential material regarding the following:

- a) alleged acts by the Applicant or members of the State Security Service (“DB”) and/or the Ministry of Internal Affairs (“MUP”);
- b) the purported relationship between the Applicant and the Accused, especially within the context of the DB and/or MUP;
- c) (acts by) the alleged joint criminal enterprise and/or its members, and the relationships between its members;
- d) the alleged creation, training, supply and direction of “Šešelj’s men”, paramilitaries (including alleged Special Forces of the DB and/or MUP such as purported units as the Red Berets and Scorpions), and Serb volunteers;
- e) the events in the area of the Serbian Autonomous Region of Slavonia, Baranja and Western Srem (“SAO SBWS”) and Zvornik.¹⁰

5. The Applicant pledges to comply with all protective orders issued by the Trial Chamber in the *Šešelj* case in relation to the requested material.¹¹

6. The Trial Chamber notes that, to date, the Applicant’s co-accused in the *Stanišić & Simatović* case, Franko Simatović (“Applicant’s Co-Accused”), has not joined the Motion.

2. Responses

7. The Prosecution Response does not dispute that there exists a nexus between the *Stanišić & Simatović* and *Šešelj* cases, nor that the Applicant seeks the requested material for the preparation of his case.¹² The Prosecution further submits that any decision by the Trial Chamber should grant access equally to both the Applicant and the Applicant’s Co-Accused.¹³

8. The Prosecution requests that the Trial Chamber grant the Motion in part, vary the witness protective measures granted in the *Šešelj* case, and order that the Registry provide access to the

⁸ Motion, para. 22.

⁹ Compare Motion, para. 3 (requesting “all witnesses and exhibits tendered in the *Prosecutor v. Šešelj*”) with Motion para. 22 (requesting “full access to all confidential materials from the case of Mr. Šešelj, including confidential transcripts of witness testimony and related exhibits from both Prosecution and Defence”).

¹⁰ Motion, para. 22.

¹¹ Motion, para. 23.

¹² Prosecution Response, para. 5.

¹³ Prosecution Response, para. 3. The Trial Chamber understands the Prosecution reference to “any decision issued by the Appeals Chamber” in this paragraph to be an inadvertent error.

Applicant and the Applicant's Co-Accused to the closed and private session trial transcripts of Prosecution witness testimonies and under-seal Prosecution exhibits in the case, subject to the following:¹⁴

- (1) the Prosecution notes that the Motion does not specifically seek access to *ex parte* materials but would oppose any such access;¹⁵
- (2) the Prosecution notes that the Motion does not specifically seek access to confidential filings but would oppose any such request;¹⁶ and
- (3) the Prosecution opposes access to Rule 70 materials tendered by the Prosecution in the *Šešelj* case, unless and until the Rule 70 provider consents to the material being provided to the Applicant and the Applicant's Co-Accused, but undertakes to contact any relevant Rule 70 provider and seek their consent should the Trial Chamber grant the Motion.¹⁷

9. The Accused indicated by oral submission that he agreed with the Motion.¹⁸

III. APPLICABLE LAW

10. As a preliminary remark and as indicated above, the Applicant does not clearly indicate the scope of his request regarding access to confidential material in the *Šešelj* case. In the interest of judicial efficiency, the Trial Chamber will treat the Motion as requesting access to all confidential material, including *inter partes*, *ex parte* and Rule 70 material.

11. Confidential material can be categorised into three types: *inter partes*, *ex parte*, and Rule 70, each having a separate standard for access.¹⁹

12. As regards confidential *inter partes* material, a party is entitled to seek 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 nature and if a legitimate forensic purpose for such access has been shown.²⁰ A requesting party may establish a legitimate forensic purpose for access

¹⁴ Prosecution Response, para. 6.

¹⁵ Prosecution Response, para. 6(a).

¹⁶ Prosecution Response, para. 6(b).

¹⁷ Prosecution Response, para. 6(c).

¹⁸ Hearing of 1 April 2008, T. 5496:22-5497:09.

¹⁹ *Prosecutor v. Vlastimir 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 ("*Đorđević Decision*"), paras. 6-15. See also *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 ("*Krajišnik Decision*"), p. 5.

²⁰ *Krajišnik Decision*, p. 4.

to confidential material from another case by demonstrating “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.²¹ In order for such access 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”.²²

13. For confidential *ex parte* material, a “higher standard” with respect to establishing a legitimate forensic purpose must be met. Indeed, “*ex parte* material, being of a higher degree of confidentiality, by nature contains information which has not been disclosed *inter partes* because of security interests of a State, other public interests, or privacy interests of a person or institution” and thus “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

14. Finally, material can be deemed confidential by virtue of the fact that it has been provided by a State pursuant to Rule 70 restrictions on its use. 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.²⁴

IV. DISCUSSION

15. The Trial Chamber finds that the Applicant has sufficiently identified and described by its general nature the *inter partes* confidential material in the *Šešelj* case to which he seeks access. Further, the Trial Chamber finds that there is a nexus between the *Stanišić & Simatović* case and the *Šešelj* case such that much of the *inter partes* confidential material filed in the latter is likely to be of material assistance in the preparation of the defence of the Applicant. The Trial Chamber notes however, that some of the confidential material in the *Šešelj* case lies entirely outside the geographic scope of the crime-bases alleged in the *Stanišić & Simatović* case, such that it would be irrelevant to the Applicant’s defence.²⁵ Therefore, while the Applicant has demonstrated a

²¹ *Krajišnik* Decision, p. 4.

²² *Krajišnik* Decision, p. 4.

²³ *Prosecutor v. Miroslav Bralo*, Case No. IT-95-17-A, Decision on Motions for Access to Ex Parte Portions of the Record on Appeal and for Disclosure of Mitigating Material, 30 August 2006, para. 17.

²⁴ *Krajišnik* Decision, p. 6.

²⁵ Specifically, the *Stanišić & Simatović* case concerns crimes committed in the Serbian Autonomous Region of Krajina, the SAO SBWS and the municipalities of Bijeljina, Bosanski Šamac, Doboj, Sanski Most, Zvornik and Trnovo in Bosnia and Herzegovina. *Prosecutor v. Jovica Stanišić & Franko Simatović*, Case No. IT-03-69-PT, Third Amended Indictment, 11 February 2008.

legitimate forensic purpose for access to much of the *inter partes* confidential material in the *Šešelj* case, his access will be limited as indicated in the disposition below.

16. With respect to the confidential *ex parte* material, the Trial Chamber finds that the Applicant has not demonstrated that access to the material which was formerly filed *ex parte* for the purpose of concealing it from the opposing party in the *Šešelj* case, is now required to ensure his fundamental right to a fair trial. Further, the Trial Chamber finds that the Applicant has not demonstrated that the reasons for which the material was kept *ex parte* in the *Šešelj* case are no longer applicable to him.²⁶ Thus, the Trial Chamber concludes that the higher standard for access to confidential *ex parte* material has not been met.

17. As regards Rule 70 material, the Trial Chamber considers that the Prosecution shall seek the consent of the Rule 70 provider(s) before such material can be disclosed to the Applicant.

V. DISPOSITION

18. Accordingly, the Trial Chamber, pursuant to Rules 54, 70 and 75 of the Rules, hereby **GRANTS** the Motion **IN PART** and:

(a) **ORDERS** the Prosecution, due to its familiarity with the material concerned, and subject to sub-paragraphs (b) and (c) below, to identify for the Registry, initially within 21 days of the present decision and then on a quarterly basis, *inter partes* confidential material not subject to Rule 70 in the *Šešelj* case relating to:

- (i) alleged acts by the Applicant or members of the DB and/or MUP;
- (ii) the purported relationship between the Accused and the Applicant, especially within the context of the DB and/or MUP;
- (iii) the alleged joint criminal enterprise and/or its members, and the relationships between its members;
- (iv) the alleged creation, training, supply and direction of “Šešelj’s men”, paramilitaries (including alleged Special Forces of the DB and/or MUP such as purported units as the Red Berets and Scorpions), and Serb volunteers; and
- (v) the events in the area of SAO SBWS and Zvornik.

²⁶ See *Dordević Decision*, para. 17.

(b) **ORDERS** that the confidential *inter partes* material identified by the Prosecution pursuant to sub-paragraph (a) shall be subject to the following:

The Prosecution shall determine as expeditiously as possible whether any of the *inter partes* confidential material falls under Rule 70, in which case it shall contact the providers of such materials to seek their consent for its disclosure, and thereupon inform the Registry whether consent for the disclosure of that material has been obtained or not, whichever is the case.

(c) **ORDERS** that confidential filings shall not be disclosed.

(d) **ORDERS** the Registry to withhold disclosure of any material subject to Rule 70 until such time as the Prosecution informs the Registry that consent for disclosure has been obtained in application of sub-paragraph (b) above, even in respect of those providers who have consented to the use of the relevant material in a prior case. Where consent cannot be obtained from provider(s) of any material subject to Rule 70, the material shall not be disclosed.

(e) **ORDERS** the Registry to disclose to the Applicant:

- (i) the confidential *inter partes* and non-Rule 70 material once it has been identified by the Prosecution in accordance with sub-paragraph (a); and
- (ii) the Rule 70 material once the Prosecution has identified such material and informed the Registry of the consent of the Rule 70 provider(s) in accordance with sub-paragraphs (a), (b), and (d).

(f) **ORDERS** that no *ex parte* material from the *Šešelj* case shall be disclosed.

(g) **ORDERS** that the Applicant, his defence counsel (“Counsel”) and any employees who have been instructed or authorised by his Counsel to have access to the *inter partes* confidential material described above shall not, without express leave of the Trial Chamber finding that it has been sufficiently demonstrated that third party disclosure is absolutely necessary for the preparation of the defence of the Applicant:

- (i) 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;
- (ii) 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

(iii) contact any witness whose identity was subject to protective measures.

If, for the purposes of preparing the defence of the Applicant, non-public material is disclosed to third parties — pursuant to prior authorisation by the Trial 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 non-public 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 the Applicant, his Counsel or any authorised employees of his Counsel as soon as it is no longer needed for the preparation of his defence.

For the purposes of sub-paragraph (g), third parties exclude: (i) the Applicant; (ii) his Counsel; (iii) any employees who have been instructed or authorised by his Counsel to have access to confidential material; and (iv) personnel from the Tribunal, including members of the Prosecution.

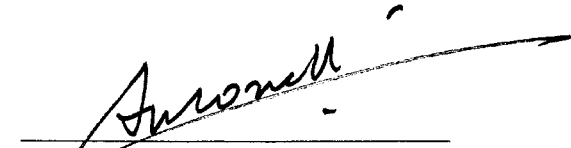
If Counsel for the Applicant or any members of his defence team who are authorised to have access to the *inter partes* confidential material from the *Šešelj* case should withdraw from the *Stanišić & Simatović* case, any confidential material to which access is granted in this decision that is in their possession shall be returned to the Registry of the Tribunal.

(h) **RECALLS** that, pursuant to Rule 75(F)(i), any protective measures that have been ordered in respect of a witness in the *Šešelj* case shall continue to have effect in the case against the Applicant, except insofar as they have been varied in accordance with this decision.

(i) **NOTES** that this decision does not grant the Applicant's Co-Accused access to the confidential materials but that he is invited to submit a written motion within one week of the date of this decision for the present decision to be amended to grant him equal access if he so wishes.

19. The Trial Chamber **DISMISSES** the Motion in all other respects.

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



Judge Jean-Claude Antonetti
Presiding

Dated this twenty-fourth day of April 2008
At The Hague
The Netherlands

[Seal of the Tribunal]

