IT-08-91-T 9/12827 BIS

UNITED NATIONS

IT-03-67-T
D9 - 1/53125 BISa
08 September 2011

~~9/53125 BISa~~
~~AJ~~

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: 1 August 2011
Original: ENGLISH
French

IN TRIAL CHAMBER III

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

Registrar: **Mr John Hocking**

Decision of: **1 August 2011**

THE PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC

DECISION ON MIĆO STANIŠIĆ MOTION FOR DISCLOSURE OF EXHIBIT LIST AND "MFI" MATERIALS FROM *ŠEŠELJ* CASE (IT-03-67)

The Office of the Prosecutor

Mr Mathias Marcussen

The Accused

Mr Vojislav Šešelj

Counsel for Mićo Stanišić (IT-08-91-T)

Mr Slobodan Zečević
Mr Slobodan Cvijetić

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 request filed publicly on 28 February 2011 by Mićo Stanišić ("Applicant"), the accused in Case No. IT-08-91-T, *The Prosecutor v. Mićo Stanišić and Stojan Župljanin* ("*Stanišić and Župljanin* Case"), whereby the Applicant requests the Chamber to order the Tribunal's Registry ("Registry") to disclose to his Counsel the list itemizing both the public and the confidential exhibits admitted into evidence in Case No. IT-03-67-T, *The Prosecutor v. Vojislav Šešelj* ("*Šešelj* Case") as well as the materials marked for identification ("MFI") in the *Šešelj* Case but not admitted to the record in this case ("Request").[1]

II. PROCEDURAL BACKGROUND

2. In a publicly filed decision dated 18 September 2008, the Chamber decided to stay its ruling on all public requests seeking access to exhibits admitted to the record until the end of the trial, except for requests brought by the accused before the Tribunal, who might need them in preparing their defence, or by national jurisdictions.[2]

3. On 10 March 2010, the Applicant publicly filed before this Chamber a motion seeking disclosure of all of the confidential materials used in the *Šešelj* Case ("Motion of 10 March 2010").[3]

4. In a publicly filed decision dated 27 August 2010 ("Decision of 27 August 2010"),[4] the Chamber noted the existence of a sufficient nexus between the *Stanišić and Župljanin* Case and the *Šešelj* Case[5], authorizing disclosure to the Applicant of all the closed-session and private-session hearing transcripts, confidential *inter partes* submissions, and confidential *inter partes* decisions from the Chamber, as well as all

[1] "Request by Mr. Mićo Stanišić for an Order to the Registry to Provide His Counsel with the Exhibit List in the *Šešelj* Case", public, 28 February 2011 ("Request"), para. 4.
[2] "Decision Regarding Public Access to Trial Exhibits", public, 18 September 2008.
[3] "Motion by Mićo Stanišić for Access to All Confidential Materials in the *Šešelj* Case", public, 10 March 2010 ("Motion of 10 March 2010"), paras 1-3.
[4] "Decision on Motions by Mićo Stanišić and Stojan Župljanin Seeking Disclosure of Confidential Documents in the Vojislav Šešelj Case", public, 27 August 2010 ("Decision of 27 August 2010").

confidential exhibits admitted in the *Šešelj* Case.[6] The Chamber further denied the request of the Applicant involving the disclosure of confidential *ex parte*[7] documents and documents received by the Prosecution during the investigative phase while preparing for the case.[8]

5. The Accused did not respond in writing to the Request but, during the Hearing of 30 March 2010, advised the Chamber that he did not object in principle to the disclosure of documents relating to this case, wherever disclosure was requested by the defence team of another accused before the Tribunal.[9]

6. The Office of the Prosecutor ("Prosecution") did not respond to the Request.

III. ARGUMENTS OF THE APPLICANT

7. In support of its Request, the Applicant asks the Chamber to order the Registry to provide his Counsel with a list itemizing: (1) the public and confidential exhibits admitted in the *Šešelj* Case; and (2) the documents marked for identification ("MFI") but not admitted into evidence ("MFI Documents").[10]

8. The Applicant opines that, with this list, he will be able to determine whether he wishes to obtain evidence required for the preparation of his defence.[11]

9. The Applicant also states that he was informed by representatives of the Registry that an order from the Chamber was required in order to obtain the list of public and confidential exhibits admitted to the record in the *Šešelj* Case and MFI Documents.[12]

---

[5] Decision of 27 August 2010, paras 33-35.
[6] Decision of 27 August 2010, para. 39. These are confidential *inter partes* documents not covered by Rule 70 of the Rules of Procedure and Evidence ("Rules"). As regards documents covered by Rule 70, the Chamber authorised their disclosure subject to receipt of the necessary consent prior to disclosure.
[7] Decision of 27 August 2010, para. 37.
[8] Decision of 27 August 2010, para. 30.
[9] Hearing of 30 March 2010, French hearing transcript, p. 15862.
[10] Request, para. 4.
[11] Request, para. 4.
[12] Request, para. 5.

IV. APPLICABLE LAW

10. Article 21 (2) of the Statute of the Tribunal ("Statute") provides that any person against whom charges are brought shall be entitled to fair and public hearing, subject to the provisions of Article 22 of the Statute.

11. Under Article 21 (4)(b) of the Statute, the accused is entitled, in proceedings before the Tribunal, to have adequate time and facilities for the preparation of his defence.

12. As regards confidential *inter partes* documents, a party has the right to request access to the documents filed in another case brought before the Tribunal which will help that party to prepare his case, provided that the party has identified the documents sought or described their general nature and has provided a relevant legitimate legal purpose for doing so.[13] Prior to granting a request for access to confidential documents, the Trial Chamber must be convinced that the moving party has established that the material at issue is "likely to assist the applicant's case materially, or that there is at least a good chance that it would",[14] without necessarily having to explain precisely how each of the documents might be useful.[15] This requirement is met as soon as the Applicant establishes that "there is a nexus between the applicant's case and the cases from which the material is sought", that is to say, a geographic, temporal or otherwise material overlap between the two cases.[16] The Chamber further recalls that the principle of equality of arms implies that an accused is placed on comparable footing to the Prosecution, which has access to all

---

[13] See *e.g.* "Decision on Stanišić Motion for Access to Confidential Materials in the Šešelj Case Pursuant to Rule 75 (G)(i)", public, 24 April 2008 ("*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", public, 19 May 2009 ("*Milošević* Decision"), para. 7.

[14] *Stanišić* Decision, para. 11; *Milošević* Decision, para. 8.

[15] *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", public, 9 September 2005 ("*Miletić* Decision"), p. 4.

[16] *Stanišić* Decision, para. 12; *Milošević* Decision, para. 8; see also *The Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, "Decision on Momcilo Perišić's Request for Access to Confidential Material in the *Dragomir Milošević* Case", public, 27 April 2009, para. 5; *The Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, "*Décision relative à la requête conjointe de Enver Hadžihasanović, Mehmed Alagić et Amir Kubura aux fins d'accès à toutes les pièces confidentielles, comptes rendus d'audience et pièces à conviction de l'affaire Le Procureur c/ Tihomir Blaškić*", public, 23 January 2003, p. 4; *The Prosecutor v. Milan Martić*, Case No. IT-95-11-A, "Decision on Motion by

submissions filed *inter partes*, so that he may understand the proceedings and the evidence and assess its relevance to his own case.[17] Therefore, once an accused has been granted access to confidential exhibits or confidential testimony or testimony heard in closed session in another case before the Tribunal, the accused must be given the opportunity to access the motions, submissions, decisions and hearing transcripts that may be related to them.[18]

13. Similarly, pursuant to Rule 68 (i) of the Rules, the Prosecution is required to disclose as soon as practicable to the Defence any material which in the actual knowledge of the Prosecutor may suggest the innocence or mitigate the guilt of the accused or affect the credibility of the Prosecution evidence. If the Defence considers that the Prosecution has failed to fulfil its obligation, the Defence may request disclosure of materials in possession of the Prosecution by establishing their likely exculpatory nature.[19] The Prosecution must determine which materials meet the requirements for disclosure pursuant to Rule 68 of the Rules and perform this task in good faith.[20]

14. In addition, as regards the filing of evidence, this Chamber, in an order filed publicly on 15 November 2007, informed the parties that documentary and other evidence could be filed for identification and be assigned a number.[21] The Chamber has also indicated that the evidence tendered would only be admitted once the

---

Jovica Stanišić for Access to Confidential Testimony and Exhibits in the *Martić* Case Pursuant to Rule 75(G)(i)", public, 22 February 2008, para. 9.

[17] *Miletić* Decision, p. 4.

[18] *Milošević* Decision, paras 11-12.

[19] *The Prosecutor v. Juvénal Kajelijeli*, Case No. ICTR-98-44A-T, "Decision on Kajelijeli's Urgent Motion and Certification with Appendices in Support of Urgent Motion for Disclosure of Materials Pursuant to Rule 66 (B) and Rule 68 of the Rules of Procedure and Evidence", public, 5 July 2001, para. 13; *The Prosecutor v. Ignace Bagilishema*, Case No. ICTR-95-1A-T, "*Décision relative à la requête de la Défense en citation de témoins sur le fondement de l'article 73 du Règlement de procédure et de preuve* ", public, 8 June 2000, para. 15; *The Prosecutor v. Zejnil Delalić, Zdravko Mucić alias "Pavo", Hazim Delić, Esad Landžo alias "Zenga"*, Case No. IT-96-21-T, "Decision on the Request of the Accused Hazim Delić Pursuant to Rule 68 for Exculpatory Information", public, 24 June 1997, paras 12-13, 15, 18.

[20] *The 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", public, 30 August 2006, para. 30.

[21] "Order Setting Out the Guidelines for the Presentation of Evidence and the Conduct of the Parties During the Trial", public, 15 November 2007, Annex, para. 8.

Chamber had ruled on its admissibility, either orally or in writing, after which it would receive a permanent exhibit number.[22]

15. The Chamber further recalls that the established case-law of the Tribunal regarding requests for disclosure by other accused before the Tribunal of documents put to witnesses in court, of documents whose admission into evidence has been requested or of exhibits restricts such disclosure to "exhibits" officially admitted into evidence. For example, in Case No. IT-04-81-T, *The Prosecutor v. Momčilo Perišić* ("*Perišić* Case"), with particular reference to the request by the Accused Zdravko Tolimir for "confidential material used during interviews but not tendered into evidence", the Trial Chamber noted that such material could not be considered as "confidential exhibits", found that it had no jurisdiction to deal with such a request and granted the request for disclosure of the exhibits whose admission was final.[23]

16. Similarly the Chamber notes that in Case No. IT-05-87-A, *The Prosecutor v. Nikola Šainović et al.*, the Appeals Chamber also restricted the disclosure of evidence to another accused before the Tribunal to "exhibits" whose admission was final.[24]

V. DISCUSSION

A. Concerning the Request for a List Itemizing Public and Confidential Exhibits Admitted to the Record in the *Šešelj* Case[25]

17. The Chamber considers that access to the list of public exhibits may assist the Applicant in determining whether public exhibits admitted to the record in the *Šešelj*

[22] *Ibid.*
[23] *The Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-T, "Decision on Zdravko Tolimir's Urgent Request for Disclosure of Confidential Material from the *Perišić* Case", public, 30 September 2010, paras 1, 11 and 13. See also in this respect *The Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, "Decision on General Miletić's Request for Access to Confidential Information in the *Karadžić* Case", public, 31 March 2010, paras 1 and 20(a)(ii). The Chamber notes that the request was more general – "evidence which will be admitted or presented confidentially during the remainder of the trial" – and the Trial Chamber ordered disclosure of the "trial exhibits"; see also *The Prosecutor v. Vladimir Đorđević*, Case No. IT-05-87/1-T, "Decision on Defence Motion for Access to Transcripts, Exhibits and Documents in the *Đorđević* Case", public, 10 June 2009, para. 21 and p. 8.
[24] *The Prosecutor v. Nikola Šainović et al.*, Case No. IT-05-87-A, "Decision on Vladimir Đorđević's Motion for Access to Transcripts, Exhibits and Documents", public, 16 February 2010, specifically para. 21.
[25] Request, para. 4.

Case are likely to assist Šešelj in preparing his defence and, by extension, in determining whether he subsequently intends to request disclosure of these documents from the Chamber.[26]

18. In similar fashion, the Chamber considers that access to the list of confidential exhibits may enable the Applicant to ensure that all the confidential exhibits referred to in the Decision of 27 August 2010 were indeed disclosed to him, as a material error in transmission or an omission cannot be ruled out.[27]

19. The Chamber therefore considers that disclosure by the Registry to the Applicant of a list of public and confidential exhibits admitted to the record in the *Šešelj* Case is likely to assist the Applicant in the preparation of his defence.

B. Concerning the Request for a List of MFI Documents in the Šešelj Case[28]

20. As a preliminary matter, the Chamber notes that the documents that still have the status of MFI Documents in the *Šešelj* Case are few and most of them are documents associated with the Accused's testimony in Case No. IT-02-54, *The Prosecutor v. Slobodan Milošević* ("*Milošević* Case") which also had the status of MFI Documents in that case.

21. The Chamber recalls that, in a decision of 30 October 2007, it had ordered that the following exhibits be marked for identification by the Prosecution: (1) the exhibits used during the testimony of the Accused in the *Milošević* Case which were previously admitted during the testimony of witnesses other than the Accused in the *Milošević* Case; and (ii) the exhibits tendered during the Accused's testimony in the *Milošević* Case and marked for identification in the latter case ("Decision of 30 October 2007").[29] The Chamber had considered that these exhibits should indeed be marked for identification for a better understanding of the hearing transcript in the

[26] The Chamber recalls that the Decision of 27 August 2010 authorises disclosure to the Applicant of confidential *inter partes* documents: see *supra*, paras 3 and 4.
[27] Decision of 27 August 2010, para. 39.
[28] Request, p. 4.
[29] See "Decision on Prosecution's Motion to Admit into Evidence Transcripts of Vojislav Šešelj's Testimony Given in the *Milošević* Case", public, 30 October 2007 ("Decision of 30 October 2007").

Milošević Case, which was admitted to the record in the Decision of 30 October 2007.[30]

22. On the merits, the Chamber notes that the MFI Documents are documents which have been assigned a provisional number and have not been admitted into evidence. The Chamber therefore considers that the MFI Documents cannot be deemed to be exhibits.

23. Consequently the Chamber finds that it lacks jurisdiction to review the request for disclosure of the list of MFI Documents.

24. Nonetheless, the Chamber reminds the Applicant that, as the Prosecution is a single indivisible unit, the Prosecution team in the *Stanišić and Župljanin* Case must discharge its duty of disclosure under Rules 66 and 68 (i) of the Rules, and such disclosure may involve exhibits not admitted into evidence in the *Šešelj* Case, yet marked for identification.

VI. DISPOSITION

FOR THE FOREGOING REASONS, pursuant to Article 21 (2) and 21 (4)(b) of the Statute and Rules 54 and 73 of the Rules,

PARTIALLY GRANTS the Request.

ORDERS the Registry to disclose to Counsel for the Applicant a list itemizing public and confidential exhibits admitted into evidence in this case.

DENIES the Request in all other respects.

[30] Decision of 30 October 2007, p. 3.

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

/signed/
Jean-Claude Antonetti
Presiding Judge

Dated this first day of August 2011
At The Hague
The Netherlands

[Seal of the Tribunal]