THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

BEFORE THE TRIAL CHAMBER **Case No: IT-03-67-T**

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

Registrar: Mr. Hans Holthuis

Date filed: 19 March 2008

THE PROSECUTOR

-V-

VOJISLAV ŠEŠELJ

PUBLIC

DEFENCE FOR STANIŠIĆ MOTION FOR ACCESS TO CONFIDENTIAL TESTIMONY AND EXHIBITS IN THE ŠEŠELJ CASE PURSUANT TO RULE 75(G)(I)

The Office of the Prosecutor:

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Counsel for the Accused

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I INTRODUCTION

1. The Applicant herewith respectfully requests the assistance of the honourable Trial Chamber to vary the protective measures issued in regards to the confidential testimony of witnesses and exhibits adduced in the *Prosecutor v. Šešelj* pursuant to Rule 75(G)(i) of the Rules of Procedure and Evidence (RPE herein).

2. The Trial Chamber has ordered non-disclosure to the public of materials disclosed to the Accused under Rule 66(A)(i)[1] and under Rules 66(A)(ii) and 68.[2] Nevertheless, pursuant to Rule 66(A)(ii) the Prosecution has disclosed several witness statements and exhibits from *Prosecutor v. Vojislav Šešelj* to the Defence of Mr. Stanisic. The Applicant does though have good cause to believe that further access is required.

3. In light of the alleged events, significant overlap between the two cases put forward by the Prosecution and recent Trial Chamber III decisions, the Applicant requests access, as the material becomes available, to all witnesses and exhibits tendered in the *Prosecutor v. Vojislav Šešelj*. This is the application of the defence for Mr. Stanišić.

II LEGAL BASIS FOR THE APPLICATION

4. According to ICTY precedent, "a party is always entitled to seek material from any source, including 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".[3]

5. Access by the Chamber may be granted if they are satisfied that the requesting party has established that the material sought from the first proceeding has a 'legitimate forensic purpose' in the second proceeding. That is, there is "the existence of a nexus between the Applicant's case and the case from which the material is sought and that such nexus consists of a geographical, temporal or otherwise material overlap between the two cases".[4] Such access may be granted if the Chamber is satisfied 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".[5]

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[1] *Prosecutor v. Vojislav Šešelj,* Case No. IT-03-67, "Decision on Prosecution's Motion for Order of Non-Disclosure," 13 March 2003.
[2] *Ibid.,* "Decision on Prosecution's Motion for Non-disclosure of Materials Provided Pursuant to Rules 66(A)(ii) and 86 for Protective Measures for Witnesses during the Pre-Trial Phase," 11 February 2004.
[3] *Prosecutor v. Dragan Obrenović, et. al.,* Case No. IT-05-88, Decision on Pandurević motion for access to confidential material in Prosecutor v. Obrenović, 19 July 2007, par. 19.
[4] *Prosecutor v. Dragan Obrenović, et. al.,* Case No. IT-05-88, Decision on Pandurević motion for access to confidential material in Prosecutor v. Obrenović, 19 July 2007, par. 20.
[5] *Prosecutor v. Dragan Obrenović, et. al.,* Case No. IT-05-88, Decision on Pandurević motion for access to confidential material in Prosecutor v. Obrenović, 19 July 2007, par. 21.

6. If the legitimate forensic purpose can be established, the party seeking the material need not describe the documents they are seeking in detail as long as they can identify the general nature of the documents.[6] Access will not be granted where the Applicant is seen to be engaging in a "fishing expedition" to establish if there is a case to make at all.[7]

7. Moreover, it is also important to note the applicability of two recent decisions of Trial Chamber III to motions requesting access to confidential materials by the Defence for Mr. Stanisic.[8] The two decisions granted the Applicant complete access to documents from the Milosevic case because of the allegation that they were both members of the JCE and thus, the cases are closely connected.[9] The Trial Chamber went on to note that "The proximity of two cases can affect the necessity of disclosing such information so as to facilitate the adequate preparation for the case".[10] In this regard, according to recent Tribunal jurisprudence, by establishing the legitimate forensic purpose and the necessity of such disclosure the Applicant should be granted access to all confidential material in the Šešelj case as it becomes available.

8. The Applicant holds that the legal requirements as outlined above have been satisfied in this case. These will be explained below.

III ESTABLISHING THE LEGITIMATE FORENSIC PURPOSE

9. In order to receive access to confidential material it is necessary to demonstrate a legitimate forensic purpose. That is, there must be a nexus between the case against Mr. Šešelj and Mr. Stanišić.[11] Based on a general analysis of the facts between the two cases it is clear that a legitimate forensic purpose exists.

10. Mr. Stanišić was Chief of the State Security Service (DB) of the Ministry of Internal Affairs of the Republic of Serbia (MUP), allegedly from 31 December 1991 to 27 October 1998.[12] From early 1990, Vojislav Šešelj held leadership positions with the "Serbian Freedom Movement", the "Serbian Renewal Movement" and in June of that

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[6] *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Decision on Ivan Čermak's and Mladen Markač's joint motion for access to confidential testimony and documents in *Prosecutor v. Milan Martić*, 1 March 2007, par. 11.
[7] *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Decision on Ivan Čermak's and Mladen Markač's joint motion for access to confidential testimony and documents in *Prosecutor v. Milan Martić*, 1 March 2007, par. 11.
[8] *Prosecutor v. Jovica Stanišić and Franco Simatović*, Case No. IT-03-69- PT, Decision Reconsidering Conditions for the Defence Access to Confidential Testimony and Documents from the *Slobodan Milosevic* Case, 4 February 2008, and, *Prosecutor v. Jovica Stanišić and Franco Simatović*, Case No. IT-03-69- PT, Order Clarifying the 4 February Decision of the Trial Chamber on Defence Access to Confidential Material from the *Milosevic* Case, 19 February 2008.
[9] *Prosecutor v. Jovica Stanišić and Franco Simatović*, Case No. IT-03-69- PT, Order Clarifying the 4 February Decision of the Trial Chamber on Defence Access to Confidential Material from the *Milosevic* Case, 19 February 2008, para 7.
[10] *Prosecutor v. Jovica Stanišić and Franco Simatović*, Case No. IT-03-69- PT, Order Clarifying the 4 February Decision of the Trial Chamber on Defence Access to Confidential Material from the *Milosevic* Case, 19 February 2008, para 7.
[11] *Prosecutor v. Dragan Obrenović, et. al.,* Case No. IT-05-88, Decision on Pandurević motion for access to confidential material in Prosecutor v. Obrenović, 19 July 2007, par. 20.
[12] *Prosecutor v. Jovica Stanišić and Franco Simatović*, Case No. IT-03-69- PT, Revised Second Amended Indictment, 15 May 2006, par.1.

year he founded the "Serbian National Renewal Party" that was subsequently renamed the "Serbian Chetnik Movement". On 23 February 1991 he was appointed President of the newly founded "Serbian Radical Party". He remained leader of the "Serbian Chetnik Movement" and the "Serbian Radical Party" until 28 April 1994. It is the Prosecution case that there was close coordination between Mr. Stanišić and Mr. Šešelj in their roles.[13]

11. This close coordination between the two accused was asserted in the *Šešelj* pre-trial brief. In that brief, the Prosecution alleges that "Šešelj, directly and with the assistance of his subordinates in the SRS and SCP, coordinated the efforts and the activities of the SRS/SCP volunteers with other individuals and groups within the JCE, such as Jovica Stanišić and Franko Simatović of the DB of the Serbian MUP".[14] This clearly supports this Application in that it indicates the nexus between the Prosceution's cases against the Applicant and Mr. Šešelj.

12. The Prosecution Motion for Joinder[15] is also seen to confirm the validity of this application for access to witness testimonies and confidential materials. It illustrates the "nexus between the Applicant's case and the case from which the material is sought".[16] In the Prosecutions application for Joinder it was submitted, pursuant to Rule 48 of the RPE, that "both as a matter of law and in light of discretionary factors", a joint trial of Stanišić and Šešelj was warranted.[17] This was because "Persons accused of the same or different crimes committed in the course of the same transaction may be jointly charged and tried".[18] Thus, throughout their application, the Prosecution submitted that there was a connection between the Applicants case, Mr. Stanišić, and Mr. Šešelj. This connection is representative of the required nexus for access to confidential material.

13. Furthermore, the apparent nexus between the two cases is also reflected in the commonalities in the Indictments of Mr. Šešelj and Mr. Stanišić.[19] In the indictment against Mr. Šešelj and the Applicant it was alleged that they both participated in a Joint Criminal Enterprise (JCE herein).[20] The specific involvement in the alleged JCE was outlined in their individual indictments and notably, it was alleged by the

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[13] *Prosecutor v. Vojislav Šešelj,* Case No. IT-03-67-PT, Prosecution's Final Pre-Trial Brief and Corrigendum to Final Pre-Trial Brief, 31 July 2007, para 19.
[14] *Prosecutor v. Vojislav Šešelj,* Case No. IT-03-67-PT, Prosecution's Final Pre-Trial Brief and Corrigendum to Final Pre-Trial Brief, 31 July 2007, para 19.
[15] *Prosecutor v. Jovica Stanišić and Franco Simatović,* Case No. IT-03-69- PT, Prosecution Motion for Joinder, 1 June 2005.
[16] *Prosecutor v. Dragan Obrenović, et. al.,* Case No. IT-05-88, Decision on Pandurević motion for access to confidential material in Prosecutor v. Obrenović, 19 July 2007, par. 20.
[17] *Prosecutor v. Jovica Stanišić and Franco Simatović,* Case No. IT-03-69- PT, Prosecution Motion for Joinder, 1 June 2005, para 1.
[18] Rule 48 of the Rules of Procedure and Evidence.
[19] *Prosecutor v. Jovica Stanišić and Franco Simatović,* Case No. IT-03-69- PT, Revised Second Amended Indictment, 15 May 2006, par.11-12 and *Prosecutor v. Vojislav Šešelj,* Case No. IT-03-67, Third Amended Indictment, 7 December 2007, para 8(a).
[20] *Prosecutor v. Jovica Stanišić and Franco Simatović,* Case No. IT-03-69- PT, Revised Second Amended Indictment, 15 May 2006, par.9-10 and *Prosecutor v. Vojislav Šešelj,* Case No. IT-03-67, Third Amended Indictment, 7 December 2007, para 6.

Prosecution, that there is 'a significant crime base overlap' between the two cases.[21] Examples of the overlap in the crime base will be expounded below.

14. Firstly, Mr. Stanišić has been indicted for the 'planning, ordering, committing or otherwise aiding and abetting of the planning, preparation or execution of the murder and wilful killing of non-Serbs in numerous areas including SAO SBWS and Zvorknik'.[22] Similarly, Mr. Šešelj, is also charged with Murder in SAO SBWS and Zvornik.[23] They are both also charged with similar counts of Persecution[24], Deportation[25] and Inhumane Acts (Forcible Transfer)[26].

15. Secondly, according to the Prosecution, during August and September 1991, large areas in Croatia came under Serb control due to the actions of the Serb military forces, including "Šešelj's men", the "White Eagles", and police forces.[27] It is the Prosecution's case that Mr. Šešelj was in charge of these men and that they were being "supplied, trained and partly led by the JNA and officials of the Serbian MUP".[28] In relation to these alleged facts, Mr. Stanišić is charged with 'directing, organising, training, supplying, arming and financing Serb forces who attacked and took control of towns and villages in SAO SBWS'.[29] Similar allegations are also made in Zvornik.[30] Thus, there is a clear nexus between the two cases.

16. Thirdly, Mr. Šešelj allegedly contributed to the purported JCE by coordinating the forcible removal of non-Serbs from territories to create "Greater Serbia". The volunteers under Mr. Šešelj are alleged to have received weapons from the Serbian DB, which Mr. Stanišić was the head of.[31] In addition, "Šešelj, directly and with the assistance of his subordinates in the SRS and SCP, coordinated the efforts and the activities of the SRS/SCP volunteers with other individuals and groups within the alleged JCE, such as Radmilo Bogdanovic[32], one time Minister of the MUP of Serbia,

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[21] *Prosecutor v. Jovica Stanišić and Franco Simatović*, Case No. IT-03-69- PT, Prosecution Motion for Joinder, 1 June 2005, para 28.
[22] *Prosecutor v. Jovica Stanišić and Franco Simatović*, Case No. IT-03-69- PT, Revised Second Amended Indictment, 15 May 2006, para 23, 33-40
[23] *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67, Third Amended Indictment, 7 December 2007, para 18-21.
[24] *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67, Third Amended Indictment, 7 December 2007, para 15 and *Prosecutor v. Jovica Stanišić and Franco Simatović*, Case No. IT-03-69- PT, Revised Second Amended Indictment, 15 May 2006, para 21 (a) and (b).
[25] *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67, Third Amended Indictment, 7 December 2007, para 31-33 and *Prosecutor v. Jovica Stanišić and Franco Simatović*, Case No. IT-03-69- PT, Revised Second Amended Indictment, 15 May 2006, para 62-63.
[26] *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67, Third Amended Indictment, 7 December 2007, para 31-33 and *Prosecutor v. Jovica Stanišić and Franco Simatović*, Case No. IT-03-69- PT, Revised Second Amended Indictment, 15 May 2006, para 62-63.
[27] *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67, Third Amended Indictment, 7 December 2007, Annex 1, Para 17.
[28] *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67, Third Amended Indictment, 7 December 2007, Annex 1, Para 17.
[29] *Prosecutor v. Jovica Stanišić and Franco Simatović*, Case No. IT-03-69- PT, Revised Second Amended Indictment, 15 May 2006, para 6.
[30] *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67, Third Amended Indictment, 7 December 2007, para 22 and *Prosecutor v. Jovica Stanišić and Franco Simatović*, Case No. IT-03-69- PT, Revised Second Amended Indictment, 15 May 2006, para 7.
[31] *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Prosecution's Final Pre-Trial Brief and Corrigendum to Final Pre-Trial Brief, 31 July 2007, para 20 and 38.
[32] Para 19 Šešelj Prosecution Pre-Trial Brief, footnote no. 55 - Interview of Šešelj in "The Death of Yugoslavia," 02:26:37 – 02:27:13, 65terExhibit6067. VS-011, VS-026 and VS-045.

Jovica Stanišić and Franko Simatovic of the DB of the Serbian MUP[33].....[list continues]".[34] This clearly highlights the alleged crime base overlap.

17. This comparison of the indictments and elements of the Prosecution pre-trial briefs against Mr. Seselj and Mr. Stanišić indicates that both Accused are to a large extent indicted because of their alleged involvement in the same crimes and within the same areas.

18. Other similarities pertaining to the alleged JCE and the two Indictments further support the Applicant's submission that there is a substantial overlap and nexus between these two cases. For instance, as outlined above, it is the Prosecution's theory that both the Accused participated in an alleged joint criminal enterprise from 1 August 1991 until at least 31 December 1995.[35] It is also alleged that Mr. Stanišić committed 'crimes against humanity' and 'violations of the laws or customs of war' from on or about 1 April 1991 until 31 December 1995. Similarly, Mr. Šešelj has been charged with the above mentioned crimes from on or about 1 August 1991 until September 1993. Hence, there is a clear temporal overlap between the Applicant's case and *Prosecutor v. Vojislav Šešelj.*

19. The above analysis clearly shows that the Applicant has a legitimate forensic purpose in accessing witness testimonies and other confidential materials from *Prosecutor v. Vojislav Šešelj.*

IV SATISFYING THE REMAINING LEGAL REQUIREMENTS

20. As outlined above, for the purposes of rule 75 (G) (i), there is a clear nexus between the case of Mr. Stanišić and the case of Mr. Šešelj. The Prosecution Motion for Joinder[36] and the similarities in the two Indictments clearly reflect the geographical, temporal and material overlap in the two cases.[37] The requested confidential material therefore are very 'likely to assist the Applicant's case'.[38] Thus, the Applicant submits that given the above established legal requirements, this request can not be viewed as a "fishing expedition".[39]

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[33] Para 19 Šešelj Prosecution Pre-Trial Brief, footnote no. 56 VS-011, VS-026 and VS-045.
[34] Para 19 Šešelj Prosecution Final Pre-Trial Brief.
[35] *Prosecutor v. Jovica Stanišić and Franco Simatović,* Case No. IT-03-69- PT, Revised Second Amended Indictment, 15 May 2006 and *Prosecutor v. Vojislav Šešelj,* Case No. IT-03-67, Third Amended Indictment, 7 December 2007.
[36] *Prosecutor v. Jovica Stanišić and Franco Simatović,* Case No. IT-03-69- PT, Prosecution Motion for Joinder, 1 June 2005.
[37] *Prosecutor v. Dragan Obrenović, et. al.,* Case No. IT-05-88, Decision on Pandurević motion for access to confidential material in Prosecutor v. Obrenović, 19 July 2007, par. 20.
[38] *Prosecutor v. Dragan Obrenović, et. al.,* Case No. IT-05-88, Decision on Pandurević motion for access to confidential material in Prosecutor v. Obrenović, 19 July 2007, par. 21.
[39] See for example *Prosecutor v. Milan Martić,* Case No. IT-95-11-T, Decision on Ivan Čermak's and Mladen Markač's joint motion for access to confidential testimony and documents in *Prosecutor v. Milan Martić,* 1 March 2007, par. 11.

21. The Applicant emphasizes that he is not put in a position to specify in detail the relevant witness materials requested, as obviously the Applicant does not have any knowledge about the details of protected witnesses and confidential exhibits. Regardless, based on a general analysis of the connections between the case against Mr. Šešelj and the case against the Applicant, it is fair to say that a legitimate forensic purpose exists. In this regard, the two recent Trial Chamber III decisions indicate that if the necessity of disclosure and proximity can be established, as has been, the Applicant should be granted access to all non-public transcripts and exhibits.[40]

22. The Applicant therefore asserts, given the considerable overlap between the two cases, full access to all confidential materials from the case of Mr. Šešelj, including confidential transcripts of witness testimony and related exhibits both from Prosecution and Defence, is justified. However, if the honourable Trial Chamber would require a further specification of the materials for which access is sought, the Applicant herewith provides an overview of the material it deems relevant for the charges brought against Mr. Stanišić. According to the Applicant, the access sought to confidential materials from the case against Mr. Šešelj should include at the least materials concerning:

    a) alleged acts by the Applicant, Mr. Stanišić, or members of the DB and/or MUP;
    b) the purported relationship between Mr. Šešelj and Mr. Stanišić, 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 SAO SBWS and Zvornik.

23. The Applicant further undertakes to comply with all protective orders issued by the Trial Chamber in relation to the requested material.

VI RELIEF SOUGHT

24. According to the aforementioned reasons, the Applicant respectfully requests that the Trial Chamber grant access to all Prosecution and Defence testimonies and exhibits tendered in the case against Mr. Šešelj pursuant to Rule 75(G)(i) of the RPE. The Applicant further requests that in granting this access, the Honourable Trial Chamber

[40] *Prosecutor v. Jovica Stanišić and Franco Simatović*, Case No. IT-03-69- PT, Decision Reconsidering Conditions for the Defence Access to Confidential Testimony and Documents from the *Slobodan Milosevic* Case, 4 February 2008, para 11 (i), and, *Prosecutor v. Jovica Stanišić and Franco Simatović*, Case No. IT-03-69- PT, Order Clarifying the 4 February Decision of the Trial Chamber on Defence Access to Confidential Material from the *Milosevic* Case, 19 February 2008, para 11.

will order the continued release to the Applicant confidential transcripts and exhibits as it becomes available.

Respectfully submitted,
19 March 2008

p/o

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