



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-PT

Date: 24 May 2007

Original: ENGLISH
French

BEFORE THE PRE-TRIAL JUDGE

Before: Judge Jean-Claude Antonetti

Registrar: Mr Hans Holthuis

Decision of: 24 May 2007

THE PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC DOCUMENT

**DECISION ON IVAN ČERMAK'S AND MLADEN MARKAČ'S JOINT
MOTION FOR ACCESS TO CONFIDENTIAL TESTIMONY AND
DOCUMENTS IN THE ŠEŠELJ CASE**

The Office of the Prosecutor:

Ms Christine Dahl
Mr Ulrich Müssemer
Mr Klaus Hoffman

The Accused:

Mr Vojislav Šešelj

**Counsel for the Defence for Ivan
Čermak and Mladen Merkač**

Mr Čedo Prodanović
Ms Jadranka Sloković-Glumac
for Ivan Čermak

Mr Miroslav Šeparović (in transfer)
Mr Goran Mikulić
for Mladen Markač

I, Jean-Claude Antonetti, Judge 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”);

SEIZED OF the motion of Ivan Čermak and Mladen Markač (“Applicants”), filed on 9 January 2007, for access to confidential testimony, documents, transcripts and exhibits (“Documents Requested”) in the case of the *Prosecutor v. Vojislav Šešelj*, (“Motion”);¹

NOTING the Prosecution response filed on 16 January 2007 (“Response”);²

NOTING the absence of a response from Vojislav Šešelj (“Accused”);

CONSIDERING that the Applicants are jointly accused with Ante Gotovina in the case of the *Prosecutor v. Ante Gotovina et al.* (“*Gotovina et al.*”)³ in an indictment dealing with the conflict between the Republic of Croatia (“Croatia”) and the Republic of Serbian Krajina (“RSK”), and in particular with the events that occurred between July 1995 and 15 November 1995, during and after “Operation Storm”;⁴

CONSIDERING that, according to the Applicants, the Accused allegedly incurred responsibility for having participated in a joint criminal enterprise between 1991 and 1995 whose objective was to force the non-Serb population to leave Croatia and, in particular, the territory of the RSK;⁵

CONSIDERING that in their request, the Applicants argue that access to the Documents Requested is necessary for the preparation of their defence and that, consequently, such access should be granted in accordance with Articles 20 and 21 of the Statute of the Tribunal (“Tribunal”) and with Rules 54, 73 and 75(G)(ii) of the Rules of Procedure and Evidence of the Tribunal (“Rules”);

¹ Ivan Čermak’s and Mladen Markač’s Joint Motion for Access to Confidential Testimony and Documents in *Prosecutor v. Vojislav Šešelj* Case, filed 9 January 2007 (“Motion”).

² “Prosecutor’s Response to Ivan Čermak’s and Mladen Markač’s Joint Motion for Access to Confidential Testimony and Documents in *Prosecutor v. Vojislav Šešelj* Case”, filed 16 January 2007.

³ *The Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90 (“*Gotovina et al.*”).

⁴ Motion, para. 1.

⁵ Id., para. 2.

CONSIDERING, therefore, that the Applicants assert that the events covered by the *Šešelj* indictment share the same spatial and temporal base as the *Gotovina et al.* indictment;⁶

CONSIDERING that the Prosecution objects to the Motion on the grounds that the Applicants have failed to establish a sufficient nexus between the *Gotovina et al.* case and the *Šešelj* case and failed to show a “legitimate forensic purpose”;⁷

CONSIDERING that in its Response, the Prosecution argues that there exists no temporal nexus between the two cases because “Operation Storm” allegedly began in August 1995 and ended on 7 August 1995,⁸ and that, furthermore, the *Šešelj* indictment concerns the Accused’s participation in a joint criminal enterprise which allegedly began in 1991 and ended in September 1993 when Mr Šešelj allegedly came into conflict with Slobodan Milošević;⁹

CONSIDERING moreover that the Prosecution submits that there also exists no geographical nexus between the two cases which would justify granting the Applicants access to the Documents Requested, to the extent that, as regards Croatia, the Indictment concerns the Accused’s alleged responsibility for crimes committed in Voćin, a region that was not targeted during “Operation Storm”;¹⁰

CONSIDERING, in addition, that the Prosecution argues that the documents have not been described with sufficient clarity and that no “legitimate forensic purpose” has been shown;¹¹

CONSIDERING that the Prosecution concludes by submitting that since the trial of the Accused has yet to begin, no confidential transcripts, testimonies or exhibits exist for the Applicants to materially access;¹²

CONSIDERING that the Appeals Chamber affirmed that for an Accused to be granted access to confidential material in a different case, there must not only be a

⁶ *Ibid.*

⁷ Response, para. 3.

⁸ *Id.*, para. 7.

⁹ *Id.*, para. 8.

¹⁰ *Id.*, paras. 9-10.

¹¹ *Id.*, para. 11.

¹² *Id.*, para. 9.

showing of a geographical, temporal, or otherwise material link between the two cases to demonstrate that these documents will, or will likely, assist in the preparation of the defence of the Applicant,¹³ but the material sought must also be described, at least in general terms, and a legitimate forensic purpose must be demonstrated;¹⁴

CONSIDERING that the Pre-Trial Judge concludes that since the trial phase in the *Šešelj* case has yet to begin, the only confidential documents in the record are certain passages of transcripts of status conferences held in closed session which deal with procedural matters relating only to the Accused;

CONSIDERING therefore that the Requested Documents have not been tendered into evidence and remain in the possession of the Prosecution;

CONSIDERING, consequently, that any disclosure of Requested Documents at this stage of the proceedings falls outside the remit of the Pre-Trial Judge in the *Šešelj* case but is, conversely, covered by the disclosure obligations of the Prosecution in the *Gotovina et al.* case pursuant to Rules 66 and 68 of the Rules;

FOR THE FOREGOING REASONS

PURSUANT TO Rule 54 of the Rules,

DENIES the Motion.

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

/signed/

Jean-Claude Antonetti
Pre-Trial Judge

Done this twenty-fourth day of May 2007
At The Hague
The Netherlands

[Seal of the Tribunal]

¹³ *The Prosecutor v. Tihomir Blaškić*, Decision on Joint Motion of Enver Hadžihasanović, Mehmed Alagić, and Amir Kubura for Access to All Confidential Material, Transcripts and Exhibits in the Case *Prosecutor v. Tihomir Blaškić*, 23 January 2003, p. 4.

¹⁴ *Ibid.*