



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-04-74-T
Date: 7 March 2011
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IN TRIAL CHAMBER III

Before: Judge Jean-Claude Antonetti, Presiding
Judge Árpád Prandler
Judge Stefan Trechsel
Reserve Judge Antoine Kesia-Mbe Mindua

Registrar: Mr John Hocking

Decision of: 7 March 2011

THE PROSECUTOR

v.

**Jadranko PRLIĆ
Bruno STOJIC
Slobodan PRALJAK
Milivoj PETKOVIĆ
Valentin ĆORIĆ
Berislav PUŠIĆ**

PUBLIC

**DECISION ON MOTIONS OF MIĆO STANIŠIĆ AND STOJAN ŽUPLJANIN
FOR DISCLOSURE OF CONFIDENTIAL DOCUMENTS IN *PRLIĆ ET AL.*
CASE (IT-04-74-T)**

The Office of the Prosecutor:

Mr Kenneth Scott
Mr Douglas Stringer

Counsel for the Accused:

Mr Michael Karnavas and Ms Suzana Tomanović for Jadranko Prlić
Ms Senka Nožica and Mr Karim A. A. Khan for Bruno Stojic
Mr Božidar Kovačić and Ms Nika Pinter for Slobodan Praljak
Ms Vesna Alaburić and Mr Zoran Ivanišević for Milivoj Petković
Ms Dijana Tomašegović-Tomić and Mr Dražen Plavec for Valentin Ćorić
Mr Fahrudin Ibrišimović and Mr Roger Sahota for Berislav Pušić

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, on the one hand, of “Motion by Mićo Stanišić for Access to Confidential Materials in the Prlić et al. Case” filed as a public document on 9 February 2011 by Mićo Stanišić, accused in the *The Prosecutor v. Stanišić and Župljanin*, no. IT-08-91-T (“Stanišić Motion”; “*Stanišić and Župljanin Case*”) and, on the other, of the “Motion by Mr Stojan Župljanin for access to all confidential materials in the Prlić et al. Case”, filed as a public document on 18 February 2011 by Stojan Župljanin, also accused in the *Stanišić and Župljanin Case*, seeking the disclosure of all confidential documents in the present case, *The Prosecutor v. Prlić et al.*, no. IT-04-74-T (“Župljanin Motion”; “*Prlić et al. Case*”) (together, the “Motions”; the “Requesting Parties”).

II. PROCEDURAL BACKGROUND

2. On 9 February 2011 and 18 February 2011, respectively, in the Stanišić Motion and the Župljanin Motion the Requesting Parties asked for the disclosure of all confidential documents used in the *Prlić et al. Case* that relate to the period before the outbreak of war in Bosnia and Herzegovina up to 31 December 1992, notably: (1) all the transcripts of hearings held in closed session and in private session; (2) all confidential filings by the parties and confidential decisions; and (3) all confidential exhibits.¹

3. On 23 February 2011, the Office of the Prosecutor (“Prosecution”) filed as a public document the “Prosecution Combined Response to the Motions by Mićo Stanišić and Stojan Župljanin for Access to Confidential Materials in the Prlić Case” (“Response”) in which it asks for the Motions to be denied.

¹ Stanišić Motion, para. 3; Župljanin Motion, para. 3.

III. ARGUMENTS OF THE PARTIES

A. Arguments Presented in the Motions

4. In support of the Motions, the Requesting Parties argue that the events and facts alleged in the Indictments against them are closely related to the political background of the facts in the *Prlić et al.* Case and, more specifically, to the background of the armed conflict in which both they and the Accused in the *Prlić et al.* Case were involved according to the Prosecution.²

5. More specifically, Mićo Stanišić argues that he was indicted because of his position as Minister of the Serbian Ministry of the Interior of Bosnia and Herzegovina and his alleged involvement in a joint criminal enterprise within the period and the background of the armed conflict, as alleged in the Indictment in the *Stanišić and Župljanin* Case and the *Prlić et al.* Case, and that Bruno Stojić was a member of the Ministry of the Interior of the Socialist Republic of Bosnia and Herzegovina at the same time as he was.³

6. For his part, Stojan Župljanin argues that the *Stanišić and Župljanin* Indictment implicates him as the Chief of the Banja Luka Security Centre, attached to the Serbian Ministry of the Interior of Bosnia and Herzegovina, and as a member of the Crisis Staff of the Autonomous Region of Krajina, and alleges he was a member of a joint criminal enterprise within the period and background of the armed conflict alleged in the *Stanišić and Župljanin* and the *Prlić et al.* Indictments.⁴

7. Consequently, the Requesting Parties maintain (1) that access to the sought confidential documents will assist them in the preparation of their defence by allowing them to place the alleged armed conflict in a political background;⁵ (2) that there is a legitimate forensic purpose, since the *Prlić et al.* Case is the only case

² Stanišić Motion, paras 4 and 7, and Župljanin Motion, paras 4 and 7, referring to *The Prosecutor v. Prlić et al.*, Case No. IT-04-74, Second Amended Indictment, 11 June 2008, para 232 (“*Prlić et al.* Indictment”) and *The Prosecutor v. Stanišić and Župljanin*, Case No. IT-04-79-PT, Second Amended Indictment, 10 September 2009, para. 43 (“*Stanišić and Župljanin* Indictment”).

³ Stanišić Motion, para. 8.

⁴ Župljanin Motion, para. 8.

⁵ Stanišić Motion, para. 8; Župljanin Motion, para. 8.

involving Croatian leadership in Bosnia and Herzegovina;⁶ and (3) that they identified the documents by describing their general nature.⁷

8. Finally, the Requesting Parties argue that in order to ensure fairness of the proceedings, they require access to the documents relating to their case with a view to obtaining all the facts, elements and circumstances of the case that could demonstrate their innocence, mitigate their responsibility or lead to the dismissal of the case.⁸ They add that should they be granted access to the confidential documents, they will respect all the protective measures applicable in the *Prlić et al.* Case, as well as any additional protective measures that the Trial Chamber may find necessary.⁹

B. Arguments Presented in the Response

9. In its Response, the Prosecution asks for the Motions to be denied on the grounds that they are late¹⁰ and that the Requesting Parties have failed to demonstrate a legitimate forensic purpose in support of their Motions.¹¹

10. With respect to the late nature of the Motions, the Prosecution maintains that the *Prlić et al.* Case had already started when the Requesting Parties appeared for the first time before the Tribunal, and that this does not explain why such requests were not made earlier, even though the Requesting Parties had filed similar requests in other cases.¹²

11. With respect to there being a legitimate forensic purpose, the Prosecution argues that there are no material, geographic and temporal links between the *Prlić et al.* Case and the *Stanišić and Župljanin* Case;¹³ that for this reason, the Requesting Parties failed to identify the legitimate forensic purpose which they had to show in order to gain access to the confidential documents; that they simply indicated the existence of an overlap of the political background between the cases and that the

⁶ Stanišić Motion, para. 9; Župljanin Motion, para. 9.

⁷ Stanišić Motion, para. 10; Župljanin Motion, para. 10.

⁸ Stanišić Motion, para. 10; Župljanin Motion, para. 10.

⁹ Stanišić Motion, para. 10; Župljanin Motion, para. 10.

¹⁰ Response, paras 2 to 5.

¹¹ Response, paras 2, 6 to 19.

¹² Response, paras 3 to 5.

¹³ Response, paras 10 to 11, 14.

armed conflict had taken place in Bosnia and Herzegovina, without other geographical limitations; that they simply provided a very vague and general description of the requested documents and that they failed to indicate the start date to the period from which they request the documents.¹⁴ The Prosecution also maintains that the Requesting Parties provide a very broad and vague material link between the two cases, namely the political background of the armed conflict, without explaining how these documents could assist them in the preparation of their defence.¹⁵ Similarly, the Prosecution draws attention to the argument put forward by Mićo Stanišić that both Bruno Stojić and he worked for the Ministry of the Interior of the Socialist Republic of Bosnia and Herzegovina at the same time, and argues that this information is not complete. In fact, Mićo Stanišić had not specified in the Stanišić Motion which aspect of Bruno Stojić's work was relevant to his case or how this information could assist in establishing the political background to the proceedings against him.¹⁶

12. The Prosecution also argues that the Requesting Parties have not demonstrated that they examined the public documents in the *Prlić et al.* Case relating to the political background of the conflict in Bosnia and Herzegovina before filing their Motions and why these documents were not sufficient for the preparation of their case.¹⁷ According to the Prosecution, they did not establish either why the confidentiality measures ordered for the benefit of witnesses and the sources of documentary evidence should be lifted for their benefit.¹⁸ Finally, the Prosecution deems that the Motions should be denied because they have all the characteristics of a "fishing expedition",¹⁹ and indicates that the Župljanin Motion is an almost identical repetition to the Stanišić Motion which, for the Prosecution, proves that this is a "fishing expedition" on Stojan Župljanin's part.²⁰

IV. APPLICABLE LAW

¹⁴ Response, para. 12.

¹⁵ Response, para. 13.

¹⁶ Response, para. 14.

¹⁷ Response, para. 15.

¹⁸ Response, para 19.

¹⁹ Response, paras 16 and 17.

²⁰ Response, para. 18.

13. Pursuant to Rule 75 (F)(i) of the Rules of Procedure and Evidence (“Rules”), once protective measures have been ordered in respect of a victim or witness in proceedings before the Tribunal (the “first proceedings”), these measures continue to apply *mutatis mutandis* in all other proceedings before the Tribunal or another jurisdiction until they are rescinded, varied or augmented in accordance with procedure set out in this Rule. Moreover, Rule 75 (G) of the Rules sets out that a party to the second proceedings seeking to rescind, vary or augment protective measures ordered in the first proceedings must file its request with any Chamber, however constituted, remaining seized of the first proceedings, or to the Chamber seized of the second proceedings, if no Chamber remains seized of the first proceedings.

14. Jurisprudence distinguishes between three categories of confidential documents: *inter partes* documents, *ex parte* documents and documents provided under Rule 70. Each of these categories is regulated by different access conditions.²¹

15. The Chamber notes that the Requesting Parties seek disclosure of “all confidential documents” without specifying whether they are *inter partes*, *ex parte* and/or Rule 70 documents.²² For the sake of judicial economy, the Chamber will deal with the Motions as requests for access to *inter partes*, *ex parte* and Rule 70 documents.

16. Concerning *inter partes* confidential documents, a party has the right to ask to examine documents that were admitted in another case before the Tribunal, ones that would assist in the preparation of his case, on condition that it identifies the requested documents or specifies their general nature, and that it shows a legitimate forensic purpose in so doing.²³ Before granting a request for access to confidential documents, the Trial Chamber must be certain that the Requesting Party has established that the

²¹ *The Prosecutor v. Šešelj*, Case No. IT-03-67-T, “Decision on Stanišić Motion for Access to Confidential Materials in the Šešelj Case Pursuant to Rule 75 (G)(i)”, 24 April 2008 (“Šešelj Decision of 24 April 2008”), para. 11. See also *The Prosecutor v. Šešelj*, Case No. IT-03-67-T, “Decision on Motions by Mićo Stanišić and Stojan Župljanin Seeking Disclosure of Confidential Documents in the Vojislav Šešelj Case (IT-03-67)”, 27 August 2010, para. 23 (“Šešelj Decision of 27 August 2010”).

²² Stanišić Motion, para. 1; Župljanin Motion, para. 1.

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”, 30 September 2010, para. 7 (“Perišić Decision”); Šešelj Decision of 27 August 2010, para. 25; Šešelj of 24 April 2008, para. 12; *The Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, “Decision on Radovan Karadžić’s

exhibits in question are likely “to assist the applicant’s case materially, or that there is a good chance that it would”,²⁴ without necessarily having to explain precisely how each of these documents could be of use.²⁵ This condition is fulfilled when the Requesting Party establishes “that there is a factual nexus between the case of the said party and the cases in which these exhibits were tendered”, that is, geographical, temporal or other substantive overlaps between the two cases.²⁶ The Chamber moreover recalls that the principle of equality of arms presupposes that the Accused will be placed in a situation similar to that of the Prosecution, which has access to all submissions filed *inter partes*, so that he may understand the proceedings and the evidence and weigh the relevance in relation to his own case.²⁷ Consequently, once an Accused has been authorised to examine confidential exhibits or confidential testimony or testimony heard in closed session in another proceeding before the Tribunal, he must have the opportunity to examine the motions, submissions, decisions and transcripts that may relate to them.²⁸

17. The Appeals Chamber also recalled that the mere fact that both Indictments in question concern crimes committed in Bosnia and Herzegovina cannot be deemed as sufficiently specific since, if such a link were sufficient, practically every accused person before the Tribunal would automatically have access to all confidential documents in all other cases.²⁹

18. With respect to confidential and *ex parte* documents, requirements to establish the existence of a legitimate forensic purpose are “more stringent”, and access to documents in this category should only be granted on an exceptional basis.³⁰ “*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

Motion for Access to Confidential Material in the *Dragomir Milošević* Case”, 19 May 2009, para. 7 (“Milošević Decision”).

²⁴ Perišić Decision, para. 8; Šešelj Decision of 27 August 2010, para. 25; Šešelj Decision of 24 April 2008, para. 12; Milošević Decision, para. 8.

²⁵ Šešelj Decision of 27 August 2010, para 25, referring to *The Prosecutor v. Blagojević and Dragan Jović*, Case No. IT-02-60-A, “Decision on Motion by Radivoje Miletić for Access to Confidential Information”, 9 September 2005, p. 4 (“Miletić Decision”).

²⁶ Šešelj Decision of 27 August 2010, para. 25; Šešelj Decision of 24 April 2008, para. 12; Milošević Decision 8.

²⁷ Šešelj Decision of 27 August 2010, para 25; Miletić Decision, p. 4.

²⁸ Šešelj Decision of 27 August 2010, para. 25; Milošević Decision, para. 8.

²⁹ *The Prosecutor v. Rasim Delić*, IT-04-83-A, “Decision on Motion by Radovan Karadžić for Access to Confidential Materials in the Rasim Delić Case” (“Delić Decision”), para. 8.

a State, other public interests, or privacy interests of a person or institution” and, consequently, “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”.³¹

19. Finally, documents may be considered confidential because their use is subject to restrictions under Rule 70 of the Rules. In such a case, “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 and that this holding does not depend upon whether that material was used as evidence in a previous case”.³²

V. DISCUSSION

20. The Chamber will first consider whether, as jurisprudence requires, the Requesting Parties have identified the documents they are seeking or have specified their nature. In this case, the Requesting Parties are seeking disclosure of all the transcripts of testimony heard in closed session, all confidential filings of the parties and confidential decisions, as well as all confidential exhibits, relating to the period before the outbreak of war in Bosnia and Herzegovina up to 31 December 1992.³³ The Chamber deems that this constitutes sufficient identification with respect to the circumstances of the case and fulfils the aforementioned jurisprudential criteria.

21. Secondly, the Chamber will analyse whether, in order to gain access to all the material sought, the Requesting Parties have established the existence of a legitimate forensic purpose by showing a temporal, geographical and other substantive overlaps between the two cases. In this instance, the Requesting Parties argue that the events and facts alleged in the *Stanišić and Župljanin* Indictment are closely linked to the political background of the facts in the *Prlić et al.* Case;³⁴ that during the period relating to the facts alleged in both Indictments, an armed conflict did take place and

³⁰ Šešelj Decision of 27 August 2010, para. 26; Šešelj Decision of 24 April 2008, para. 13.

³¹ Šešelj Decision of 27 August 2010, para. 26; Šešelj Decision of 24 April 2008, para. 13.

³² Šešelj Decision of 27 August 2010, para. 27; Šešelj Decision of 24 April 2008, para. 14. See also the Perišić Decision, para. 8.

³³ Stanišić Motion, para. 3; Župljanin Motion, para. 3.

³⁴ Stanišić Motion, para. 3; Župljanin Motion, para. 3.

that the Accused in both cases were involved.³⁵ As in the aforementioned Delić Decision,³⁶ the Chamber considers that the fact that both Indictments relate to the same political background and, more specifically, the armed conflict in Bosnia and Herzegovina, cannot be deemed sufficiently specific to show the existence of a connection between these two cases.

22. Moreover, the Chamber considers that the fact, as alleged in the Stanišić Motion, that Mićo Stanišić and Bruno Stojić worked at the Ministry of the Interior of the Socialist Republic of Bosnia and Herzegovina at the same time, at an unspecified date,³⁷ cannot be deemed sufficiently specific to establish any sort of link between the two Indictments in question.

23. Consequently, the Chamber deems that the Requesting Parties have not shown the existence of the legitimate forensic link between their case and the *Prlić et al.* Case, and that the Motions should, therefore, be denied.

VI. DISPOSITION

FOR THE FOREGOING REASONS,

PURSUANT TO Rule 75 of the Rules,

DENIES the Motions by a majority.

Presiding Judge Jean-Claude Antonetti attaches a dissenting opinion to the present Decision.

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

/signed/

³⁵ Stanišić Motion, para. 7; Župljanin Motion, para. 7.

³⁶ *See supra*, footnote 29.

³⁷ Stanišić Motion, para. 8.

Jean-Claude Antonetti
Presiding Judge

Done this seventh day of March 2011
At The Hague
The Netherlands

[Seal of the Tribunal]

Dissenting Opinion of Presiding Judge Jean-Claude Antonetti

The Chamber was seized of a request from the Stanišić Defence for access to confidential documents in the *Prlić et al.* Case.³⁸

In its filing of 22 February 2011, the Prosecution opposes this request on the basis of the Decision rendered by the Appeals Chamber in the *Delić* Case³⁹ and on the absence of a link between the *Stanišić and Župljanin* Case and the *Prlić* Case.

To my mind, this request presents a problem of principle that concerns the equality of arms. In its filings, the Prosecution deems that the Stanišić Defence is undertaking a “fishing expedition.”⁴⁰ Equally, the Prosecution asserts in a peremptory way that the facts covered in the *Prlić* Case are of no interest to the Stanišić and Župljanin Defence. The position adopted by the Prosecution is surprising because the Prosecution takes on the task of judging the facts and asks the Chamber to follow its lead.

The Prlić Chamber is not at all familiar with the *Stanišić and Župljanin* Case (apart from what concerns me, having been the Confirming Judge) and for this reason, a Judge who is not familiar with a case has no legitimate reasons to discard such a request.

The link established by the Stanišić and Župljanin Defence was said to be due to the fact that the Accused Stojić worked with Stanišić at the SRBH MUP.⁴¹ This may be the case, but we have no way of knowing this.

³⁸ “Motion by Mićo Stanišić for Access to Confidential Materials in the Prlić et al. Case”, public, 9 February 2011.

³⁹ *The Prosecutor v. Rasim Delić*, Case No. IT-04-83-A, “Decision on Motion by Radovan Karadžić for Access to Confidential Materials in the Rasim Delić Case”, public, 19 May 2009, para. 8. See also on this matter, *The Prosecutor v. Blagojević*, Case No. IT-02-60-A, “Decision on Momčilo Perišić’s Motion Seeking Access to Confidential Material in the Blagojević and Jokić Case”, public, 18 January 2006, para. 4.

⁴⁰ “Prosecution Combined Response to the Motions by Mićo Stanišić and Stojan Župljanin for Access to Confidential Materials in the Prlić Case”, public, 22 February 2011, para. 16.

⁴¹ *Ibid.*, para. 14.

In a more general sense, the conflict that broke out during the break-up of former Yugoslavia brought about, as everyone can see, the creation of entities such as the Republika Srpska or the Republic of Herceg-Bosna. The alleged crimes mentioned in paragraph 10 of the Prosecution's submission seems to concern the departure of non-Serbs from several municipalities between April 1992 and December 1992.

I note that the Indictment in the *Prlić* Case also mentions expulsions of non-Serbs. Moreover, I find that there is a certain overlap in the dates (April 1992 to December 1992) in the *Stanišić and Župljanin* Case and the *Prlić* Case, the alleged JCE having taken place between 18 November 1991 and April 1994.

It is also worth noting that the geographical area is included in the Republic of Bosnia and Herzegovina (Republika Srpska).

On another matter, only the Office of the Prosecutor has access to all the documents in all the cases. On the principle of equality of arms, why should the Defence, which is one of the parties in terms of the Statute, not have the right to gain access to the same documents? This obstacle could be for the protection of witnesses or entities that benefit from protective measures under Rule 70 of the Rules. This obstacle is raised because of the respect for confidentiality imposed on Counsel for the Accused and on the Accused themselves under threat of indictment for contempt of court.

Of course, the Prosecution in its submission indicated that the *Stanišić and Župljanin* Defence had access to public documents, but this position does not resolve the problem when a document has not been disclosed publicly because, if it was admitted in proceedings, it is not automatically disclosed to everyone and sometimes parts of the transcripts are not release to the public.

Case-law of the Appeals Chamber in the *Delić* Case cited by the Prosecution, confirms the principle that the applicant must show a legitimate interest in order to receive these documents. Therefore, this is at the discretion of the Judges of the seized Chamber. As far as I am concerned, there is a legitimate interest in disclosing these documents.

Moreover, I note that, although the request was addressed to the Chamber, it was the representatives of the Office of the Prosecutor who replied to the Motion. I ask myself how these representatives are able to assess the fact that a request from the Stanišić Defence is not of interest to them, even though they are not familiar with the case? It would have been better had the Trial Attorney in the *Stanišić and Župljanin* Case drafted the submission filed with the signature of the Prosecutor ...

/signed/

Jean-Claud Antonetti

Presiding Judge

Done this seventh day of March 2011

The Hague

Netherlands

[Seal of the Tribunal]