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UNITED
NATIONS



**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: 4 July 2006

Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Patrick Robinson
Judge Bakone Justice Moloto

Registrar: Mr Hans Holthuis

Order of: 4 July 2006

PROSECUTOR

v.

VOJISLAV ŠEŠELJ

DECISION ON FORM OF DISCLOSURE

Office of the Prosecutor

**Ms Hildegard Uertz-Retzlaff
Mr Dan Saxon
Mr Ulrich Müssemer**

The Accused

Mr Vojislav Šešelj

Standby Counsel

Mr Tjarda Eduard van der Spoel

Introduction

1. On 26 March 2004 the Accused filed his "Motion No. 30". On 19 April 2004 the Prosecution filed its "Response to the Accused's 'Motion No. 30' and Motion for Order Directing the Accused to Accept Disclosure Material in Electronic Format".

2. In his motion, the Accused stated:

I request that you immediately send me the statements of all witnesses in all cases who mentioned my name in any context during testimonies before the Prosecutor or during testimonies before a trial chamber.

3. In its response, the Prosecution said that it would supply the requested material under the following conditions:

(i) the provision of the requested material would be limited by the need to protect victims and witnesses, pursuant to Rules 69 and 75 of the Tribunal's Rules of Procedure and Evidence, and as well by the public interest protected by Rules 66 (C) and 70 (B);

(ii) the requested material would be made available to the Accused in electronic format, rather than in hard copy or videotape;

(iii) some material would be supplied in a language other than Serbo-Croatian, in which case it would fall upon the Accused to seek translation.¹

4. The Accused has refused to accept any material which the Prosecution has sought to disclose to him in electronic format.² As the pre-trial Judge noted:

The first difficulty is the fact that the accused continues to refuse anything which is not in hard copy, that is, anything that is in electronic format. The problem arises ... in the light of the following two facts: first, that he rejects this material when it is handed to him in CD-ROM format or in any other electronic format while [the Prosecution] considers its obligation under whichever Rule is applicable to have been fulfilled ...

The second issue related only to Rule 68 disclosure in that while the accused pretends that even in the case of Rule 68 ... the material disclosed ought to be disclosed in his own language. [The Prosecution] maintains that under the Rules it does not have an obligation to translate Rule 68 material into the accused's language if it is not in that language now.³

¹ Para. 2.

² Prosecution's Fourth Report Concerning Disclosure, 30 September 2004, paras 1-8; T. 281.

³ T. 269-272.

5. The pre-trial Judge allowed the Accused to file written submissions on these issues. On 9 November 2004 the Accused filed a "Request of the Accused to Disclose Materials of the Prosecution in Written Form and in Serbian".⁴ This was followed by the Prosecution's "Response to Accused's Request for Disclosure of Materials in Written Form and in Serbian", filed on 29 November 2004. The Accused was denied leave to reply.⁵

Applicable law

6. The following Articles from the Statute and Rules are relevant to the issues currently before the Trial Chamber:

Article 21 Rights of the accused

...

2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute.

...

4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

(a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) to be tried without undue delay;

...

(f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal.

Rule 66 Disclosure by the Prosecutor

(A) Subject to the provisions of Rules 53 and 69, the Prosecutor shall make available to the defence in a language which the accused understands

(i) within thirty days of the initial appearance of the accused, copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused; and

(ii) within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge appointed pursuant to Rule 65 ter, copies of the statements of all witnesses whom the Prosecutor intends to call to testify at trial, and copies of all written statements taken in accordance with Rule 92 bis; copies of the statements of additional prosecution witnesses shall be made available to the defence when a decision is made to call those witnesses.

⁴ It was submitted to the Registry for translation into English on 1 November 2004, that is, after the expiry of the time-limit established by the Pre-Trial Judge. This notwithstanding, the Trial Chamber will exceptionally take it into consideration.

⁵ Decision on the Accused's Submissions Number 60 and 61 for Request for Leave to Reply and for Extension of Time to Reply, 14 December 2004.

(B) The Prosecutor shall, on request, permit the defence to inspect any books, documents, photographs and tangible objects in the Prosecutor's custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.

...

Rule 68

Disclosure of Exculpatory and Other Relevant Material⁶

Subject to the provisions of Rule 70,

(i) the Prosecutor shall, as soon as practicable, disclose 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 Prosecution evidence;

(ii) without prejudice to paragraph (i), the Prosecutor shall make available to the defence, in electronic form, collections of relevant material held by the Prosecutor, together with appropriate computer software with which the defence can search such collections electronically.

...

Discussion

7. The Trial Chamber will consider whether the Accused is entitled to receive the material in a particular format. It will also consider which material the Accused is entitled to receive in Serbo-Croatian. Throughout this decision, the Trial Chamber takes into account the particular circumstances of the Accused; namely, that he is self-represented, in detention, and not officially assisted by persons fluent in one of the official languages of the Tribunal.

8. The following categories of material are involved:

A. Material that the Prosecution intends to use in support of its case

9. Material in this category is regulated by Rule 66 (A). According to the Prosecution, the statements of witnesses whom the Prosecution intends to call to testify at trial – that is, Rule 66 (A) (ii) material – have been disclosed, or will be disclosed, to the Accused, in Serbo-Croatian.⁷ It is moreover the Prosecution's intention to disclose to the Accused in Serbo-Croatian all exhibits that it will offer into evidence at trial.⁸ Therefore, no translation issue arises under this heading.

⁶ At the time of the Accused's motion, Rule 68 read, in full, as follows: "The Prosecutor shall, as soon as practicable, disclose to the Defence the existence of material known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of Prosecution evidence." The amendment does not raise any issue under Rule 6 (D) of the Rules.

⁷ Second response, para. 6.

⁸ First response, para. 3; second response, para. 14.

10. On the question of format, the issue is whether there exists an obligation on the Prosecution to disclose Rule 66 (A) (ii) material and exhibits in hard-copy format, as opposed to electronic. The main purpose of disclosure is to enable the Accused to know the Prosecution's case against him so that he may prepare his defence. This purpose is frustrated when disclosure is in a format that makes it impossible or unreasonably difficult for the Accused to make effective use of the material disclosed. In the *Brđanin* case, the Trial Chamber correctly stated that "the raison d'être behind the disclosure rules is undoubtedly to permit the accused to make effective use of that material", and proceeded to find, for that reason, that Rule 68 (i) (exculpatory) material must not be disclosed in summary form.⁹

11. In the history of the Tribunal, disclosure has usually been made in hard copy. More recently the Rules were amended to provide for disclosure in electronic format, as well as to impose wider disclosure obligations. This reflects developments in modern technology, holding the promise of immense savings in time, space, and cost, which the Tribunal should not ignore. The new format of disclosure can be converted to the old format with relative ease, when this is done selectively, so that persons who prefer to work within the conventions of the old format are not disadvantaged. Some training and support are required to effect the conversion from new to old, but so long as these are provided, there can be no injustice. It is telling in this respect that Rule 68 (ii) – the only provision among those listed above to have been specifically amended to promote use of the new technology – obliges the Prosecution to make available to the defence appropriate computer software to enable the defence to utilize the material disclosed to it in the new format.

12. The fact that only Rule 68 (ii) has been thus amended does not necessarily mean that hard-copy disclosure is required under Rules 66 (A) or (B) or 68 (i). The crucial question is whether the principle of fairness is breached by providing material in electronic format. The Trial Chamber is of the view that, so long as such assistance as is reasonable and necessary in the circumstances is given to the Accused for the purpose of accessing, retrieving, and, in general, effectively utilizing material disclosed in electronic format, no unfairness results.

13. The Accused is entitled to receive from the Registry the basic equipment and training necessary to make effective use of material disclosed in electronic format.

⁹ *Prosecutor v. Radoslav Brđanin*, Decision on Motion for Relief from Rule 68 Violations by the Prosecutor and for Sanctions to Be Imposed Pursuant to Rule 68 bis and Motion for Adjournment while Matters Affecting Justice and a Fair Trial Can Be Resolved, 30 October 2002, para. 26.

B. Material that the Prosecutor does not intend to use in support of its case

(i) Exculpatory material – Rule 68 (i)

14. Rule 68 (i) requires the Prosecution to disclose exculpatory material which in the actual (as opposed to constructive) knowledge of the Prosecution may suggest the innocence or mitigate the guilt of the accused or affect the credibility of Prosecution evidence. The rule is silent on the question of the language of disclosure. This does not, of course, mean that there is no obligation to disclose the material in a particular form; and while there is no *general* right in the Tribunal to translated material, Trial Chambers have in certain circumstances granted such requests, citing the fair-trial principle. For example, in the *Čelebići* case, the Trial Chamber held that orders and decisions of the Tribunal should be translated into the language of the accused;¹⁰ and in *Naletilić and Martinović* the Trial Chamber granted a request to have all exhibits used during the trial similarly translated, adding that “the guarantees provided in Article 21(4) of the Statute do not extend to all documents, but only to evidence which forms the basis of the determination by the Chamber of the charges against the accused”.¹¹ In relation to Rule 68, in particular, it was said in the *Ljubičić* case that:

the current general standard regarding translation of documents during the pre-trial stage of the proceedings requires that the following material be submitted to the Accused in a language he understands: ... Exculpatory material disclosed by the Prosecutor according to Article 68 of the Rules.¹²

15. This Trial Chamber is of the view that the same observations that were made above in relation to the format of disclosure apply here. The disclosure of exculpatory material must be in a form that allows the Accused to make effective use of it in the preparation of his defence. Rule 66 imposes an obligation on the Prosecution to disclose material on which it intends to rely in a language the Accused understands because of the importance of that material to the Accused in the preparation of his case. Like Rule 66 material, Rule 68 (i) material is also, potentially, very important to an accused: whereas the former may be incriminatory, the latter may be exculpatory and, therefore, both may crucially affect the question of guilt or innocence. Disclosure of Rule 68 (i) material in a language other than that of the accused may

¹⁰ *Prosecutor v. Zejnil Delalić et al.*, Decision on Defence Application for Forwarding the Documents in the Language of the Accused, 25 September 1996, para. 8.

¹¹ *Prosecutor v. Mladen Naletilić et al.*, Decision on Defence’s Motion Concerning Translation of all Documents, 18 October 2001.

¹² *Prosecutor v. Ljubičić*, Decision on the Defence Counsel’s Request for Translation of All Documents, 20 November 2002, p. 3.

make it unreasonably difficult for the accused – especially an accused who is self-represented, in detention, and not officially assisted by persons fluent in one of the official languages of the Tribunal – to make effective use of the material disclosed. From a fair-trial perspective, therefore, the Prosecution must disclose to the Accused exculpatory material in a language which the Accused understands. This obligation is confined, of course, to material of which the Prosecution has actual knowledge.

(ii) Statements given to the Prosecution mentioning the Accused – Rule 66 (B)

16. This category includes statements of witnesses which the Prosecution does not intend to call to testify in this case and which are not considered to be exculpatory. The Prosecution estimates that it holds about one thousand such statements by witnesses who mention the Accused, which together amount to about six or seven thousand pages.¹³ The vast majority of these statements are in their original version (English), but some have already been translated into Serbo-Croatian.¹⁴ The Prosecution “accepts that witness statements that mention the Accused by name could ‘be relevant or possibly relevant to an issue’ in these proceedings.”¹⁵ Moreover, “the Accused’s request constitutes a valid request under Rule 66 (B)”, albeit subject to the Prosecution’s “obligations to protect the safety and security of victims and witnesses ... and the Prosecution’s obligations to protect information falling within the scope of Rules 66 (C) and 70 (B).”¹⁶

17. The Prosecution is hereby directed to provide the Accused with those witness statements in its possession in which the Accused is mentioned by name and which are not subject to protection. There is no entitlement of the Accused to receive this material in Serbo-Croatian; however, where a Serbo-Croatian version is available, this should be given to the Accused along with the original-language version. As for material subject to protection, the Prosecution is to seek the Trial Chamber’s permission for partial disclosure, or non-disclosure, of any such material in its possession.

(iii) Private- and closed-session transcripts mentioning the Accused – Rule 68 (ii)

18. The Prosecution has stated that it would perform a search of all of private- and closed-session court transcripts for instances (not considered to be exculpatory) where a witness mentions the Accused by name.¹⁷ The Trial Chamber requests the Prosecution to do so, as this

¹³ First response, para. 7.

¹⁴ T. 235-236; second response, para. 9.

¹⁵ First response, para. 5.

¹⁶ First response, para. 2.

¹⁷ First response, para. 10.

is potentially relevant material not in the public domain. The transcripts will of course be in English, and there is no obligation upon the Prosecution or the Tribunal to have such material translated. The Prosecution is to inform the Accused of the witness name or pseudonym and transcript page of the case in which the Accused is mentioned by name. It will then be for the Accused to request access to this material in accordance with the applicable procedures.

(iv) Publicly available material

19. The Accused requested the Registry to provide him with “all motions that all the counsels in all the cases have hitherto submitted, the Prosecutor’s response to them and the court decisions”, in the “Serbian language”, for the stated reason that he needs to familiarize himself with the entire jurisprudence of the Tribunal in order to mount his defence.¹⁸ The Registry responded that:

To comply with this request, Registry would have to provide thousands of documents amounting to tens of thousands of pages. This is neither practicable nor reasonable. The Registry may, however, be able to accommodate a more limited or focused request.¹⁹

20. Public testimonies, exhibits, and filings in other proceedings before this Tribunal are available to the Accused, where this is reasonably justified, upon application to the Registry.²⁰ It is for the Accused to locate and select material in this category. The Registry may, of course, refuse an unreasonable request. It is moreover for the Registry to decide the format (hard-copy or electronic) in which to supply such material to the Accused. There is no obligation to translate such material into Serbo-Croatian. The Accused should be aware that the only items routinely translated into Serbo-Croatian are Chamber decisions, not parties’ submissions, with the exception of parties’ submissions in the present case, an exception made in order to assist the self-represented Accused.

Compliance

21. The Prosecution’s disclosure obligations are discharged when it provides to the Accused the material that is the subject of those obligations, in accordance with what is stated in this decision. This is so even if the Accused refuses to accept the material. Nevertheless, in the event that the Accused decides that he will, after all, accept the material, he is entitled to

¹⁸ T. 239-240, 289-290.

¹⁹ Letter to the Accused from the Deputy Registrar, dated 9 June 2004, filed 11 June 2004.

²⁰ *Prosecutor v Slobodan Milošević*, Decision of Defence Motion filed by the Defence of Franko Simatović (IT-03-69-PT) for Access to Transcripts and Documents, 20 October 2003.

receive it, including material that he refused to accept in the past; upon request of the Accused, this must be provided anew to him by the Prosecution.

Disposition

For the foregoing reasons,

PURSUANT TO Rule 54,

THE TRIAL CHAMBER HEREBY:

FINDS that the Prosecution is entitled to provide Rule 66 (A) and (B) material, as well as Rule 68 (i) material, in electronic format, subject to the qualifications regarding assistance for the Accused;

FINDS that there is an obligation to provide Rule 68 (i) material in a language the Accused understands;

DIRECTS the Prosecution to provide the Accused with those witness statements in its possession in which the Accused is mentioned by name, subject to the exceptions mentioned in the body of this decision;

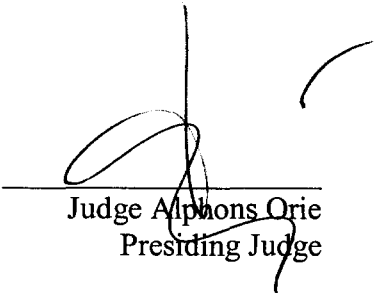
DIRECTS the Prosecution to provide the Accused with the names or pseudonyms and transcript references of private- and closed-session testimony in cases before this Tribunal where the Accused is mentioned by name;

DISMISSES all other requests in the aforementioned filings by the parties;

DISMISSES all other motions of the Accused for translation of material into Serbo-Croatian to the extent that they are inconsistent with the present decision.

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

Dated this 4th day of July 2006
The Hague
The Netherlands



Judge Alphons Orie
Presiding Judge

[Seal of the Tribunal]