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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: 22 November 2006

Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Patrick Robinson
Judge Frank Höpfel

Registrar: Mr Hans Holthuis

Decision of: 22 November 2006

PROSECUTOR

v.

VOJISLAV ŠEŠELJ

DECISION ON PROVISION OF PREVIOUS TESTIMONY IN AUDIO FORMAT

Office of the Prosecutor

Ms Hildegard Uertz-Retzlaff
Mr Dan Saxon
Mr Ulrich Müssemeyer
Ms Melissa Pack
Ms Joanne Motoike

The Accused (representing himself)

Mr Vojislav Šešelj

Standby Counsel for the Accused

Mr David Hooper
Mr Andreas O'Shea

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I. INTRODUCTION

1. The Trial Chamber is seised of Submission No. 139 ("Submission"), in which the Accused requests written translations in his own language of the material that the Prosecution seeks to have admitted pursuant to Rule 92 *bis* of the Tribunal's Rules of Procedure and Evidence ("Rules").[1]

2. The Accused's request relates to the "Prosecution Motion for Admission of Transcripts and Written Statements in Lieu of Viva Voce Testimony Pursuant to Rule 92 *bis*", with confidential and partly *ex parte* annexes, filed in translation on 6 March 2006.[2] In its Motion, the Prosecution seeks to have admitted as evidence the prior testimony and "related exhibits", including photographs, of 32 witnesses, 23 written witness statements and associated documents, and five statements of two deceased persons ("Rule 92 *bis* material"). The Rule 92 *bis* material is contained in confidential Annexes A, C and E and confidential and *ex parte* Annexes B and D to the Motion.

3. On 8 March 2006, the Accused received: (a) the Prosecution's submissions as set out in the Rule 92 *bis* Motion; (b) a CD containing the Rule 92 *bis* material that was not filed *ex parte*; and (c) hard copies of the Rule 92 *bis* material that was not filed *ex parte*, in 14 binders.

4. Of the 14 binders of Rule 92 *bis* material, the Accused returned all but approximately 400 pages.[3] The pages he did not return were in Serbo-Croatian. The Accused also returned the CD on account of his decision not to use a computer.[4]

5. The only material that was not provided to the Accused in written format and in his own language was the transcripts of previous proceedings. Therefore, the Trial Chamber considers that the Accused's request for written translations in his own language of the Rule 92 *bis* material is, in effect, a request for a Serbo-Croatian version of the transcripts. The English versions of the transcripts are contained in Annexes A and B to the Prosecution's Motion. As Annex B is *ex parte*, the Accused's request initially encompassed the transcript evidence of 12 witnesses contained in Annex A.

6. However, following the Trial Chamber's "Decision on the Application of Rule 73 *bis*", which ordered the Prosecution not to present any evidence relating to five specified crime

[1] Submission No. 139, 13 March 2006. See also, T. 554-558.
[2] The Prosecution's Motion is dated 24 January 2006.
[3] See Procès Verbal, 15 March 2006.
[4] Submission No. 139, p. 1. See also T. 556-557. The photographs were also returned "because they cannot be used as evidence without a relevant account of events in the Serbian language". See Submission No. 139, p. 1.

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sites, including Brčko, Bijeljina and Bosanki Šamac,[5] seven of the 12 witnesses will not be called, or are unlikely to be called, to present evidence. The Accused's request, therefore, concerns the transcript evidence of five witnesses contained in Annex A.

7. The Prosecution did not file a response to the Submission. In the Status Conference held on 4 July 2006, the Prosecution informed the pre-trial Judge that it had audio recordings in Serbo-Croatian of the transcripts contained in Annex A to its Motion that could be provided to the Accused.[6] The audio recordings were provided to the Accused on a CD on 24 July 2006. The Accused refused to receive the CD.

8. The issue of the provision of transcripts in audio format arose again at the Status Conference held on 8 November 2006. The Accused appeared to have modified his position; he expressed objections he had made in the past but also stated that he would only listen to audio recordings on cassette tape.[7]

9. In addition, the Trial Chamber notes that at the time when the Accused made his request only the Prosecution's first motion for admission of material pursuant to Rule 92 *bis* had been filed. Since then the Prosecution has filed a number of other motions requesting the admission of transcripts of witness testimony, in respect of which the same issue arises.[8] This Decision applies to those motions as well.[9]

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[5] Decision on the Application of Rule 73 *bis*, 8 November 2006.
[6] T. 555-556.
[7] T. 760-761.
[8] Prosecution's Addendum and Corrigendum to "Prosecution's Motion for Admission of Transcripts and Written Statements in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*", with Confidential Annex, 2 October 2006; Prosecution's Second Motion for Admission of Written Statements and Transcripts, with Confidential and *Ex Parte* Annexes, 2 October 2006; Prosecution's Addendum to "Prosecution's Second Motion for Admission of Written Statements and Transcripts", with Confidential and Partly *Ex Parte* Annexes, 16 October 2006; Prosecution's Additional Addendum and Corrigendum to "Prosecution's Motion for Admission of Transcripts and Written Statements in Lieu of *Viva Voce* Testimony Pursuant to Rule 92 *bis*", with Confidential Annexes, 17 October 2006; Prosecution's Submission of the Expert Report of Ewa Tabeau pursuant to Rule 94 *bis* and Motion for the Admission of Transcripts pursuant to Rule 92 *bis*(D), 13 July 2006; Prosecution's Submission of the Expert Report of Colonel Ivan Grujić pursuant to Rule 94 *bis* and Motion for the Admission of Transcripts pursuant to Rule 92 *bis*(D), 14 July 2006; and, Prosecution's Submission of the Expert Report of Professor Dr Davor Strinovic pursuant to Rule 94 *bis* and Motion for the Admission of Transcripts pursuant to Rule 92 *bis*(D), 13 July 2006.
[9] Note, however, that Prosecution's Submission of the Expert Report of Ewa Tabeau pursuant to Rule 94 *bis* and Motion for the Admission of Transcripts pursuant to Rule 92 *bis*(D), 13 July 2006, was decided at the Status Conference held on 8 November 2006. See, T. 773.

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II. DISCUSSION

10. In the Submission, the Accused argues that it is his "absolute right" to receive hard copies of all documents "because a document has always been a document in the true sense of the word only if it is on paper".[10] The Accused also states that he is "prepared to accept photographs and video recordings on video cassettes as evidence, but computer technology, being the ultimate means of manipulation, holds no interest for me whatsoever".[11] At the Status Conference held on 4 July 2006, the Accused objected to the Rule 92 *bis* material being provided in audio format. He stated, "methods are being devised here all the time in order to impede my preparation for defence. Now audio material. One man cannot listen to all of that. This material has to be on paper… [W]hat I am supposed to do? Spend a year listening to all the material they're going to submit to me? Imagine how many hours that is going to be and how many hours per day a person can spend fully focused on listening to that."[12]

11. At the Status Conference held on 8 November 2006, the Accused repeated the objections he had previously made to audio format, submitting that it would be time-consuming to listen to lengthy transcripts in audio format and that having the transcripts in audio format makes it difficult to quickly review and identify relevant sections of the material. However, the Accused also stated that he did not object to receiving material in audio format *per se*.[13] On being asked by the Presiding Judge whether he was "strongly opposed against receiving or having disclosed to you any material in audio", the Accused responded:

> [A] priori, I do not object to being given some material in audio format as well but it should be something which I can manage physically speaking. I'm not categorically against. I can receive it all in audio and video form, but to the extent that I can manage and handle it up to a maximum of 8 hours a day because one cannot concentrate any more than that. If it is on paper, I can proceed much more quickly, I can work much more quickly.[14]

12. The Accused also stated:

> Electronic recordings are one thing and audio recordings are a different thing. I am refusing to receive anything in electronic format, but I did not refuse audio recordings if these are cassettes that are used on a cassette player. I am refusing everything that has to do with

[10] Submission No. 139, p. 1.
[11] *Ibid.*
[12] T. 557.
[13] T. 751-752.
[14] T. 752-753. See also 760 where the Accused states: "[The Prosecution] tried to serve on me 232 audio recordings on computer disks and that is why I refused it. And you should do the math. For 12 and a half thousand pages, even if they did have audio tapes, how much time would be necessary to hear all of that?"

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> computers because I refuse to use a computer and I am fully clear on that. I want to receive audio recordings but you should assess how much a normal person can take and how much time it takes to hear all of that.
>
> [...]
>
> I only agree to classical [tape] format because everything that has to do with a computer is something that I categorically refuse and I stick to that. I am not going to receive anything that's related to computers.[15]

13. The primary issue the Trial Chamber must determine here is whether, in the circumstances of this case, the disclosure of the recordings of transcripts in audio format pursuant to Rule 66(A)(ii) of the Rules is permissible given that, in order to fulfil the purpose of disclosure under Rule 66(A)(ii), the Accused must be able to make effective use of that material. The second issue that the Chamber will address concerns whether the Accused is entitled to receive the material only on cassettes and not on CDs.

14. With regard to the first issue, in its "Decision on the Form of Disclosure", the Trial Chamber stated:

> 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.
>
> [...]
>
> 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.[16]

15. More specifically, material may be disclosed in audio format pursuant to Rule 66(A)(ii) of the Rules to ensure that that material is made available to the accused in a language he understands.[17]

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[15] T. 760-761.

[16] Decision on Form of Disclosure, 4 July 2006, paras 10 and 12.

[17] See *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, Oral Ruling, T. 4993-4999, 30 July 2004; *Prosecutor v. Popović et al.*, Case No. IT-05-88-PT, Decision on Joint Defence Motions Requesting the Translation of the Pre-Trial Brief and Specific Motions, 24 May 2006, para. 16; *Prosecutor v. Popović et al.*, Case No. IT-05-88-PT, Decision on Joint Defence Motion Seeking the Trial Chamber to Order the Registrar to Provide the Defence with

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16. The Accused is self-represented and does not speak either of the working languages of the Tribunal. Moreover, the quantity of audio material that is at issue is voluminous. In order to ensure that the Accused is not disadvantaged by the provision of the transcripts in audio format, it is essential that the Accused should have adequate time to review them before he files his submissions in response to Prosecution motions for the admissibility of written evidence.[18]

17. What constitutes "adequate time" must be determined on the basis of the facts of the case.[19] The time periods that have been found by human rights bodies to be "adequate" for the preparation of an accused's defence vary considerably depending on the nature of the case and the amount of material involved, amongst other factors.[20]

18. In this regard, the Trial Chamber notes that one of the central purposes behind the rules permitting the admission of written statements and transcripts of previous proceedings is to assist in ensuring that a trial is conducted expeditiously. In the present situation, it is possible that the requests for the admission of transcripts could, as a result of the need to ensure the Accused has adequate time to review the transcripts, lead to delays during trial, contrary to the purpose of the rules. Therefore, the Trial Chamber considers that the Prosecution should review the transcripts for which it has requested admission with a view to significantly reducing their size. The lengthier the transcripts the more time the Trial Chamber will need to allow for review of the audio recordings by the Accused. The Prosecution should also consider whether some of the witnesses whose evidence is to be presented through the admission of transcripts could, instead, present their evidence *viva voce*. The Prosecution is further encouraged to consider how this Decision may impact on its witness order if, for example, it has a number of witnesses with transcripts giving their testimony consecutively.

BCS Transcripts of Proceedings in Two Past Cases Before the International Tribunal, 6 March 2006, p. 5; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-PT, Order for the Translation of Documents, 17 January 2006, p. 2.

[18] Article 21(4)(b) of the Tribunal's Statute provides that an accused must have adequate time and facilities for the preparation of his or her defence.

[19] *Öcalan v. Turkey*, ECtHR, App. No. 46221/99, Judgment, 12 May 2005 ("*Öcalan* Judgment"), paras 138-148; *G.B. v. France*, ECtHR, App. No. 44069/98, Judgment, 2 October 2001, paras 60-70; *Kremzow v. Austria*, ECtHR, App. No. 12350/86, Judgment, 21 September 1993 ("*Kremzow* Judgment"), paras 45-50; *Campbell and Fell v. United Kingdom*, ECtHR, App. Nos. 7819/77 and 7878/77, Judgment, 28 June 1984 ("*Campbell and Fell* Judgment"), para. 98; *Harward v. Norway*, HRC, Comm. No. 451/1991, UN doc. CCPR/C/51/D/451/1991, 16 August 1994 ("*Harward* Views"), para. 9.5.

[20] *Twalib v. Greece*, ECtHR, App. No. 24294/94, Judgment, 9 June 1998 (less than an hour to review the case file was found to be adequate time); *Campbell and Fell* Judgment (one day to study the "notices of report" and five days to prepare for the hearing was found to be adequate time); *Kremzow* Judgment (three weeks to study the Attorney-General's position paper ['*croquis*'] was found to be adequate time); *Mayzit v. Russia*, ECtHR, App. No. 63378/00, Judgment, 20 January 2005 (one month and one week to study the case file was found to be adequate time); *Harward* Views (six weeks to prepare for trial was found to be adequate time); *Öcalan* Judgment (20 days to examine 17,000 pages was found not to be adequate time).

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19. In addition to the issue of adequate time, it is clear that the Accused must have access to the means to listen to the audio recordings. A letter from the Registry to the Accused dated 10 November 2006, a translated version of which was also provided to the Accused on 10 November 2006, contains the following:

- A "standing offer" to provide the Accused with either a desk-top computer with the necessary hardware and software or a CD or DVD player connected to a television to enable him to listen to audio CDs;
- An offer of technical support to the Accused from the staff of the United Nations Detention Unit to enable him to make effective use of the material disclosed to him in audio format;
- A request to the Accused to notify the administrative assistant at the United Nations Detention Unit which of the facilities offered he would like to be provided with.

20. The Trial Chamber finds that it is appropriate to give the Accused audio recordings of transcripts provided he is given adequate time to review them and the necessary and reasonable assistance to enable him to make effective use of the material. The Trial Chamber notes that the Accused has expressed a willingness to spend a relatively long period of time per day (eight hours) listening to material on cassette tapes.[21]

21. In addition to the offers of assistance made in the letter of 10 November 2006, the Accused has, in the past, been offered various types of equipment, and training to use that equipment, to enable him to listen to audio material.[22] In light of the past offers of assistance and the "standing offer" made in the letter of 10 November 2006, the Trial Chamber considers that reasonable and necessary assistance is being made available to the Accused to enable him to make effective use of the audio material. The Chamber strongly encourages the Accused to accept the audio material that is provided to him and to avail himself of the facilities on offer; it is the Accused who bears responsibility for any consequences arising from his refusal to accept the audio recordings and/or the offers of facilities and assistance.[23]

22. The second issue before the Trial Chamber concerns the medium in which the audio material can be provided to the Accused. The Trial Chamber notes that, as stated in the letter

[21] T. 753.

[22] See, for example, Letter addressed to the Accused from Mr. van de Vliet, Head of Office for Legal Aid and Detention Matters, 13 July 2006, in which Mr. van de Vliet noted that the Registry had previously offered to install a desktop computer in the Accused's residential cell, accompanied by all necessary computer training, and extended that offer to the Accused again.

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of 10 November 2006 from the Registry to the Accused, audio cassette format is no longer used by the Tribunal and audio recordings are available only in digital format, which are then converted into CDs. The Chamber reiterates that electronic disclosure is permissible as long as the Accused is given "such assistance as is reasonable and necessary in the circumstances".[24] It is, therefore, clear that the audio material may be provided to the Accused in CD form, subject to the requirement for reasonable and necessary assistance. In the paragraph above, the Chamber has determined that the Accused is being provided with reasonable and necessary assistance. Furthermore, the Accused has been offered a CD or DVD player and thus does not need to use a computer to listen to CDs. Consequently, his objection to receiving electronic recordings because he will not use a computer has no merit.

[23] See also T. 773.
[24] Decision on Form of Disclosure, 4 July 2006, paras 10 and 12.

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III. DISPOSITION

For the foregoing reasons, the Trial Chamber hereby,

DENIES the request made in the Submission,

FINDS that audio material may be provided to the Accused on CD, provided he is given reasonable and necessary assistance to make effective use of that material,

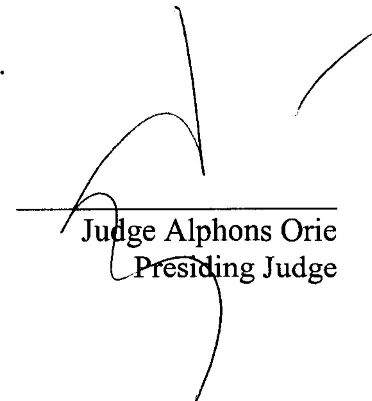
ORDERS the Prosecution, by 4 December 2006, to inform the Chamber of the outcome of:

a) The review of the transcripts for which the Prosecution has requested admission with a view to reducing their size significantly, and

b) The consideration given to whether some of the witnesses whose evidence is to be presented through the admission of transcripts could present their evidence *viva voce*,

INVITES the Prosecution to consider how this decision may impact on the presentation of its case, including the witness order, and inform the Chamber of any possible impact,

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



Judge Alphons Orie
Presiding Judge

Dated this twenty-second day of November 2006
The Hague
The Netherlands

[Seal of the Tribunal]

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