



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-03-69-PT

Date: 7 May 2007

Original: English

**IN THE TRIAL CHAMBER**

Before: **Judge Frank Höpfel, Pre-Trial Judge**

Registrar: **Mr. Hans Holthuis**

Order of: **7 May 2007**

**PROSECUTOR**

v.

**JOVICA STANIŠIĆ  
FRANKO SIMATOVIĆ**

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**DECISION ON PROSECUTION MOTION FOR ADJUSTMENT OF WORK PLAN**

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**The Office of the Prosecutor**

Ms. Doris Brehmeier-Metz

Mr. Gregory Townsend

**Counsel for Jovica Stanišić**

Mr. Geert-Jan Alexander Knoops

Mr. Wayne Jordash

**Counsel for Franko Simatović**

Mr. Zoran Jovanović

**I, Frank Höpfel**, 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”), am seized of a motion filed by the Office of the Prosecutor (“Prosecution”) seeking relief from the deadline for all disclosure obligations which were set for 1 March 2007 in the Order establishing a Work Plan of 19 January 2007.<sup>1</sup>

1. On 28 March 2007, the Prosecution filed its “Motion for adjustment of work plan” (“Motion”), wherein it reports on its failure to comply with the work plan attached to the Order establishing a Work plan of 19 January 2007 (“Work Plan”). The Prosecution has offered to submit progress reports on disclosure of materials that are currently still outstanding and requests to be relieved from the deadline of 1 March 2007 set out in the Work Plan.<sup>2</sup>
2. On 6 April 2007, counsel for the Accused Jovica Stanišić responded to the Motion (“Stanišić Repsonse”)<sup>3</sup> and on 11 April 2007, counsel for the Accused Franko Simatović responded to the Motion (“Simatović Response”).<sup>4</sup> In their responses, both defence counsel request the Trial Chamber, pursuant to Rule 65 *ter* (N) of the Rules of Procedure and Evidence (“Rules”), to either exclude from the proceedings or reject the admission of Prosecution materials disclosed after the deadline of 1 March 2007 set in the Work Plan (with the exception of disclosure of certain exculpatory material pursuant to Rule 68 of the Rules).<sup>5</sup> On 18 April 2007, the Prosecution filed leave to reply and replied to the Defence Responses (“Reply”).<sup>6</sup>
3. With regard to the Defence request to reject the *admission* of evidence, it should be noted that the Pre-Trial Judge is not seized with a Prosecution Motion for admission of evidence. Therefore, only those arguments of the Defence which relate to the exclusion, pursuant to Rule 65 *ter* (N) of the Rules, of disclosure materials received after 1 March 2007 will be considered.
4. In its Motion, the Prosecution submits that certain materials from the archives of the VRS Main Staff (“VRS Archives”) were untimely disclosed to the Defence.<sup>7</sup> Furthermore, it requests delayed disclosure of certain archives from Belgrade (“Belgrade Archives”).<sup>8</sup> Finally, it submits

<sup>1</sup> Motion, paras 13-15; *see* order establishing a work plan, 19 January 2007.

<sup>2</sup> Motion, paras 13-15.

<sup>3</sup> Defence response to motion for adjustment of work plan and request for non-admission or exclusion of materials on the basis of Rule 65 *ter* (N), 6 April 2007.

<sup>4</sup> Defence Response to Prosecution Motion for adjustment of Work Plan, 11 April 2007.

<sup>5</sup> Stanišić Response, pp. 3 and 4; Simatović Response, para. 7.

<sup>6</sup> Request for leave to reply and reply to the responses of the defence to the prosecution's "Motion for adjustment of work plan", 18 April 2007.

<sup>7</sup> Motion, paras 3-6.

<sup>8</sup> Motion, paras 7-10.

that certain translations cannot be provided to the Defence due to higher priorities assigned by the Conference and Language Services Section (CLSS) to other cases.<sup>9</sup>

5. The Pre-Trial Judge first turns to the submission which addresses disclosure of materials from the VRS Archives. On 21 March 2007, the Prosecution submitted 25 documents from these VRS Archives to the Defence. Thus, three weeks had passed beyond the deadline of 1 March 2007 set out in the Work Plan when these materials were disclosed.<sup>10</sup> However, in light of the fact that no trial date has yet been set, the Prosecution's advance notice that such documents would likely be disclosed in the near future,<sup>11</sup> and the relatively small number of documents disclosed, the Pre-Trial Judge does not see how the late disclosure of the 25 documents from the VRS Archives would cause any unfair prejudice to the Defence, and rejects the Defence request to apply the exclusion remedy under Rule 65 *ter* (N) of the Rules with respect to these materials.
6. Secondly, the issue disclosure of materials from the Belgrade Archives will be discussed. The Prosecution asserts that "for reasons beyond the control of the Prosecution, [documents from the Belgrade Archives] had not arrived by 1 March 2007."<sup>12</sup> It requests to be relieved from disclosing materials from these archives for an indefinite period of time, as "it has only recently begun its comprehensive review of the documents which it received from the Serbian authorities" and "it is uncertain when all the requested documents will be provided by the Serbian authorities".<sup>13</sup>
7. The Pre-Trial Judge is faced with several questions regarding disclosure of materials from the Belgrade Archives. It is unclear why the Prosecution, which reportedly searched the archives in question in September and October 2006,<sup>14</sup> was unable to inform the Pre-Trial Judge of its inability to comply with deadline of 1 March 2007. It is also unclear why the Prosecution did not seize the Trial Chamber with a motion pursuant to Rule 54 *bis* of the Rules when it was certain the deadline set out in the Work Plan could not be met.
8. The Defence have argued that the materials from the Belgrade Archives should be excluded as the deadline set out in the Work Plan has elapsed. The Pre-Trial Judge however reminds the

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<sup>9</sup> Motion, paras 11-12.

<sup>10</sup> The Defence had been informed of the existence of the 25 documents from the VRS Archives on the Electronic Disclosure System (EDS) on 21 March 2007, despite their presence on EDS since 20 February 2007, Motion, paras 5 and 6.

<sup>11</sup> Motion to vacate order to file consolidated pre-trial brief, filed on 19 June 2006 with confidential and *ex parte* Annex A, paras 3-8.

<sup>12</sup> Motion, para. 14; Reply, para. 9.

<sup>13</sup> Motion, paras 10 and 14.

<sup>14</sup> Motion, paras 7 and 8.

parties that the Work Plan is not intended to be an inflexible document. Rule 65 *ter* (N) provides that “[u]pon a report of the Pre-Trial Judge, the Trial Chamber shall decide, should the case arise, on sanctions to be imposed on a party which fails to perform its obligations to the present Rule. Such sanctions *may* include the exclusion of testimonial evidence.”<sup>15</sup> It is therefore clearly not the case that the exclusion of evidence is the sole remedy for non-compliance with the Work Plan. The exclusion of evidence should be a last resort when other means at the disposal of the Chamber and the parties have failed. This is not the case with respect to disclosure of materials from the Belgrade Archives.

9. In light of the fact that no trial date has yet been set, any possible prejudice that the Accused might suffer resulting from delayed disclosure of materials from the Belgrade Archives may still be remedied by their disclosure within a reasonable time period.
10. The Trial Chamber is mindful that the Prosecution is reliant on state cooperation,<sup>16</sup> and that materials from the Belgrade Archives are potentially relevant to the Prosecution case. However, in order to ensure a fair and expeditious trial pursuant to Rule 65 *ter* (B), the Trial Chamber has an obligation to continuously weigh the rights of the Accused to a public trial against the Prosecution’s need to protect certain information. The Prosecution has explained why, in June 2006, the information regarding the Belgrade Archives needed protection,<sup>17</sup> but it has not filed a motion pursuant to Rules 66 (C) or Rule 68 (iv) of the Rules. Instead, the Prosecution has withheld this information regarding the Belgrade Archives from the Accused, and it withheld the materials it recently received from Belgrade Archives, without requesting prior relief to do so. In the absence of a Prosecution motion pursuant to Rule 66 (C) or 68 (iv) of the Rules or a Defence Motion for immediate disclosure of these materials, and in light of the impact that delayed disclosure is having on these pre-trial proceedings, a review is necessary of whether the *ex parte* nature of the materials should be lifted, and if so, when these materials should be disclosed.
11. On 19 June 2006, the Prosecution indicated to the Trial Chamber that the information regarding the Belgrade Archives can be made public and, at least, *inter partes* once the Prosecution had completed its search thereof.<sup>18</sup> In light of the Prosecution’s assertions that it has conducted two missions to the Belgrade Archives, that it has already received a large volume of material from the Republic of Serbia, that there is no indication when the review of the materials will be

<sup>15</sup> Rule 65 *ter* (N) of the Rules, emphasis added.

<sup>16</sup> Reply, para. 5.

<sup>17</sup> Motion to vacate order to file consolidated Pre-trial brief, 19 June 2006, confidential and *ex parte* Annex A, paras 15 and 16.

<sup>18</sup> Motion to vacate order to file consolidated Pre-trial brief, 19 June 2006, confidential and *ex parte* Annex A, para. 12.

completed<sup>19</sup> and in the absence of a Motion pursuant to Rules 66 (C) or Rule 68 (vi) of the Rules, the Pre-Trial Judge no longer finds that there are sufficient grounds to withhold the information regarding the Belgrade Archives from the Accused. Therefore, the *ex parte* nature of the Prosecution and Trial Chamber filings regarding the Belgrade Archives shall be lifted and made *inter partes* in 30 days of the date of this Decision, absent some further reasoned request of the Prosecution.

12. By lifting the *ex parte* nature of the information regarding the Belgrade Archives, it appears that there is no longer a need for the Prosecution to withhold documents originating from the Belgrade Archives, except in the event that it is necessary for the Prosecution to seek protection pursuant to Rule 70 of the Rules. Therefore, in light of the fact that the deadline for disclosure set out in the Work Plan has passed, and in the absence of a Motion requesting relief pursuant to Rules 66 (C) or Rule 68 (vi) or Rule 70 of the Rules, the Prosecution Motion will be partially granted and a date will be set for the disclosure of materials from the Belgrade Archives to the Defence. The Prosecution shall disclose to the Defence those materials from Belgrade Archives currently in its possession and relevant to this case within 30 days of the date of this Decision. As there is no indication when the Prosecution will have received all materials from the Belgrade Archives, the Prosecution shall disclose these materials on an ongoing basis. In the event the Prosecution will need to seek protection with the Trial Chamber pursuant to Rule 70 of the Rules, it shall file a reasoned Motion within 15 days of the date of this Decision.
13. The Pre-Trial Judge lastly turns to the issue of translations. In the event the Prosecution is unable to receive translations from CLSS within a reasonable amount of time, it should seize the Trial Chamber with a motion. Such a motion should set out a summary regarding the documents requiring translation, the time when the translation was requested with CLSS, the reason why translation has not been completed and the estimated time that translation of the documents will require. Further, in order to be fully informed on the issue of outstanding translations, the Pre-Trial Judge will require a full report from the Prosecution on all outstanding translations in this case, to be filed within 30 days of the date of this Decision.
14. Finally, it should be noted that in case the Prosecution's failure to comply with the Work Plan results in any unfair prejudice to either of the Accused, certain relief from deadlines set in the Work Plan can be considered in order to ensure a fair and impartial trial.

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<sup>19</sup> Motion, paras 7-10.

For these reasons,


**PURSUANT** to Rules 54 and 65 *ter* of the Rules,

The Pre-Trial Judge **HEREBY GRANTS** leave to file the Reply, **GRANTS** the Motion in part, **ORDERS** that:

- (1) the Prosecution shall disclose to the Defence, within (30) thirty days of the date of this Decision, all materials relevant to this case from the Belgrade Archives currently in its possession. It shall disclose these materials on an ongoing basis; once it has ascertained that materials from the Belgrade Archives that are in its possession are relevant to this case, and provided that such materials are not subject to protection pursuant to Rule 70 of the Rules, it shall forthwith communicate such documents to the Defence. In the event that materials potentially fall under the protection of Rule 70 of the Rules, the Prosecution shall file a reasoned Motion with the Trial Chamber requesting temporary relief from disclosure not later than (15) fifteen days from the date of this Decision;
- (2) the Prosecution shall file a full report to the Trial Chamber on all outstanding translations in this case within (30) thirty days of the date of this Decision;

and **INVITES** the Registrar to lift the *ex parte* nature of all filings relating to the Belgrade Archives in (30) thirty days of the date of this Decision.<sup>20</sup>

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

  
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 Judge Frank Höpfel  
 Pre-Trial Judge

Dated this seventh day of May 2007  
At The Hague  
The Netherlands

**[Seal of the Tribunal]**

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<sup>20</sup> These are: “Confidential and *ex parte* Annex A to Motion to vacate order to file consolidated Pre-trial brief,” 19 June 2006; “Confidential and *ex parte* Annex H” to the “Submission of material verifying Prosecution motion to vacate order to file consolidated pre-trial brief with *ex-parte* and confidential annexes,” 5 July 2006; “*Ex parte* and confidential Annex” to the “Progress report to Trial Chamber with *ex parte* and confidential annex,” 11 August 2006 .