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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: 7 June 2007

Original: ENGLISH
French

BEFORE THE PRE-TRIAL JUDGE

Before: **Judge Jean-Claude Antonetti**

Registrar: **Mr Hans Holthuis**

Decision of: **7 June 2007**

THE PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC DOCUMENT

DECISION ON MOTION NUMBER 289 REGARDING FORM OF DISCLOSURE

The Office of the Prosecutor:

Ms Christine Dahl

The Accused:

Mr Vojislav Šešelj

I. INTRODUCTION

1. 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"), am seized of Motion No. 289 regarding the form of disclosure, filed by Vojislav Šešelj ("Accused") on 17 May 2007 ("Motion"). The Accused requests the review of the "Decision on Form of Disclosure", rendered by Trial Chamber I ("Chamber I") on 4 July 2006 ("Decision of 4 July").

2. The Decision of 4 July gave the Office of the Prosecutor ("Prosecution") the possibility of disclosing Rule 66 (A), 66 (B) and 68 (i) materials in electronic format, provided the Accused has the assistance necessary to use them.[1] Moreover, the Decision partially granted the Accused's motion for disclosure in a language he understands.[2]

3. Accordingly, the Accused requests that the Prosecution be instructed to disclose to him all Rule 66 and 68 materials in Serbian and in hard copy.[3]

II. PROCEDURAL BACKGROUND

4. On 26 March 2004, the Accused filed a motion requesting disclosure of "statements of all witnesses in all cases who mentioned [his] name in any context during testimonies before the Prosecutor or during testimonies before a trial chamber."[4]

5. On 19 April 2004, the Prosecution filed its response as well as a motion for an order directing the Accused to accept disclosure material in electronic format.[5]

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[1] Decision of 4 July, p. 10.
[2] *Ibid.*
[3] Motion, p. 6.
[4] Motion No. 30.

6. After the Accused refused to accept any form of electronic disclosure, Chamber I permitted the Accused to file a request for disclosure of documents from the Prosecution in hard-copy and in his own language.[6] The Prosecution responded to this second motion on 29 November 2004.[7] On 14 December 2004, Chamber I denied the Accused's motion to file a reply.[8]

7. In its Decision of 4 July, Chamber I:

> **[FOUND]** 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;
>
> **[FOUND]** that there is an obligation to provide Rule 68 (i) material in a language the Accused understands;
>
> **[DIRECTED]** 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;
>
> **[DIRECTED]** 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.[9]

8. On the same date, the Accused expressed his intention to apply for certification to appeal the Decision of 4 July.[10] Chamber I, however, did not rule on that request which was unreasoned. Moreover, on 31 July 2006, the Accused seized the Appeals Chamber directly of his appeal of the Decision on 4 July. That request was denied and returned to the Accused since no certification had been granted.[11]

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[5] "Prosecution's Response to the Accused's 'Motion Number 30' and Motion for Order Directing the Accused to Accept Disclosure Material in Electronic Format," dated 13 April 2004 and registered on 19 April 2004.
[6] Motion No. 43, dated 26 October 2004 and registered on 9 November 2004.
[7] "Prosecution's Response to Accused's Request for Disclosure of Materials in Written Form and in Serbian," dated 23 November 2004 and registered 29 November 2004.
[8] "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.
[9] Decision of 4 July, p. 10.
[10] "Urgent Order to the Dutch Authorities Regarding Health and Welfare of the Accused", 6 December 2006 ("Order Regarding the Health of the Accused"), para. 4
[11] *Ibid.*

9. The Accused began a hunger strike on 10 November 2006 demanding, among other things, that all documents from the Prosecution be provided in hard-copy format and in Serbian.[12] In a decision of 17 November 2006, the Deputy Registrar indicated that in accordance with the Decision of 4 July, the Registry would provide the appropriate assistance to the Accused to help him fully exploit the electronic disclosures. To that end, the Deputy Registrar mentioned that a computer, printer, as well as technical training and assistance could be provided.[13]

10. During the status conference of 22 November 2006, Chamber I reviewed its position and decided to grant the Accused's request for certification to appeal the Decision of 4 July. Indeed, Chamber I considered the importance of the Accused's right to have adequate time and facilities to prepare his defence.[14]

11. The Accused ended his hunger strike on 8 December 2006 after the Registry, that same day, granted his requests regarding disclosure of all documents from the Prosecution in hard-copy and in Serbian.[15]

12. In the "Decision on the Status of Decisions Issued and Pending Motions", rendered on 18 December 2006, it was decided that any variation of the time-limit for the Accused to file his request for certification to appeal would lie within the discretion of the Appeals Chamber.[16]

13. In his Submission No. 240, the Accused stated that he would not seek to appeal the Decision of 4 July in light of the guarantees made by the Registrar on 8 December 2006.[17] On 24 January 2007, the Registrar clarified his decision of 8 December 2006 by specifying that he had no authority to order the Prosecution to

[12] *Id.*, paras. 1, 3.
[13] Decision of 27 November 2006, p. 4.
[14] Order Regarding the Health of the Accused, para. 4; Status conference, 22 November 2006, T. 805-806.
[15] Appeal Against the Decision of 4 July, para. 6, footnote 8.
[16] "Decision on the Status of Decisions Issued and Pending Motions", signed on 18 December 2006 and registered on 5 January 2007, p. 11.

disclose all of the documents in hard-copy and in Serbian. Moreover, on 31 January 2007, Chamber I informed the Accused that the Registrar's Decision of 8 December 2008 in no way reversed the Decision of 4 July and that the decision remained in force.[18]

14. On 1 February 2006, the Accused filed an interlocutory appeal against the Decision of 4 July. On 17 April 2007, the Appeals Chamber noted that:

> "although the present Decision does not find that the Trial Chamber incorrectly exercised its discretion in the Impugned Decision, this does not prevent Mr. Šešelj from applying for a modification of the Impugned Decision to the newly assigned Trial Chamber, which might consider, in its discretion, a different trial management approach than that followed in the Impugned Decision."[19]

15. During the status conference of 2 May 2007, the Accused verbally expressed his intention to seize the Pre-Trial Judge of the issue of the form of disclosure.[20] The Motion was registered on 17 May 2007, and the Prosecution responded to it on 31 May 2007.[21]

III. ARGUMENTS OF THE PARTIES

A. The Accused's Motion

16. In the Motion, the Accused argues principally that the Prosecution's disclosure obligations under Rules 66 and 68 must be interpreted in a way which respects the right of the Accused to be informed quickly and effectively, in Serbian and in hard-copy, of the nature and cause of the charges against him.[22]

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[17] Submission No. 240, dated 9 January 2007 and registered on 11 January 2007.
[18] "On the Continuing Effect of Certain Orders," registered on 31 January 2007, paras. 4, 5.
[19] "Decision on Vojislav Šešelj's Interlocutory Appeal Against the Trial Chamber's Decision on Form of Disclosure," 17 April 2007, para. 20.
[20] Status conference of 2 May 2007, Transcript in French ("T(F)"), p. 1064
[21] "Prosecution Response to Accused's Motion for Review of the Decision on Form of Disclosure Issued by Trial Chamber I on 4 July 2006 (No. 289)", 31 May 2007.
[22] Motion, pp. 5-6.

17. In his request, the Accused focuses on the fact that he is self-representing, that he has been in detention for more than four and a half years, that he does not use a computer, and that he is in no way obligated to undergo any kind of training.[23]

B. The Prosecution Response

18. The Prosecution opposes the Motion on the grounds that it fails to meet the requirements for reconsidering a prior decision and that the Decision of 4 July was well-founded in its conclusion that disclosure in electronic format does not impair the rights of the accused under Article 21 of the Statute of the Tribunal ("Statute").[24] As such, according to the Prosecution, electronic disclosure should continue and that, exceptionally, time and resources permitting, the Prosecution will continue to provide the Accused with paper copies of material already disclosed in electronic format.[25]

19. First, the Prosecution thus argues that only a change of circumstances or cases where there is evidence that the impugned decision was erroneous and has caused prejudice justify the review of a Trial Chamber's decision.[26]

20. Second, in substance, the Prosecution considers that electronic disclosure safeguards the Accused's right to a fair and expeditious trial and permits quicker and easier access to desired information, especially in cases as complex as that against the Accused.[27]

21. Nevertheless, regarding disclosure of various documents in Serbian, the Prosecution states that it has the intention to disclose, in Serbian, materials pursuant to Rule 66 (A) (ii) of the Rules of Procedure and Evidence ("Rules") and documents pursuant to Rule 68 (i), as ordered by the Chamber.[28]

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[23] *Ibid.*
[24] Response, para. 6.
[25] *Id.*, para. 5.
[26] *Id.*, para. 7.
[27] *Id.*, para. 12.
[28] *Id.*, para. 15.

IV. APPLICABLE LAW

22. Article 21 of the Statute constitutes the primary legal foundation for any discussion on the form of disclosure.

> Article 21 (Rights of the Accused)
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> [...]
>
> 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.
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> [...]
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> 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;
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> (c) to be tried without undue delay;
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> (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
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> (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> (f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal;
>
> [...].

23. Furthermore, two Rules in the Rules of Procedure and Evidence must also be mentioned in part.

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 pretrial 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 transcripts and written statements taken in accordance with Rule 92 *bis*; Rule 92 *ter*, and Rule 92 *quater*; copies of the statements of additional prosecution witnesses shall be made available to the defence when a decision is made to call those witnesses.

(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 Material)

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.

[...]

24. The Tribunal case-law regarding forms of disclosure is scarce, and decisions relating thereto have dealt with each problem on a case-by-case basis, without establishing any guiding principle.[29] It is nonetheless certain that the case-law has consistently considered that Rule 68 disclosure, "as soon as practicable", is fundamentally important to ensure that the conduct of proceedings is fair.[30]

V. DISCUSSION

25. To begin, although the Appeals Chamber called upon the newly assigned Trial Chamber to exercise its discretionary power in the matter, the Pre-Trial Judge recalls the order issued by the President of Trial Chamber III on 27 February 2007 whereby the Pre-Trial Judge was entrusted with all of the functions relating to the pre-trial phase of the trial specified in Rules 66, 67, 73, 73 *bis*, and 73 *ter* of the Rules.[31]

A. Disclosure of Rule 66 and Rule 68 documents in Serbian

26. On the issue of disclosure of documents in Serbian to the Accused, the Pre-Trial Judge concurs with the Decision of 4 July and, as a result, the following paragraphs will be very brief.

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[29] *The Prosecutor v. Naser Orić,* Case No. IT-03-68-T, "Decision on Ongoing Complaints about Prosecutorial Non-Compliance with Rule 68 of the Rules", 13 December 2005; Decision of 4 July, para. 14, referring to *The Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21, "Decision on Defence Application for Forwarding the Documents in the Language of the Accused", 25 September 1996; *The Prosecutor v. Mladen Naletilić and Vinko Martinović,* Case No. IT-98-34, "Decision on Defence's Motion Concerning Translation of All Documents," 18 October 2001; *The Prosecutor v. Paško Ljubičić,* Case No. IT-00-41, "Decision on the Defence Counsel's Request for Translation of all Documents," 20 November 2002.

[30] *The Prosecutor v. Naser Orić,* Case No. IT-03-68-T, "Decision on Ongoing Complaints about Prosecutorial Non-Compliance with Rule 68 of the Rules," 13 December 2005; *The Prosecutor v. Radoslav Brđanin,* Case No. IT-99-36-T, "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.

27. The Decision of 4 July clearly indicated that the issue of translation into Serbian of Rule 66 (A) "material that the Prosecution intends to use in support of its case" does not arise, since the express language of Rule 66 (A) provides that the Prosecution must disclose documents "in a language which the accused understands."[32] While the disposition of the decision of 4 July is clear, the Pre-Trial Judge would like to confirm that the Accused has the right to receive, in a language he understands, all Rule 66 (A) documents and not just material "that the Prosecution intends to use in support of its case."

28. Regarding Rule 68 disclosure, Chamber I ruled that:

> 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.[33]

Given the paramount importance of Rule 68 (i) documents, and given the fact that in its Response the Prosecution did not seek to appeal or challenge this aspect of the Decision of 4 July, the Pre-Trial Judge reaffirms the Decision of 4 July and thus considers that all Rule 68 (i) documents must be disclosed in a language the Accused understands.

29. Conversely, regarding Rule 66 (B) disclosures, the Pre-Trial Judge considers that, as regards these statements of witnesses whom the Prosecution does not intend to call in the case and which are not considered to be exculpatory to the Accused, there is no provision for translation into a language the Accused understands. Indeed, contrary to Rule 66 (A) of the Rules, Rule 66 (B) does not provide for disclosure into a language which the Accused understands. Moreover, beyond the language of Rule 66 (B), it would be unreasonable to order the translation of these documents when in fact by nature they are less essential than documents disclosed under Rules 66 (A) and 68 of the Rules.

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[31] "Order Entrusting Functions to Pre-Trial Judge," 27 February 2007.
[32] Decision of 4 July, para. 9.
[33] Decision of 4 July, para. 15.

30. Likewise, regarding the transcripts of evidence taken in closed session or in private session which mention the name of the Accused and are subject to disclosure under Rule 68 (ii) of the Rules, the Pre-Trial Judge can only welcome the pragmatic approach adopted by Chamber I. According to Chamber I, the Prosecution would perform a search of all of private- and closed-session transcripts where a witness mentions the Accused by name. The name of the witness or pseudonym and the transcript page will be disclosed to the Accused. It will then be for the Accused to request access to this material in accordance with the applicable procedures.[34] The Pre-Trial Judge agrees with the procedure established and with the decision whereby it is not incumbent upon the Prosecution to translate the transcripts into a language which the Accused understands.

B. Disclosure of Rule 66 and 68 materials in hard-copy format

31. In the Decision of 4 July, Chamber I considered that electronic disclosure holds "the promise of immense savings in time, space, and cost, which the Tribunal should not ignore."[35] Moreover, Chamber I considered that there would be no breach of the principle of fairness "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."[36] This position was affirmed by the Appeals Chamber.[37]

32. It is unquestionable that in principle, and in general, electronic disclosure has the many advantages referred to above. It is equally undeniable that all of the necessary facilities have been provided to make this electronic disclosure efficient, in terms of both equipment and training. Nevertheless, the issue is more complex and the Pre-Trial Judge must now examine all of the circumstances which make the case against the Accused a very distinctive one.

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[34] *Id.*, paras. 18-19.
[35] *Id.*, para. 11.
[36] *Id.*, para. 12.
[37] Appeal Against the Decision of 4 July, para. 20.

33. On two occasions, the Appeals Chamber has reaffirmed the right of the Accused to represent himself before the Tribunal.[38] On several occasions, the Accused stated that he does not wish to use a computer but instead prefers to examine the hard-copies of the documents necessary for his defence.[39] Such statements are proof that it is not appropriate for the Prosecution to simply remark that information is more easily and readily accessible when it is in electronic format.[40]

34. Furthermore, as the Prosecution recalls, the Trial Chamber, here in the person of the Pre-Trial Judge, must ensure that the proceedings are conducted expeditiously and fairly.[41] The consequence is that today the Accused refuses electronic disclosure, and therefore has not had access to a large majority of the Rule 66 and Rule 68 documents, which are absolutely essential for the preparation of his defence. In this case, therefore, electronic disclosure has not produced the expected benefits.

35. In its Decision of 4 July, Chamber I cited a decision in *Brđanin* whereby "the raison d'être behind the disclosure rules is undoubtedly to permit the accused to make effective use of that material". The Pre-Trial Judge completely agrees with this proposition. Nevertheless, contrary to the position of Chamber I, he concludes that at this stage of the proceedings, the Accused, who is self-representing, must have access to the documents essential for the preparation of his defence in the format he believes will help him to effectively use them.

36. Accordingly, for the same reasons that Rule 66 (A) documents must be provided to the Accused in a language he understands, these documents will also have to be provided in hard-copy as soon as possible. Likewise, Rule 68 (i) documents will have to be provided to the Accused in a language he understands and in hard-copy "as soon as practicable".

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[38] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR73.3, "Decision on Appeal Against the Trial Chamber's Decision on Assignment of Counsel," dated and registered 20 October 2006; *The Prosecutor v. Vojislav Šešelj*, "Decision on Appeal Against the Trial Chamber's Decision (No. 2) on Assignment of Counsel," dated and registered 8 December 2006.
[39] Status conference of 4 April 2007, T(F), pp. 1000, 1002, 1016, 1019-1020; Status Conference of 2 May 2007, T(F), pp. 1060, 1066, 1068, 1079; Status Conference of 22 May 2007, T(F), pp. 1186, 1191.
[40] Response, para. 12.
[41] *Id.*, para. 14.

VI. DISPOSITION

37. For the foregoing reasons, pursuant to Article 21 of the Statute and Rules 66 and 68 of the Rules, **PARTIALLY GRANT** the Motion and **ORDER** the Prosecution to disclose, as soon as possible, in hard-copy and in a language the Accused understands:

(i) the Rule 66 (A) (i) documents;

(ii) the Rule 66 (A) (ii) documents;

ORDER the Prosecution to disclose, "as soon as practicable", in hard-copy and in a language that the Accused understands, the Rule 68 (i) documents.

38. The Motion is denied in all other respects.

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

/signed/
Jean-Claude Antonetti
Pre-Trial Judge

Done this seventh day of June 2007
At The Hague
The Netherlands

[Seal of the Tribunal]