



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-T

Date: 12 December 2008

Original: English

IN TRIAL CHAMBER III

Before: Judge Jean-Claude Antonetti, Presiding
Judge Frederik Harhoff
Judge Flavia Lattanzi

Registrar: Mr. Hans Holthuis

Decision of: 12 December 2008

PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC

**DECISION ON THE ACCUSED'S SUBMISSIONS NUMBERED 390, 392
AND 402**

Office of the Prosecutor

Mr. Daryl Mundis
Ms. Christine Dahl

The Accused

Mr. Vojislav Šešelj

I. INTRODUCTION

1. **TRIAL CHAMBER III** ("Trial 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 seised of the Accused's submissions numbered 390¹, 392² and 402³ filed on 17 July 2008, 6 August 2008 and 9 October 2008 (respectively, "Submission 390", "Submission 392" and "Submission 402", and collectively "Submissions"), in which the Accused claims that the Prosecution failed to respect its disclosure obligations pursuant to Rule 68(i) of the Rules of Procedure and Evidence of the Tribunal ("Rules") and asks that sanctions be imposed.

II. BACKGROUND

2. The Trial Chamber recalls that the procedural history and reasoning underlying the decision of 7 October 2008 ("7 October 2008 Decision"),⁴ which was rendered on the basis of Submission 390 and Submission 392, are detailed therein and that only their most salient aspects need be presently recalled.

3. The Accused's Submissions concern two separate sets of documents disclosed to him by the Prosecution.

4. The first set of documents consists of hard-copies of documents compiled by the Prosecution by using keywords indicated by the Accused to search for potentially exculpatory material ("First Set"). The First Set, the disclosure of which is the subject of a Trial Chamber decision dated 5 November 2007 ("Decision of 5 November 2007"),⁵ consists of approximately 3,000 documents.⁶

5. The second, and distinct,⁷ set consists of hard-copies of documents which were electronically disclosed to the Accused's then-standby counsel on 30 September 2004 ("Second

¹ Original in BCS with an English translation entitled "Submission 390", with annexes totaling 88 pages, filed 17 July 2008 ("Submission 390").

² Original in BCS with an English translation entitled "Submission 392", with annexes totaling 527 pages, filed 6 August 2008 ("Submission 392").

³ Original in BCS with an English translation entitled "Submission 402", filed 9 October 2008 ("Submission 402").

⁴ Decision on the Accused's Submission 390 and Submission 392, 7 October 2008.

⁵ Second Decision Concerning Prosecution Obligations Under Rule 68(i) of the Rules of Procedure and Evidence, original in French dated 5 November 2007.

⁶ The Trial Chamber notes that the Prosecution has failed to clarify the total number of pages that these 3,000 documents may represent.

⁷ The Trial Chamber notes that neither set of documents is a subset of the other but that they are the result of separate searches, carried out at different times, in the Prosecution's evidence collection. There is no indication of what overlap, if any, exists between the two sets of documents.

Set”) but which the Accused refused to accept in their electronic form. The Second Set consists of approximately 26,000 documents.⁸

6. The Accused filed Submission 390 on 17 July 2008, arguing that the disclosure of documents in the First Set, which he contends falls under Rule 68(i) of the Rules, violated the Prosecution’s obligations pursuant to Rule 68(i) of the Rules and the Decision of 5 November 2007.⁹

7. Following the Prosecution’s disclosure of documents in the Second Set, the Accused filed Submission 392 on 6 August 2008, largely reiterating the arguments contained in Submission 390.¹⁰

8. The Prosecution filed a joint response to Submission 390 and Submission 392 on 20 August 2008 (“Joint Response”).¹¹ As a general matter, the Joint Response contended that both Submissions 390 and 392 were legally and factually incorrect and should be denied.¹² The Prosecution described the process by which documents in the First Set were compiled and disclosed but focused the bulk of its arguments on the disclosure of the Second Set of documents. The Prosecution argued that it has never characterised the material in the Second Set of documents as falling under Rule 68(i) of the Rules.¹³ It considered that these documents were “only relevant in nature” and thus fell within the purview of Rule 68(ii), rather than (i), of the Rules, such that they needed only be made available to the defence in electronic form, which was done.¹⁴ Given the Accused’s persistent demands for hard-copies of these documents, the Prosecution stated that it nevertheless “finally agreed to print all B/C/S documents [...] and to disclose them to the Accused” in order to “break the deadlock on this issue.”¹⁵

9. The Trial Chamber rendered the 7 October 2008 Decision on the basis of these filings and noted

⁸ It appears that these 26,000 documents may represent approximately 350,000 pages. *See* Notice of Compliance, Confidential Annex A.

⁹ Submission 390, pp. 2-6. The Accused attached some of the documents disclosed to him in annexes to Submission 390, totaling 88 pages, to illustrate the deficiencies he alleged.

¹⁰ Submission 392, pp. 3-7. The Accused attached some of the documents disclosed to him in annexes to Submission 392, totaling 527 pages, to illustrate the deficiencies he alleged.

¹¹ Prosecution Response to the Accused’s Submission 392 and Supplement to Response Re Submission 390, 20 August 2008 (“Joint Response”). The Trial Chamber notes that the Prosecution had filed an initial response to Submission 390 on 31 July 2008 stating that the matter was not yet ripe for judicial review and that it would attempt to resolve it directly with the Accused. Prosecution Response to the Accused’s Submission 390, 31 July 2008. The Joint Response was thus a supplement to that initial response as regards Submission 390.

¹² Joint Response, para. 1.

¹³ Joint Response, para. 4.

¹⁴ Joint Response, para. 8.

¹⁵ Joint Response, para. 8.

that it is incumbent upon the Prosecution alone, subject to the ultimate supervision of the Trial Chamber, to determine on a case-by-case basis which documents are covered by Rule 68(i) of the Rules. The Trial Chamber further notes that the Accused has not identified any specific documents which he claims should properly be considered as Rule 68(i) material. However, in light of the uncertainty that persists as regards the extent of the Prosecution's compliance with its obligations under Rule 68(i) of the Rules, namely whether the Accused has received all Rule 68(i) material in hard-copy and in a language he understands prior to its ruling on [Submission 390 and Submission 392], the Trial Chamber finds that it should stay its decision on [Submission 390 and Submission 392] pending receipt of the further clarifications sought from the Prosecution, as outlined in the Disposition below.¹⁶

10. The Trial Chamber thus stayed its decision on Submission 390 and Submission 392 pending receipt of a written submission from the Prosecution providing further details on its Rule 68(i) disclosures, including whether all the materials were provided to the Accused in hard-copy and in a language that he understands.¹⁷

11. On 9 October 2008, the Accused filed Submission 402, following further disclosures by the Prosecution of documents in the Second Set, wherein he largely reiterated the arguments contained in Submission 390 and Submission 392.¹⁸

12. On 21 October 2008, the Prosecution submitted its "Notice of Compliance with 7 October 2008 Decision on the Accused's Submission 392 and Submission 390" ("Notice of Compliance"),¹⁹ detailing its history of Rule 68(i) disclosures. Specifically, the Prosecution listed in Confidential Annex A to the Notice of Compliance its disclosures pursuant to Rule 68(i) of the Rules as well as those made pursuant to Rules 66 and/or 68 of the Rules. Further, the Prosecution listed in Confidential Annex B to the Notice of Compliance the documents' BCS ERN ranges and, if available, their descriptions.

13. On 23 October 2008, the Prosecution filed a response to Submission 402 incorporating and relying on its previous Joint Response.²⁰

14. In light of the foregoing filings, the Trial Chamber hereby renders its decision on the Accused's Submissions.

III. APPLICABLE LAW

15. Rule 68 of the Rules states in relevant part:

¹⁶ 7 October 2008 Decision, para. 20 (internal citations omitted).

¹⁷ 7 October 2008 Decision, para. 21.

¹⁸ Submission 402, pp. 3-7.

¹⁹ Prosecution Notice of Compliance with 7 October 2008 Decision on the Accused's Submission 392 and Submission 390, Public with Confidential Annexes, 21 October 2008 ("Notice of Compliance").

²⁰ Prosecution Response to the Accused's Submission 402, 23 October 2008, para. 1.

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; [...]

16. Rule 68 *bis* of the Rules states that “[t]he pre-trial Judge or the Trial Chamber may decide *proprio motu*, or at the request of either party, on sanctions to be imposed on a party which fails to perform its disclosure obligations pursuant to the Rules.”

17. Disclosure under Rule 68(i) of the Rules is a continuous obligation, which need not be completed prior to the commencement of the Trial.²¹ Pursuant to that obligation, the Prosecution must disclose to an accused material that it considers exculpatory as soon as practicable after obtaining knowledge that the said material is in its possession.²² Subject to the ultimate supervision of the Trial Chamber, it is incumbent upon the Prosecution to determine on a case-by-case basis which documents are covered by Rule 68(i) of the Rules, in view of the right of an accused to a fair trial.²³

IV. DISCUSSION

A. Preliminary matter

18. The Trial Chamber notes that the Accused requests permission in Submission 402 to exceed the word limit prescribed by the Practice Direction on the Lengths of Briefs and Motions.²⁴ The Trial Chamber agrees to take into consideration the Accused’s Submission 402, amounting to 5,007 total words, exceeding the limit of 3,000 words set by the Practice Direction on the Lengths of Briefs and Motions, given the sheer mass of documents that Submission 402 relates to. The Trial Chamber notes that a significant portion of Submission 402 is spent providing examples of the alleged deficiencies in the documents disclosed to the Accused by the Prosecution.

²¹ *Prosecutor v. Vojislav Šešelj*, No. IT-03-67-PT, Order Regarding Disclosure of Material Pursuant to Rule 68(i) of the Rules of Procedure and Evidence, original in French dated 9 July 2007, pp. 2-3.

²² *Prosecutor v. Naser Orić*, No. IT-03-68-T, Judgement, 30 June 2006, para. 74.

²³ Second Decision Concerning Prosecution Obligations Under Rule 68(i) of the Rules of Procedure and Evidence, original in French dated 5 November 2007, p. 3.

²⁴ Submission 402, p. 2.

B. Disclosure of the First Set and Second Set of documents

19. The Trial Chamber notes that Confidential Annex A to the Notice of Compliance provides dates for the disclosures of documents in the First and Second Set and details whether they were provided to the Accused in hard copy and in a language he understands, as well as whether they were accompanied by an index. Confidential Annex B to the Notice of Compliance also includes the BCS ERN ranges for these documents and, where available, a document description.²⁵ Further, the Notice of Compliance provides similar details for additional disclosures that do not comprise the First and Second Set of documents, including disclosures made pursuant to Rule 68(i) of the Rules, as well as pursuant to Rules 66 and/or 68 of the Rules.²⁶ The Notice of Compliance thus provides an exhaustive backdrop against which to examine the Submissions' argument that the Prosecution has failed to honour its Rule 68(i) obligations with respect to the First and Second Sets of documents.

20. The Trial Chamber recalls that the Prosecution is under an obligation to disclose all Rule 68(i) of the Rules material to the Accused as soon as practicable, and to do so in hard-copy and in a language that he understands.²⁷

21. As regards the First Set, the Trial Chamber notes that the Parties are in agreement that at least some of these documents are Rule 68(i) material. Specifically, the Prosecution identified approximately 1,330 documents comprising more than 44,000 pages that were disclosed to the Accused pursuant to Rule 68(i) of the Rules and the Decision of 5 November 2007.²⁸ The Prosecution indicated that all of these documents were provided to the Accused in hard-copy and in a language that he understands.²⁹ All but 47 of these 1,330 documents were also accompanied by an index at the time of their disclosure and/or were described in Confidential Annex B to the Notice of Compliance.³⁰ The Prosecution has maintained that the remaining documents that comprise the First Set were not disclosed to the Accused in hard-copy and/or in a language he understands given that

²⁵ The Trial Chamber notes that neither the Notice of Compliance, nor its Confidential Annexes, make clear whether, and if so how, the indexes provided with the documents disclosed differ from the descriptions included in Confidential Annex B. Indeed, some documents appear to have been accompanied by an index at the time of their disclosure but do not have a description listed in Confidential Annex B, and *vice-versa*.

²⁶ The Trial Chamber notes that the Prosecution at times uses a general reference to Rule 68 of the Rules in its disclosures without specifying which subsection(s) of that Rule it is acting pursuant to.

²⁷ See Decision on Motion Number 289 Regarding Form of Disclosure, original in French dated 7 June 2007, para. 37; Order Regarding Disclosure of Material Pursuant to Rule 68(i) of the Rules of Procedure and Evidence, original in French dated 9 July 2007, p. 3; Second Decision Concerning Prosecution Obligations Under Rule 68(i) of the Rules of Procedure and Evidence, original in French dated 5 November 2007, p. 4.

²⁸ See Confidential Annex A.

²⁹ See Confidential Annex A.

³⁰ Compare Confidential Annex A with Confidential Annex B.

they were “duplicates of documents previously disclosed, were authored by the Accused himself, or are in English outwith Rule 68(i).”³¹

22. The Trial Chamber notes that, in addition to the Rule 68(i) material included in the First Set of Documents, the Prosecution has disclosed more than 12,600 additional pages to the Accused pursuant to Rule 68(i) of the Rules.³² Similarly, all of these documents were disclosed in hard-copy and in a language that the Accused understands.³³ Further, the overwhelming majority of these documents was accompanied by an index at the time of disclosure and/or was described in the Notice of Compliance.³⁴

23. As regards the Second Set of documents, the Trial Chamber recalls the Prosecution’s statement that it does not, and has never, considered those documents to be Rule 68(i) material.³⁵ The Trial Chamber recalls that it is incumbent upon the Prosecution, subject to the ultimate supervision of the Trial Chamber, to determine on a case-by-case basis which documents are covered by Rule 68(i) of the Rules. The Trial Chamber further notes that the Accused has not identified any specific document amongst those in the Second Set which he claims should properly be considered as Rule 68(i) material.

24. The Trial Chamber recalls that the Accused was repeatedly warned by the Prosecution that disclosure of the Second Set would represent an enormous volume of documents and that he continued to declare that he nonetheless wanted their disclosure in hard-copy format.³⁶ These documents, which the Prosecution states were disclosed to the Accused as they appear in the Prosecution’s own evidence collection,³⁷ were thus made available to the Accused.³⁸ The Trial Chamber considers that the Accused has failed to demonstrate how the Prosecution’s disclosure of the Second Set of documents, which was made at his behest and outside the purview of Rule 68(i) material, violated the Prosecution’s disclosure obligations under Rule 68(i) of the Rules.

³¹ Prosecution’s Response to Submission 350, received 18 January 2008 and filed 21 January 2008, para. 9.

³² See Confidential Annex A.

³³ See Confidential Annex A.

³⁴ Compare Confidential Annex A with Confidential Annex B. The Trial Chamber notes that, of the small minority of documents that were neither accompanied by an index at the time of disclosure nor described in the Notice of Compliance, many of these were in disclosures that only numbered a few documents — thus making it easier for the Accused to sort through them.

³⁵ Joint Response, para. 4.

³⁶ Hearing of 4 March 2008, T. 4401-4404, referencing Hearing of 21 February 2008 (T. 3990-4003) and Hearing of 26 February 2008 (T. 4058-4097). See also Hearing of 27 September 2007, T. 1558-1578.

³⁷ Joint Response, para. 14.

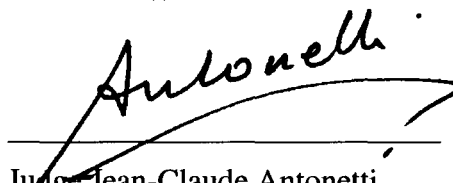
³⁸ The Prosecution has stated that it considers these documents to fall within the purview of Rule 68(ii), rather than (i), of the Rules. See Joint Response, para. 8.

25. In light of the foregoing, the Trial Chamber considers that the Prosecution has, to date, fulfilled its Rule 68(i) of the Rules obligations.

V. DISPOSITION

26. Accordingly, the Trial Chamber, pursuant to Rules 68 and 68 *bis* of the Rules, **DENIES** the Accused's submissions numbered 390, 392 and 402.

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


Judge Jean-Claude Antonetti
Presiding

Dated this twelfth day of December 2008
At The Hague
The Netherlands

[Seal of the Tribunal]