



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: 14 October 2009
Original: ENGLISH
French

IN TRIAL CHAMBER III

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

Registrar: Mr John Hocking

Decision of: 14 October 2009

THE PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC

**DECISION ON PROSECUTION MOTION FOR RETURN OF VIDEO
MATERIAL AND CORRESPONDING INDEX**

The Office of the Prosecutor

Mr Mathias Marcussen

The Accused

Mr Vojislav Šešelj

I. INTRODUCTION

1. Trial Chamber III (“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 seized of the Motion from the Office of the Prosecutor, (“Prosecution”), filed confidentially and *ex parte* (“Motion”)¹ on 14 August 2009, to request, on the one hand, the return of 11 hard drives containing video recordings (“Videos”) belonging to the Prosecution from the Registry of the Tribunal and, on the other hand, the return of the index of the video material (“Index”) which was provided to Vojislav Šešelj (“Accused”), in order to rectify an error committed during the disclosure of the Videos and the Index.

II. PROCEDURAL BACKGROUND

2. In its oral application, made during the hearing of 20 March 2008, the Accused requested disclosure of all the video recordings in the custody of the Prosecution.²

3. At the hearing of 12 June 2008, the Prosecution specified that the 11 hard drives contained 6,600 hours of video recordings and raised the issue of copyright that might come into play should the disclosure be made.³ Finally, the Prosecution requested that the Chamber order, before any disclosure to the Accused could take place, the Accused i) to return all the Videos at the end of this case; ii) not to copy these Videos; and iii) not to disclose these Videos to anyone other than persons related to his defence team.⁴

4. In its Order of 17 June 2008, the Chamber requested clarifications from the Prosecution.⁵

¹ “Prosecution Motion for Return of 11 Hard Drives with Video Material and Retrieval of Index to Video Material” (“Motion”), confidential and *ex parte*, 17 August 2009.

² Hearing of 20 March 2008, T (F) p. 5151.

³ Hearing of 12 June 2008, T (F) p. 8141.

⁴ Hearing of 12 June 2008, T (F) pp. 8141-8142 *see also Id.*, T (F) p. 8148 in which the Prosecution further specifies that only associates who have signed a confidentiality agreement with the Registry of the Tribunal should have access to these video recordings (“privileged associates”).

⁵ “Order Regarding Disclosure of Videos by the Prosecution to the Accused”, 17 June 2009, pp. 1-2.

5. In its written Submission filed confidentially on 23 June 2008, the Prosecution renewed the requests it had made at the hearing of 12 June 2008.⁶

6. In its Decision of 11 December 2008, the Chamber ordered the Registry to appoint an *Amicus Curiae* specialised in intellectual-property rights who was to prepare a report in answer to the questions raised in the Order of 17 June 2008.⁷

7. The legal opinion of the *Amicus Curiae* was filed on 4 March 2009.⁸

8. At the hearing of 7 May 2009, the Chamber consulted the Accused on the practical methods of disclosing the Videos.⁹ The Accused replied that he was not able to view the 6,600 hours of Videos himself, and that he intended transferring them to his associates who would take them to Belgrade where they could be viewed, summarized and copied according to the requirements of his defence.¹⁰

9. In its Decision rendered on 12 May 2009, the Chamber ordered that the Videos be made available to the privileged associates of the Accused in The Hague, in a room at the Tribunal or the Detention Unit reserved for such purposes (“Decision of 12 May 2009”).¹¹

10. At the hearing of 16 June 2009, the Accused stated that his privileged associates were not able to view the Videos at the Tribunal in The Hague as that would imply a minimum of 400 days of viewing time and numerous trips between Belgrade and The Hague, whereas the costs associated with the travel of the privileged associates have not been covered by the Registry since October 2008.¹²

11. In the Submission filed on 29 June 2009, the Registry suggested that, for practical and financial reasons, the Videos could be made available to the associates of the Accused, who have signed a confidentiality agreement with the Registry of the

⁶ “Prosecution Submission Concerning Disclosure of Video Material”, filed confidentially on 23 June 2008.

⁷ “Second Order Regarding Disclosure of Videos by the Prosecution to the Accused”, 11 December 2008, p. 4.

⁸ “Legal Opinion” compiled by Mark Krul on 26 February 2009, filed on 4 March 2009.

⁹ Hearing of 7 May 2009, T (F) pp. 14494-14498.

¹⁰ Hearing of 7 May 2009, T (F) p. 14496.

¹¹ “Decision on Disclosure of Videos to the Accused”, 12 May 2009, (“Decision of 12 May 2009”) para. 20.

¹² Hearing of 16 June 2009, T (F) p. 14536.

Tribunal (“privileged associates”)¹³ at the Tribunal’s Field Office in Belgrade (“Registry Submission”).¹⁴

12. At the hearing of 7 July 2009, the Accused replied that he could not review the Videos either in The Hague or Belgrade whilst his two associates Zoran Krasić and Slavko Jerković were unable to renew their status as privileged associates.¹⁵

13. In an email of 23 July 2009 sent to the two parties, the Chamber asked the Prosecution to provide it with a detailed list of the Videos, indicating those which were confidential and the reasons for the designation.

14. In a Motion filed confidentially and *ex parte* on 14 August 2009, the Prosecution seized the Chamber, requesting that it order: 1) the Registry to return the Videos; 2) the Accused or any other person in possession of a copy to return the Index; 3) the Accused to identify all persons who had received a copy of the Index; 4) that all persons in possession of a copy of the Index not be allowed to make a copy; 5) that the Prosecution separate the Videos within 28 days into those which may be disclosed to the Accused and those which should not have been disclosed to the Accused; 6) that the Registry be instructed to retrieve all copies of the Index disseminated by the Accused and place them under seal (“Motion”).¹⁶

15. At the hearing of 10 September 2009, the issue of returning the Index was discussed in open session in the presence of the Accused, who stated that the Prosecution had sent him a letter asking him to return the Index on the ground that it contained a description of the video recordings that the Prosecution did not wish to bring to his attention.¹⁷

16. In the Supplement filed confidentially and *ex parte* on 10 September 2009, the Prosecution insisted on the urgency of a ruling on the Motion and requested,

¹³ Mr Boris Aleksić and Ms Marina Raguš.

¹⁴ “Registry Submission pursuant to Rule 33 (B) Regarding the Viewing of Video Material by Vojislav Šešelj’s Legal Associates”, 29 June 2009, para. 6.

¹⁵ Hearing of 7 July 2009, T (F) p. 14561.

¹⁶ See *supra* footnote No. 1.

¹⁷ Hearing of 10 September 2009, T (F) p. 14738.

furthermore, that the Chamber order that the Index be designated as confidential (“Supplement”).¹⁸

17. In an email of 18 September 2009, the Prosecution provided the Chamber with a list of the video recordings that it wished to disclose to the Accused, together with a list of the video recordings that should be removed from the 11 hard drives currently in possession of the Registry.

18. In the Second Supplement filed confidentially and *ex parte* on 30 September 2009, the Prosecution made reference to the legal basis for its requests and provided the Chamber with further information with regard to the contents of the Videos (“Second Supplement”).¹⁹

III. ARGUMENTS OF THE PARTIES

19. The Prosecution claims that it committed an error when it disclosed the Videos and the Index as they contain confidential information – related notably to witnesses under Tribunal protection – which is irrelevant to the defence of the Accused, and that it inadvertently provided this information to the latter, and requests that all of this material be returned immediately or, if necessary, seized in order to rectify this mistake.²⁰ The Prosecution adds that the Index is an internal document that should not have been disclosed to the Accused in accordance with Rule 70 (A) of the Rules of Procedure and Evidence (“Rules”).²¹

20. The Accused, who up until the present has only received the Index, replied that the Index was forwarded to Belgrade and that he will only accept to return it in exchange for some items confiscated by the authorities at the Detention Unit.²²

¹⁸ “Prosecution Supplement to its Motion for Return of 11 Hard Drives with Video Material and Retrieval of Index to Video Material” (“Supplement”), confidential and *ex parte*, 10 September 2009.

¹⁹ “Second Prosecution Supplement to its Motion for Return of 11 Hard Drives with Video Material and Retrieval of Index to Video Material” (“Second Supplement”), confidential and *ex parte*, 30 September 2009.

²⁰ Motion, para. 2.

IV. DISCUSSION

21. The Chamber points out that, until the Motion was filed, the Prosecution had never raised any issues related to the protection of witnesses.

22. Nevertheless, now that this issue has been raised and that the Chamber has been able to verify that certain information contained in the Videos and mentioned in the Index are, indeed, of a confidential nature and relate, in part, to witnesses protected by the Tribunal, it is the Chamber's duty to take effective measures that are essential to ensure the protection of victims and witnesses whilst guaranteeing that the rights of the Accused are fully respected.

23. Firstly, with regard to the return of the Videos, which have remained in the possession of the Registry due to the fact that the Accused and his privileged associates have never expressed a desire to view them, the Prosecution may directly ask the Registry for their return, without the Chamber having to order specific protective measures concerning them.

24. Finally, with regard to the Index, at this stage the return or seizure of this document would not allow the error committed by the Prosecution to be fully rectified since the Index was disclosed to the Accused more than a year ago.²³ Nevertheless, the Chamber accepts that it is in the interests of justice to ensure that the Index is not disclosed to the public. That being the case, the Chamber considers that it must immediately be designated as confidential. Consequently, the Chamber brings to the attention of the Accused that the information contained in the Index is now strictly confidential and, therefore, may only be disclosed to his privileged associates who must safeguard its confidentiality.

25. Furthermore, the Chamber considers that the solution suggested by the Registry in its Submission is acceptable in that it allows the privileged associates of the Accused to stay in Belgrade and view the Videos there, rather than travel

²¹ Second Supplement, para. 3.

²² Hearing of 10 September 2009, T (F) pp. 14743-14744.

²³ The Prosecution disclosed the Index to the Accused on 8 April 2008, under official record No. 312.

elsewhere. Consequently, the Chamber considers that the Decision of 12 May 2009 should be amended on this point.

V. DISPOSITION

26. For the foregoing reasons, pursuant to Articles 20 (1) and 22 of the Statute and Rules 69 and 75 of the Rules,

ORDERS that

1. the Index be designated as confidential;
2. within a month of this decision, the video recordings that may be disclosed to the Accused be made available to the privileged associates of the Accused in a room reserved for such purposes at the Tribunal's Field Office in Belgrade and containing all the necessary viewing equipment;
3. the privileged associates not be allowed to copy the video recordings or remove them from the room where they are made available to them;
4. the Registry take all the necessary measures to enable the Accused and his privileged associates to use the video recordings for the Accused's defence in the present case, notably by organising, at an appropriate moment, a viewing before the Chamber of the excerpts of the video recordings deemed pertinent by the Accused or his privileged associates;
5. the video recordings be returned to the Prosecution once a final judgement is rendered in the present case; **AND**

DENIES the Motion in all other respects.

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

_____/signed/____

Jean-Claude Antonetti
Presiding Judge

Done this fourteenth day of October 2009
At The Hague
The Netherlands

[Seal of the Tribunal]