



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: 7 October 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: 7 October 2008

PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC

**DECISION ON THE ACCUSED'S SUBMISSION 390 AND
SUBMISSION 392**

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 and 392,² filed on 17 July 2008 and 6 August 2008 respectively (“Submission 390” and “Submission 392”, collectively “Submissions”), in which the Accused claims the Prosecution failed to respect its disclosure obligations pursuant to Rule 68(i) of the Rules of Procedure and Evidence of the Tribunal (“Rules”).

II. SUBMISSIONS

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

3. 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”). These documents, the disclosure of which is the subject of a Trial Chamber decision dated 5 November 2007 (“Decision of 5 November 2007”),³ make up 68 binders worth of materials representing some 3,000 documents.⁴

4. The second, and distinct,⁵ set of documents consists of hard-copies of documents which were electronically disclosed to the Accused’s then-standby counsel on 30 September 2004 (“Second Set”) but which the Accused refuses to accept in their electronic form. These documents make up 63 binders worth of materials representing some 200,000 to 300,000 pages.⁶

5. The Accused filed Submission 390 on 17 July 2008, arguing that disclosure of the First Set of documents, which he believes falls under Rule 68(i) of the Rules, violated the Prosecution’s

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

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

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

⁴ It appears that these 3,000 documents may represent approximately 350,000 pages. *See* Prosecution’s Response to Submission 350, received 18 January 2008 and filed 21 January 2008, para. 1.

⁵ 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.

⁶ The Trial Chamber notes that the Prosecution has provided conflicting information regarding the total number of pages that these documents represent. *Compare* Hearing of 27 September 2007, T. 1573 (indicating that the documents represented some 207,000 pages) *with* Hearing of 4 March 2008, T. 4401-4404 (indicating that the documents represented some 306,000 pages).

obligations pursuant to the Decision of 5 November 2007 and Rule 68(i) of the Rules.⁷ The Accused contends that while the Decision of 5 November 2007 required the Prosecution to disclose the First Set of documents to him in hard-copy and in a language he understands, some of the documents are actually in English. Further, he claims that documents disclosed in the First Set were compiled and are presented in such a way as to render them entirely unusable. Specifically, he contends that the documents lack any classification or table of contents, that they are incomplete and often illegible and that they contain documents, such as drawings of indistinct shapes, which bear no relation to his defence.⁸ As a result, he argues, the Trial Chamber should order the Prosecution to fulfil its disclosure obligations pursuant to the Decision of 5 November 2007 and Rule 68(i) of the Rules, and impose sanctions on the Prosecution pursuant to Rule 68 *bis* of the Rules.⁹

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

7. 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 contends that both Submissions 390 and 392 are legally and factually incorrect and should be denied.¹² The Prosecution describes the process by which the First Set of documents was compiled and disclosed but focuses the bulk of its arguments on the disclosure of the Second Set of documents. The Prosecution argues that it has never characterised the material in the Second Set of documents as falling under Rule 68(i) of the Rules.¹³ Instead, the Prosecution contends that these documents are “raw search results” that were compiled in the *Milošević* case to “identify potentially exculpatory material concerning ‘Perpetrating Organizations’.”¹⁴ It considers that these documents are “only relevant in nature” and thus fall within the purview of Rule 68(ii), rather than (i), of the Rules, such

⁷ Submission 390, pp. 2-6.

⁸ Submission 390, pp. 4-5. The Accused attaches some of the documents disclosed to him in annexes to Submission 390, totaling 88 pages, to illustrate the deficiencies he alleges.

⁹ Submission 390, p. 24.

¹⁰ Submission 392. The Accused attaches some of the documents disclosed to him in annexes to Submission 392, totaling 527 pages, to illustrate the deficiencies he alleges.

¹¹ Prosecution Response to the Accused’s Submission 392 and Supplement to Response Re Submission 390, 20 August 2008 (“Joint Response”); *see also* Procès-verbal of reception of BCS translation of Joint Response, signed 1 September 2008 by the Accused and filed 17 September 2008. 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. 4.

that they need only be made available to the defence in electronic form, which was done.¹⁵ Given the Accused's persistent demands for hard-copies of these documents, the Prosecution states 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."¹⁶ The Prosecution notes that the pages printed were limited to those containing the relevant raw search results and that they were printed just as they appear in the Prosecution's evidence collection.¹⁷ The Prosecution states that it "printed in good faith the material requested by the Accused" and that there is no basis for imposing sanctions or ordering it to take any further action with respect to either set of documents.¹⁸

III. APPLICABLE LAW

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

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; [...]

9. 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."

10. Disclosure under Rule 68(i) of the Rules is a continuous obligation, which need not be completed prior to the commencement of the Trial.¹⁹ Pursuant to that obligation, the Prosecution must disclose to the accused material that it considers exculpatory as soon as practicable after obtaining knowledge that the said material is in its possession.²⁰ Subject to the ultimate supervision of the Trial Chamber, it is incumbent upon the Prosecution to determine on a case-by-case basis

¹⁵ Joint Response, para. 8.

¹⁶ Joint Response, para. 8. The Prosecution notes that it considered the Accused's requests for hard copies of these documents to be requests for access to 'material to the preparation of the defence' under Rule 66(B) of the Rules.

¹⁷ Joint Response, para. 14.

¹⁸ Joint Response, para. 16.

¹⁹ *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.

²⁰ *Prosecutor v. Naser Orić*, No. IT-03-68-T, Judgement, 30 June 2006, para. 74.

which documents are covered by Rule 68(i) of the Rules, in view of the right of the Accused to a fair trial.²¹

IV. DISCUSSION

A. Preliminary matters

11. The Trial Chamber notes that the Accused requests permission, in both Submission 390 and Submission 392, to exceed the word limit prescribed by the Practice Direction on the Lengths of Briefs and Motions.²² The Trial Chamber agrees to take into consideration the Accused's Submission 390 and Submission 392, amounting to 5,168 and 7,913 total words respectively, each 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 these Submissions relate to.²³ The Trial Chamber notes that significant portions of both Submissions are spent providing examples of the alleged deficiencies in the documents disclosed by the Prosecution in the First Set and Second Set.

12. The Trial Chamber further notes that the Prosecution does not contest that the First Set and Second Set of documents share many of the deficiencies alleged by the Accused. The Trial Chamber is cognisant that these deficiencies may be inherent to the way the documents were compiled and may simply reflect the state of the documents in the Prosecution's own evidence collection. The Trial Chamber notes however, that certain questions remain regarding the compiling and disclosure of the First Set and Second Set of documents. For example, the fact that a number of entirely blank pages are included in these disclosures is difficult to reconcile with the Prosecution's assertion that they were the result of keyword searches. Further, the Trial Chamber is unable to determine what, if anything, determined the order in which the pages were printed and disclosed to the Accused.²⁴

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

13. 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

²¹ 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.

²² Submission 390, p. 2; Submission 392, p. 2.

²³ Although the actual number of pages involved is unclear, *see* fns 4 and 6 *supra*, the total number of pages disclosed to the Accused with the First Set and Second Set of documents appears to be approximately 500,000 to 600,000 pages.

²⁴ During the Hearing of 4 March 2008, the Prosecution indicated that the documents would be arranged in ERN order. *See* Hearing of 4 March 2008, T. 4401.

language that he understands.²⁵ The Trial Chamber notes that the parties differ however, as to whether the documents in the First Set and Second Set should be categorised as Rule 68(i) of the Rules material. Indeed, as detailed below, the procedural history reveals a certain ambiguity with regard to the nature of the documents disclosed in the First Set and Second Set.

14. On 30 September 2004, the Prosecution electronically disclosed 207,000 pages of documents pursuant to Rule 68 of the Rules to the Accused's then-standby counsel, without specifying whether it was doing so under subsection (i) and/or (ii) of Rule 68 of the Rules. These documents form the basis for the Second Set of documents at issue.²⁶ On 7 June 2007, the pre-trial Judge ordered the Prosecution "to disclose, 'as soon as practicable', in hard-copy and in a language that the Accused understands, the Rule 68(i) documents."²⁷

15. Following a status conference held on 4 July 2007, where certain disclosure issues were raised, the pre-trial Judge: (a) ordered the Prosecution to continue to use all the necessary means to continue to meet its obligations pursuant to Rule 68(i) and further to the Decision of 7 June 2007; and (b) ordered the Accused to provide the Prosecution with keywords he believed were necessary to enable the Prosecution to find Rule 68(i) exculpatory material more effectively ("Order of 9 July 2007").²⁸

16. Pursuant to the Order of 9 July 2007, the Prosecution carried out a new search of its evidence collection by using keywords the Accused indicated were potentially exculpatory. The result of this search forms the basis for the First Set of documents at issue. On 5 November 2007, following the completion of the Prosecution's keyword search, the Trial Chamber ordered the Prosecution to "disclose, as soon as practicable, in hard-copy and in a language the Accused understands, the approximately 3,000 documents that the Prosecution has identified by using the keywords provided by the Accused" ("Decision of 5 November 2007").²⁹

17. The Prosecution made an initial attempt to comply with the Decision of 5 November 2007 and disclosed to the Accused, in hard-copy, a portion of the First Set of documents on 3 December 2007 and 17 December 2007. The Accused contested the validity of these disclosures on 20

²⁵ 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.

²⁶ As stated previously, the Prosecution indicates that these documents now number 306,000 pages.

²⁷ Decision on Motion Number 289 Regarding Form of Disclosure, original in French dated 7 June 2007, para. 37.

²⁸ 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.

²⁹ 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.

December 2007³⁰ and, following the Trial Chamber's oral Order of 15 January 2008,³¹ the Prosecution filed written materials on 21 January 2008 attempting to detail its compliance with the Decision of 5 November 2007 ("Prosecution 21 January 2008 Submission").³² The Prosecution stated that it had disclosed hard-copies to the Accused of "everything subject to the [Decision of 5 November 2007] that was identified by the electronic search engine as a B/C/S document."³³ It added that the disclosure for lengthy B/C/S documents covered only those pages where relevant keywords provided by the Accused appeared, rather than the entirety of the document, and that certain Rule 68(i) English language documents were still in the process of being translated.³⁴ The Prosecution noted that the documents disclosed to the Accused represented only a portion of the 3,000 identified by the keyword search given that the "remaining 1750 documents are duplicates of documents previously disclosed, were authored by the Accused himself, or are in English outwith Rule 68(i)."³⁵

18. During the hearing of 4 March 2008, the Prosecution stated its willingness to disclose to the Accused hard-copies of the documents which were originally electronically disclosed to his standby counsel on 30 September 2004 — i.e., the Second Set of Documents.³⁶ The Prosecution intimated that it did not consider this material to be covered by Rule 68(i) but nonetheless agreed to disclose it to the Accused given that he "wishes to review all of this material himself as he believes it contains material that falls within Rule 68(i), and he does not trust the Prosecution to review it."³⁷ Due to the enormity of the materials to be disclosed, the Prosecution sought confirmation from the Accused that he indeed wanted this material in hard-copy rather than electronic format, which he stated he did.³⁸

19. As regards the First Set of documents, the Trial Chamber notes that the Prosecution's Joint Response does not make explicit whether it considers those documents to be Rule 68(i) material. The Trial Chamber notes that the disclosures of 3 December 2007 and 17 December 2007 appear to have been an attempt by the Prosecution to fulfill its Rule 68(i) of the Rules disclosure obligations,

³⁰ Accused's Submission numbered 350, filed 20 December 2007.

³¹ Hearing of 15 January 2008, T. 2293-2295.

³² Prosecution's Response to Submission 350, received 18 January 2008 and filed 21 January 2008.

³³ Prosecution's Response to Submission 350, received 18 January 2008 and filed 21 January 2008, para. 3.

³⁴ Prosecution's Response to Submission 350, received 18 January 2008 and filed 21 January 2008, paras 4, 7-8.

³⁵ Prosecution's Response to Submission 350, received 18 January 2008 and filed 21 January 2008, para. 9.

³⁶ Hearing of 4 March 2008, T. 4400-4404.

³⁷ Hearing of 4 March 2008, T. 4401, 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.

³⁸ Hearing of 4 March 2008, T. 4401-4404.

at least with respect to the 3,000 documents that comprise this First Set,³⁹ but that these two disclosures are nowhere referenced in the Prosecution's Joint Response. The Trial Chamber further notes that it has no information regarding the disclosure of the English language documents that the Prosecution indicated were pending translation into B/C/S as of 21 January 2008.⁴⁰ Thus, the extent to which the Prosecution's obligations under Rule 68(i), if any, were satisfied by the disclosures of 3 December 2007, 17 December 2007 or of the First Set of documents remains unclear.

20 As regards the Second Set of documents, the Trial Chamber notes the Prosecution's statement that it does not, and has never, considered those documents to be Rule 68(i) material.⁴¹ The Trial Chamber recalls 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.⁴² 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 the Motion, the Trial Chamber finds that it should stay its decision on the Motion pending receipt of the further clarifications sought from the Prosecution, as outlined in the Disposition below.

V. DISPOSITION

21 Accordingly, the Trial Chamber, pursuant to Rules 68 and 68 *bis* of the Rules,

- (i) **STAYS** its decision on the Accused's Submission 390 and Submission 392 pending receipt of the written submission from the Prosecution detailed in subsection (ii) below; and
- (ii) **ORDERS** the Prosecution to file, within 14 days of receipt of this decision, a written submission detailing:
 - (a) all disclosures made by the Prosecution to the Accused pursuant to Rule 68(i) of the Rules, including:

³⁹ See Prosecution's Response to Submission 350, received 18 January 2008 and filed 21 January 2008, paras 14-15 (seeking clarification as to whether the Decision of 5 November 2007 required the Prosecution to disclose and/or translate documents that it considered not to fall under Rule 68(i) of the Rules).

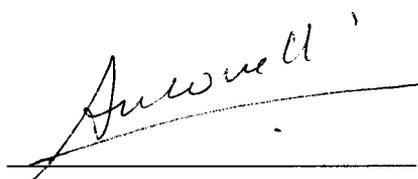
⁴⁰ See Prosecution's Response to Submission 350, received 18 January 2008 and filed 21 January 2008, para. 8.

⁴¹ Joint Response, para. 4.

⁴² See para. 10 *supra*.

1. the dates and materials included in those disclosures;
 2. whether all the materials were provided in hard-copy and in a language that the Accused understands; and
 3. whether the Prosecution provided the Accused with an index of the materials disclosed.
- (b) whether the Prosecution considers that it has, to date, provided the Accused with all the Rule 68(i) of the Rules material of which it has actual knowledge and, if not, when it anticipates being able to do so in hard-copy and in a language he understands.

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



Judge Jean-Claude Antonetti
Presiding

Dated this seventh day of October 2008
At The Hague
The Netherlands

[Seal of the Tribunal]