



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 May 2009

Original: ENGLISH
French

IN TRIAL CHAMBER III

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

Acting Registrar: Mr John Hocking

Decision of: 12 May 2009

THE PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC DOCUMENT

DECISION ON DISCLOSURE OF VIDEOS TO THE ACCUSED

The Office of the Prosecutor

Mr Daryl Mundis
Ms Christine Dahl

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 Accused’s Motion dated 20 March 2008 seeking to obtain all the video recordings that are in the possession of the Office of the Prosecutor (“Prosecution”).¹

II. PROCEDURAL BACKGROUND

2. In an oral motion, filed at the hearing of 20 March 2008, the Accused requested that the Prosecution disclose all the video recordings in its possession (“Motion”).²

3. During the hearing of 12 June 2008, the Prosecution specified that there were 11 hard disks containing 6600 hours of video recordings (“Videos”) and that it raised the issue of copyright that might come into play with this disclosure.³ Finally, the Prosecution requested that the Chamber order before any disclosure to the Accused can take place the Accused i) to return all the Videos after the end of the present case; ii) not to copy the Videos; and iii) not to disclose these Videos to anyone other than associates of the Defence team.⁴

4. By the order of 17 June 2008, the Chamber requested clarifications from the Prosecution (“Order of 17 June 2008”).⁵

¹ Hearing of 20 March 2008, Transcript in French (T(F)). 5151.

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

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

⁴ Hearing of 12 June 2008, T(F). 8141-8142; *see also Id.* T(F) 8148 where the Prosecution subsequently specified that only those associates who signed a confidentiality agreement with the Tribunal Registry should have access to these video recordings (“privileged associates”).

⁵ “Order Regarding Disclosure of Videos by the Prosecution to the Accused”, 17 June 2008 (“Order of 17 June 2008”), pp. 1-2. The Chamber put the following questions to the Prosecution: i) Why has this issue [that of copyright] arisen only now, whereas the Tribunal has been operating since 1994? ii) What is the difference between the video recordings which are the subject of the Application and all the others that have been disclosed to the Accused, and why had the Prosecution not raised the issue of copyright before? iii) Do all the video recordings pose problems and, if so, at which level? iv) Which measures would the Prosecution like the Chamber to adopt in order to protect the “owner” of the video

5. In the confidential filings of 23 June 2008, the Prosecution responded to the questions raised by the Chamber and reiterated the requests it had filed orally during the hearing of 12 June 2008 (“Written Response”).⁶

6. With the decision of 11 December 2008, the Chamber ordered the appointment of an *amicus curiae* specialised in intellectual property to draw up a report on the legal ramifications of the Tribunal broadcasting videos and on their possible use for commercial purposes by business companies or private persons and indicate whether the public broadcasting of the videos could give rise to civil responsibilities for the Tribunal and if so, what potential solutions might be found to avoid these problems and ensure a public trial (“Order of 11 December 2008”).⁷

7. The legal opinion of the *amicus curiae* was filed on 4 March 2009 (“Report”).⁸

8. During the hearing of 7 May 2009, the Chamber consulted the Accused on the practical methods of disclosing the Videos acceptable from his point of view.⁹

III. ARGUMENTS OF THE PARTIES

A. Motion of the Accused

9. The Accused requests, pursuant to Rule 68(i) of the Rules of Procedure and Evidence (“Rules”),¹⁰ the disclosure of the original version of all the Videos in the Prosecution’s possession, on the grounds that they may contain elements relevant to his defence.¹¹

recordings in terms of copyright, while guaranteeing that the Accused has access to certain prosecution or defence evidence in the custody of the Prosecution? v) Which provisions have been implemented in this respect in other trials? vi) Have written agreements for the broadcast of these video recordings been provided to the Prosecution, and if so, may the Prosecution disclose them to the Chamber?

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

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

⁸ “Legal Opinion”, drawn up by Mark Krul and dated 26 February 2009, filed on 4 March 2009.

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

¹⁰ Rule 68(i) of the Rules regarding the disclosure by the Prosecution of evidence that may suggest innocence or affect the credibility of Prosecution evidence.

¹¹ Hearing of 20 March 2008, T(F). 5151.

10. During the hearing of 7 May 2009, the Accused indicated that he could not view the 6600 hours of the Videos on his own and that his intention was to transmit them to his associates so that they could take them to Belgrade for viewing, draw up summaries and copy them for the needs of his defence.¹²

B. Prosecution Response

11. The Prosecution agrees to disclose all of the Videos, but draws the Chamber's attention to the fact that this disclosure raises the issue of copyright on these Videos.¹³ The Prosecution also indicates that the majority of the Videos were provided by business companies to be used for investigations and follow-up trials before the Tribunal; consequently, the only legitimate use of these Videos by the Accused is for the purpose of his defence.¹⁴ The Prosecution adds that, even if the Accused agreed in court to return the Videos after use and not to use them commercially,¹⁵ he undoubtedly has the intention of using these Videos for a purpose other than the preparation of his defence.¹⁶

12. The Prosecution therefore requests from the Chamber that: i) the Accused return all the Videos to the Prosecution after the end of the present case; ii) that the Accused not copy the Videos; and iii) that the Accused not disclose these Videos to anyone other than the associates of the Defence team.¹⁷

IV. DISCUSSION

13. The Chamber firstly notes that the Prosecution accepts the Accused's request for disclosure.

¹² Hearing of 7 May 2009, T(F). 14496.

¹³ Hearing of 12 June 2008, T(F). 8141-42.

¹⁴ Hearing of 12 June 2008, T(F). 8142.

¹⁵ Written response, para. 13 relevant to the Hearing of 12 June 2008, T(F). 8149-8150.

¹⁶ Written response, para. 8.

¹⁷ Written response, para. 14. The Chamber notes that the Prosecution reverts to its initial wording (*see* Hearing of 12 June 2008, T(F). 8142) and requests that only the Accused's privileged associates have access to these Videos (*see* Hearing of 12 June 2008, T(F). 8148).

14. The Chamber further notes that the disclosure in question does not appear to raise any problems regarding witness protection.

15. Therefore, the only issue that must be examined by the Chamber is the one raised by the Prosecution, namely under what conditions the Motion may be granted considering the copyright on the Videos.

16. There is no provision in the Statute or the Rules, or any Tribunal jurisprudence regarding this issue.¹⁸ This is why the Chamber requested the opinion of a specialist in intellectual property law.

17. The Chamber notes that in his Report, the *amicus curiae* indicated that the Videos should be subject to protection¹⁹ and that the owners of the Videos could demand that the Tribunal cease using them if they find out that the Accused or third parties are using their Videos commercially or for propaganda.²⁰

18. The Chamber further notes that the *amicus curiae* added in his Report that the Tribunal could limit this risk by taking all measures in its power to prevent such illegal use of the Videos by the Accused or third parties, namely by ordering, prior to the disclosure of the Videos, that: i) the Accused returns all the Videos to the Prosecution at the end of the present case; ii) that the Accused does not copy the Videos; iii) that the Accused only discloses these Videos to his privileged associates;²¹ iv) that the Chamber goes into private session each time the Videos are shown during the trial.²²

19. In light of the Report and the opinion expressed by the Accused during the hearing of 7 May 2009,²³ the Chamber finds that it is necessary to consider the recommendations of the *amicus curiae* and to order that the Videos be disclosed to the Accused under the following conditions:

¹⁸ The Chamber notes that the only jurisprudence invoked by the Prosecution – namely *The Prosecutor v. Milan Kovačević*, Case No. IT-97-24-PT, “Order for Non-Disclosure”, 3 July 1998 – concerns a request for disclosure of a single identified videotape and not of all the video recordings in the possession of the Prosecution.

¹⁹ Report, paras. 5.4 and 6.1.

²⁰ Report, para. 6.2, pp. 12-13.

²¹ See *supra* footnotes 4 and 15.

²² Report, para. 6.2, pp. 12-13.

²³ See *supra*, para. 10 and footnote 12.

- i) the Videos are to be made available to the privileged associates of the Accused in a room at the Tribunal or the detention centre reserved for such purposes and containing all the necessary viewing equipment;
- ii) the privileged associates are not allowed to copy the Videos or remove them from the room where they are made available to them;
- iii) The Tribunal Registry must bear all the costs associated with the travel of the privileged associates necessary to view the Videos;
- iv) the Registry must take all the necessary measures to enable the Accused and his privileged associates to use the Videos for the Accused's defence in the present case, notably by organising, at an opportune moment, a viewing before the Chamber of the excerpts of these Videos deemed pertinent by the Accused or his privileged associates;
- v) the Videos must be returned to the Prosecution once a final judgement is rendered in the present case;

V. DISPOSITION

20. For the foregoing reasons, pursuant to Rule 54 and 68(i) of the Rules, the Chamber

ORDERS that:

- vi) the Videos be made available to the privileged associates of the Accused in a room at the Tribunal or the detention centre reserved for such purposes and containing all the necessary viewing equipment;
- vii) the privileged associates not be allowed to copy the Videos or remove them from the room where they are made available to them;

viii) the Tribunal Registry bear all the costs associated with the travel of the privileged associates necessary to view the Videos;

ix) the Registry take all the necessary measures to enable the Accused and his privileged associates to use the Videos for the Accused's defence in the present case, notably by organising, at an opportune moment, a viewing before the Chamber of the excerpts of these Videos deemed pertinent by the Accused or his privileged associates;

x) the Videos be returned to the Prosecution once a final judgement is rendered in the present case;

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

/signed/
Jean-Claude Antonetti
Presiding Judge

Done this twelfth day of May 2009
At The Hague
The Netherlands

[Seal of the Tribunal]