



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of
Former Yugoslavia since 1991

Case No. IT-03-67-PT
Date: 16 December 2004
Original: English

IN TRIAL CHAMBER II

Before: Judge Carmel Agius, Presiding
Judge Jean Claude Antonetti
Judge Kevin Parker

Registrar: Mr. Hans Holthuis

Decision of: 16 December 2004

PROSECUTOR

v.

VOJISLAV ŠEŠELJ

**DECISION ON THE PROSECUTION'S MOTION FOR
RECONSIDERATION OF THE TRIAL CHAMBER'S ORDER
TO PROVIDE THE ACCUSED WITH THE SUPPORTING
MATERIAL**

The Office of the Prosecutor:

Ms. Hildegard Uertz-Retzlaff
Mr. Ulrich Mussemeyer
Mr. Daniel Saxon

The Accused:

Mr. Vojislav Šešelj

Standby counsel:

Mr. Tjarda Eduard van der Spoel

TRIAL CHAMBER II (“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 a Motion from the Office of the Prosecutor (“Prosecution”) requesting it to reconsider the decision to order the Prosecution to disclose to the Accused Vojislav Šešelj (“Accused”) the supporting material to the Prosecution’s Application to Amend the Indictment.¹ The Trial Chamber is also seised of an Addendum to the Prosecution’s Motion which supplements the reasons for the Prosecution’s request.²

1. The Trial Chamber’s Decision in question took note of the Accused’s objection that the supporting material had been provided *ex parte*, and thus not to him, and also ascertained that the Prosecution had not adduced reasons why the supporting material should be kept from the Accused until the amendments to the indictment for which it sought leave were approved. The Trial Chamber ordered the Prosecution to show good cause, or else provide the supporting material to the Accused.³

2. The Prosecution’s Motion takes exception with the construction of Rule 50(A)(i)(c) and (ii) of the Rules of Procedure and Evidence⁴ that in its view appears in the Trial Chamber’s Decision. The Prosecution maintains that, although Rule 50(A)(i)(c) provides that after the assignment of a case to a Trial Chamber an accused is entitled to be heard on whether the Trial Chamber should grant the Prosecution leave to amend an indictment, this entitlement does not, at that stage, extend to an accused challenging whether the supporting material adduced in support of an amendment to an indictment does in actual fact support such an amendment.⁵ According to the Prosecution, the possibility for an accused to mount such a challenge belongs in a second stage, when an accused can file preliminary motions pursuant to Rule 72, *inter alia*, alleging defects in the form of the indictment.⁶

3. In addition, the Prosecution is now submitting that the supporting material should be kept from the Accused until the amendments to the indictment are granted, due to the fact that the Prosecution will be seeking protective measures to apply to the majority of the witnesses whose statements form

¹ Confidential “Prosecution’s Motion for Reconsideration of Decision Ordering the Prosecution to Provide the Supporting Materials to the Accused within Seven Days”, 13 December 2004 (“Prosecution’s Motion”); Decision on Extension of Time to File a Response, 2 December 2004 (“Trial Chamber’s Decision”); “Prosecution’s Motion for Leave to Amend the Indictment with Confidential and *Ex Parte* Supporting Materials”, 22 October 2004 (“Prosecution’s Application to Amend the Indictment”).

² Confidential “Addendum to Prosecution’s Motion for Reconsideration of Decision Ordering the Prosecution to Provide the Supporting Materials to the Accused within Seven Days”, 13 December 2004.

³ Trial Chamber’s Decision, disposition.

⁴ Rules of Procedure and Evidence, IT/32/Rev.32, 12 August 2004.

⁵ Prosecution’s Motion, para. 6.

⁶ Prosecution’s Motion, para. 7.

part of that supporting material. Amongst the protective measures it will be seeking is the delayed disclosure to the Accused of the identity of some witnesses.⁷

4. The Trial Chamber fully agrees with the Prosecution's construction of Rule 50(A)(i)(c) and (ii) which has been described above. Rule 50(A)(ii) is clear on its terms in that it imposes the obligation on the *Trial Chamber* to, prior to granting leave to amend an indictment, satisfy itself that there is evidence which satisfies the standard set forth in Article 19, paragraph 1, of the Statute to support the proposed amendment. The Trial Chamber's Decision was never intended to convey otherwise.⁸

5. Furthermore, the Trial Chamber's order to the Prosecution was made conditional on the Prosecution failing to show good cause. The Prosecution now adduces that, in the event the Trial Chamber grants the Prosecution leave to amend the indictment, it will be seeking protective measures for some of the witnesses whose statements form part of the supporting material. This amounts to a showing of good cause, and, in such a case, it would constitute a more efficient and rational use of resources if the Prosecution were to disclose the supporting material to the Accused only once the Trial Chamber has given leave to the Prosecution to amend the indictment, in the event that the Trial Chamber decides to do so.

6. This having being said, the Accused's right to be heard pursuant to Rule 50(A)(i)(a) on the subject of whether the Trial Chamber should grant the Prosecution leave to amend the Indictment remains unaffected.

7. In the event that the Prosecution is given leave to amend the Indictment, the Prosecution will provide the supporting material to the Accused and it will then be open to him to challenge, pursuant to Rule 72, whether the supporting material supports the amendment to the indictment.

⁷ Prosecution's Motion, para. 15-16.

⁸ The source of the Prosecution's reading may have been the less than fortunate choice of words used in the Trial Chamber's Decision, which appears below in italics: "CONCLUDING therefore that, unless orders for non-disclosure apply, if the Prosecution seeks to amend an indictment after the assignment of a case to a Trial Chamber an accused *must* be in a position to challenge whether the supporting material adduced in support of an amendment to an indictment does in actual fact support such an amendment".

FOR THE FOREGOING REASONS**PURSUANT TO** Rule 54 and Rule 126 *bis* of the Rules, **HEREBY**

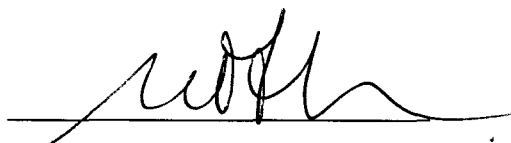
1. **VACATES** the order to the Prosecution made in the Trial Chamber's Decision;
2. **INSTRUCTS** the Accused that, should he wish to respond to the Prosecution's Application to Amend the Indictment pursuant to Rule 50(A)(i)(c), he has fourteen (14) days from the date the present decision is filed within which to do so.

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

Dated this sixteenth day of December 2004,

At The Hague

The Netherlands

**Carmel Agius****Presiding Judge****[Seal of the Tribunal]**