



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: 6 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: 6 May 2009

THE PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC DOCUMENT

**DECISION ON *AMICUS CURIAE* MOTION SEEKING VARIANCE OF
PROTECTIVE MEASURES PURSUANT TO RULE 75**

The Office of the Prosecutor

Mr Daryl Mundis
Ms Christine Dahl

The Accused

Mr Vojislav Šešelj

***Amicus Curiae* Prosecutor**

Mr Bruce MacFarlane, Q.C.

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”);

SEIZED of the Motion of the *Amicus Curiae* Prosecutor (“*Amicus Curiae*”) in Case No. IT-03-67-R77.2, *The Prosecutor v. Vojislav Šešelj* (“Case No. IT-03-67-R77.2”) filed on 7 April 2009;¹

NOTING that neither the Office of the Prosecutor (“Prosecution”) nor Vojislav Šešelj (“Accused”) responded to the Motion;²

CONSIDERING that in the Motion, the *Amicus Curiae* requests variance of the protective measures relating to: 1) the statements of three protected witnesses (“Statements”) that were disclosed to the Accused by the Prosecution and which are the subject of Case No. IT-03-67-R77.2; 2) the transcripts of the present case since 24 January 2008 (“Transcripts”);³

CONSIDERING that in its Motion, the *Amicus Curiae* argues that there is a legitimate forensic purpose for requesting access to the Statements and Transcripts, as the Accused’s book, which is at the source of the contempt allegations filed by the Prosecution, has been discussed since January 2008 in the trial before this Chamber, and that since then, the Accused has made several statements on this subject and discussions about this book have taken place in both open and closed session;⁴

CONSIDERING that the *Amicus Curiae* further submits that the Order in Lieu of an Indictment⁵ alleges that the Accused disclosed the contents of the confidential Statements and that it is necessary that the *Amicus Curiae* obtain these Statements in order to determine whether this is indeed the case;⁶

¹ “*Amicus Curiae* Prosecutor’s Motion Seeking Variance of Protective Measures Pursuant to Rule 75”, 7 April 2009 (“Motion”).

² See *Procès-verbal* of Reception, 9 April 2009.

³ Motion, para. 3; See also para. 6.

⁴ Motion, para. 4.

⁵ *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.2, “Decision on Allegations of Contempt”, public version, 21 January 2009 (“Order in Lieu of an Indictment”), p. 7.

⁶ Motion, para. 4.

CONSIDERING that the *Amicus Curiae* adds that he undertakes to abide by any measures the Chamber may impose pursuant to Rule 75 (F) of the Rules;⁷

CONSIDERING that in order for a party in proceedings before another Chamber to access confidential documents in another case, pursuant to Rule 75 (G) of the Rules of Procedure and Evidence (“Rules”), it is not enough to simply establish a geographical, temporal or other substantial overlap between the two cases,⁸ it must also describe the documents requested, at least generally, and demonstrate that there is a legitimate forensic purpose;⁹

CONSIDERING that the Chamber deems that a clear substantive overlap exists between the case with which it is seized and Case No. IT-03-67-R77.2, as the Accused in the present case has been indicted in Case No. IT-03-67-R77.2 for having allegedly violated the protective measures ordered by the present Chamber;¹⁰

CONSIDERING that the *Amicus Curiae* shows the existence of a legitimate forensic purpose, as the requested Statements and Transcripts are essential to determine the existence of violations of protective measures alleged in the Order in Lieu of an Indictment;¹¹

CONSIDERING that although the Motion is limited to obtaining the Transcripts and Statements, the Chamber considers *proprio motu*, that for the purposes of Case No. IT-03-67-R77.2, it is desirable that the *Amicus Curiae* be given access, subject to certain conditions described below intended to protect the interests of the party on whose behalf *ex parte* status has been granted,¹² to the other exhibits and documents tendered into evidence by the Prosecution in the present case that may prove relevant and necessary, including those documents having *ex parte* status;

⁷ Motion, para. 5.

⁸ *The Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, “Decision on Motion by Mićo Stanišić for Access to All Confidential Materials in the Krajišnik Case”, 21 February 2007, pp. 5 and 6.

⁹ *Ibid.*, p. 5.

¹⁰ Order in Lieu of an Indictment, p. 7.

¹¹ Order in Lieu of an Indictment, p. 7.

¹² *The Prosecutor v. Miroslav Bralo*, Case No. IT-95-17-A, “Decision on Motions for Access to *Ex Parte* Portions of the Record on Appeal and for Disclosure of Mitigating Material”, 30 August 2006, para. 17.

FOR THE FOREGOING REASONS, pursuant to Rules 54 and 75 of the Rules, the Chamber **GRANTS** the Motion and

ORDERS

- the Registry to transmit to the *Amicus Curiae* the Statements and Transcripts from the present case since 24 January 2008;
- the Prosecution to transmit all other exhibits or documents that it tendered into evidence and that it identifies as being relevant, necessary and of assistance to the *Amicus Curiae* in accomplishing his mission in Case No. IT-03-67-R77.2;

ORDERS that, unless expressly allowed by the Chamber, the *Amicus Curiae* and his assistants shall not:

- disclose to third parties the names of witnesses, their address, the transcript of their testimony, exhibits or any other information that would allow them to be identified and that would violate the confidentiality of the existing protective measures;
- disclose to third parties any documentary or other evidence, any written witness statement or its content, in whole or in part, of any previous evidence, statement or prior confidential testimony;
- disclose to third parties or to the Accused any document or exhibit having *ex parte* status.

RECALLS that, pursuant to Rule 75 (F) (i) of the Rules, the protective measures ordered in respect of a witness in the present case shall continue to have effect within the proceedings of Case No. IT-03-67-R77.2, unless varied by the present Decision.

The separate opinion of Judge Antonetti is filed on the same day as this decision.

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

/signed/

Jean-Claude Antonetti
Presiding Judge

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

[Seal of the Tribunal]

SEPARATE OPINION OF JUDGE ANTONETTI

The Trial Chamber is seized by the *Amicus Curiae* Prosecutor of a request for access to confidential documents in the case involving the Accused Šešelj.

With regard to the principle of access, there is no problem, as a Friend of the Court must have access to the proceedings in order to investigate the matter, in accordance with Rule 77 of the Rules

Nevertheless, Rule 77 of the Rules of Procedure and Evidence distinguishes between two situations:

- The first situation arises from paragraph (C) of the Rule:
 - A Chamber has reason to believe that a person may be in contempt of the Tribunal.
- The second situation arises from paragraph (D) of the same Rule:
 - A Chamber considers that there are sufficient grounds to proceed against a person for contempt.

In this second situation, the Chamber may request the Prosecutor to initiate proceedings or, in the **case of a conflict** of interest, may request the Friend of the Court to initiate proceedings, or initiate proceedings itself.

What does the term 'initiate proceedings' mean? The term means to prepare an **indictment**, nothing more. In my opinion, the role of an *amicus curiae* ceases at this stage. It is not his role to replace the Prosecutor of the Tribunal, who, under Article 16 of the Statute, is in charge of investigations and prosecutions.

The act of prosecuting involves being present at the hearings, addressing the court and making submissions about the penalty to be imposed on the Accused. **Nothing** in the Statute allows a **person from outside** the organs of the Tribunal to make submissions in place of the Prosecutor or his Trial Attorneys.

It would be an error of law, and contrary to the wording and spirit of the Statute, to interpret Rule 77 (D) of the Rules as a legal opportunity for another entity (Friend of the Court) to replace the Prosecutor, thereby resulting in the total disappearance of the Prosecutor, who is, *de jure*, an organ of the Tribunal.

Paragraph (D) allows the Chamber to act *proprio motu*. In some cases and in some countries, it can prepare an **indictment** and convict an Accused without hearing the Prosecutor's submissions (*cf. Federal Rule of Criminal Procedure 42b USA*).

In other countries, proceedings take place **in the presence** of the Public Prosecutor who recommends a sentence. To allow counsel as a Friend of the Court to make submissions in lieu of the sitting Prosecutor is a potential source of confusion in the eyes of the public, and may, therefore, discredit International Justice.

A Friend of the Court's principle role, in my opinion, is that of investigator. In his capacity as investigator, he may be called to testify by the Accused as an investigating witness. It would therefore be paradoxical, during the same hearing, for the same prosecutor to alternatively occupy the role of witness in order to answer the questions of the Accused, and then change seats to sit on the side of the international Public Prosecution.

This procedural aspect requires the presence of a **Prosecutor** on the Prosecution and, if the need arises, that of a **Friend of the Court** in the courtroom.

In conclusion, the Friend of the Court should not be called "**Amicus Curiae Prosecutor**", but "**Amicus Curiae to Prosecute**", in order to avoid any confusion as to their roles.

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

/signed/

Judge Jean-Claude Antonetti
Presiding Judge

Done this sixth day of May 2009

At The Hague

The Netherlands

[Seal of the Tribunal]