



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-AR77.1
Date: 14 December 2007
Original: English

IN THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andréia Vaz
Judge Theodor Meron

Registrar: Mr. Hans Holthuis

Decision of: 14 December 2007

PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC

**DECISION ON VOJISLAV ŠEŠELJ'S APPEAL AGAINST THE
TRIAL CHAMBER'S DECISION OF 19 JULY 2007**

The Office of the Prosecutor:

Ms. Christine Dahl

The Accused:

Mr. Vojislav Šešelj

ML

THE APPEALS 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 (“Appeals Chamber” and “International Tribunal”, respectively),

NOTING that it is seized of “Professor Vojislav Šešelj’s Notice of Appeal against the Trial Chamber III Decision of 19 July 2007” (“Notice of Appeal”) submitted by Vojislav Šešelj (“Mr. Šešelj”) on 2 November 2007 pursuant to Rule 77(J) of the Rules of Procedure and Evidence (“Rules”);¹

NOTING the “Prosecution’s Response to Šešelj’s Notice of Appeal” filed on 26 November 2007 (“Response”), in which the Prosecution informs the Appeals Chamber of its intention not to file a Response;²

NOTING “Professor Vojislav Šešelj’s Appeal against the Decision of Trial Chamber III of 19 July 2007” (“Appeal”) submitted by Mr. Šešelj on 22 November 2007;³

NOTING that, by the Order of 15 May 2007,⁴ Trial Chamber III (“Trial Chamber”) postponed the determination of a request for initiation and execution of contempt proceedings against members of the Office of the Prosecutor (“Alleged Contemnors”), filed by Mr. Šešelj on 23 March 2007;⁵

NOTING that, in its Decision of 19 July 2007 (“Impugned Decision”),⁶ the Trial Chamber denied a motion filed by Mr. Šešelj⁷ seeking review of the Order of 15 May 2007;

NOTING that on 15 August 2007, Mr. Šešelj filed an application for leave to appeal the Impugned Decision;⁸

¹ English translation filed on 12 November 2007.

² *Prosecutor v. Vojislav Šešelj*, IT-03-67-AR77.1, Prosecution’s Response to Šešelj’s Notice of Appeal, 26 November 2007.

³ *Prosecutor v. Vojislav Šešelj*, IT-03-67-AR77.1, Professor Vojislav Šešelj’s Appeal against the Decision of Trial Chamber III of 19 July 2007, 22 November 2007. English translation filed on 6 December 2007.

⁴ *Prosecutor v. Vojislav Šešelj*, IT-03-67-PT, Order Regarding Mr. Šešelj’s Motion for Contempt Proceedings, 15 May 2007 (“Order of 15 May 2007”).

⁵ *Prosecutor v. Vojislav Šešelj*, IT-03-67-PT, Motion by Professor Šešelj for Trial Chamber III to Instigate Proceedings for Contempt of the Tribunal Against Carla Del Ponte, Hildegard Uertz-Retzlaff and Daniel Saxon, 8 March 2007. English translation filed on 23 March 2007.

⁶ *Prosecutor v. Vojislav Šešelj*, IT-03-67-PT, Decision on the Accused’s Motion for Review of the Order of 15 May 2007, 19 July 2007 (“Impugned Decision”).

⁷ *Prosecutor v. Vojislav Šešelj*, IT-03-67-PT, Professor Vojislav Šešelj’s Motion for Trial Chamber III to Review its Order of 15 May 2007 Postponing a Decision on the Motion to Instigate Contempt Proceedings Until After the Completion of the Trial, 5 June 2007.

⁸ *Prosecutor v. Vojislav Šešelj*, IT-03-67-PT, Professor Vojislav Šešelj’s Motion for Leave to File an Interlocutory Appeal Against the Decision of Trial Chamber III of 19 July 2007, 15 August 2007 (“Request for Certification”). English translation received on 28 August 2007.

NOTING that on 14 September 2007, the Trial Chamber denied the Request for Certification on the grounds that (i) the Impugned Decision was a decision “relating in its essential parts to contempt”, (ii) consequently, it had “no jurisdiction to determine [Mr. Šešelj’s] request for certification” and (iii) Mr. Šešelj had a right to appeal directly to the Appeals Chamber pursuant to Rule 77(J) of the Rules;⁹

CONSIDERING that, pursuant to Rule 77(D) of the Rules, contempt proceedings are initiated upon determination by a Chamber that there are sufficient grounds to proceed against a person for contempt;

CONSIDERING further that the parties to a contempt proceedings are, on the one hand, the alleged contemnor and, on the other hand, the prosecuting authority, which can be, depending on the Chamber’s choice, (i) the Prosecutor of the International Tribunal, (ii) an *amicus curiae* appointed by the Registrar pursuant to Rule 77(C)(ii) of the Rules or (iii) the Chamber itself;

CONSIDERING that no decision to initiate contempt proceedings against the Alleged Contemnors has been rendered yet;

CONSIDERING that the Trial Chamber, rather, decided to postpone its determination on whether or not to initiate contempt proceedings¹⁰ and that, until such determination, this decision remains within its exclusive discretion pursuant to Rule 77 of the Rules;

CONSIDERING, therefore, that there are currently no contempt proceedings pending against the Alleged Contemnors;

CONSIDERING, further, that both the Order of 15 May 2007¹¹ and the Impugned Decision¹² were issued pursuant to Rule 54 of the Rules;

CONSIDERING, further, that Rule 77(J) of the Rules shall be interpreted as allowing for appeals against decisions disposing of the contempt case only;¹³

⁹ *Prosecutor v. Vojislav Šešelj*, IT-03-67-PT, Decision on the Accused’s Request for Certification to Appeal the Trial Chamber’s Decision of 19 July 2007, 14 September 2007 (“Decision on Certification”). B/C/S translation received on 22 October 2007.

¹⁰ Order of 15 May 2007, p. 3.

¹¹ Order of 15 May 2007, p. 3.

¹² Impugned Decision, p. 4.

¹³ See *Prosecutor v. Josip Jović*, IT-95-14&14/2-R77-AR.72.1, Decision on Interlocutory Appeal Challenging the Jurisdiction of the Tribunal, 2 March 2006, para. 5 where the Appeals Chamber addresses an appeal under Rule 72(B)(i) of the Rules in contempt proceedings. The Appeals Chamber notes that the Appeals Chamber of the Special Court for Sierra Leone has followed the same reasoning with regard to applicability of Rule 77(J) of its Rules of Procedure and Evidence, the contents of which was then similar to the one of Rule 77(J) of the Rules of the Tribunal - See Special Court for Sierra Leone (“SCSL”), *Prosecutor v. Brima, Kamara and Kanu* (“AFRC”), SCSL-04-16-AR77,

CONSIDERING, therefore, that Rule 77(J) of the Rules is not applicable in the present case and that the Trial Chamber erred in law in directing Mr. Šešelj to file an appeal pursuant to this rule;¹⁴

NOTING further that Mr. Šešelj's request to initiate contempt proceedings addressed only issues relating to contempt proceedings, in which he cannot be a party¹⁵ and has no standing,¹⁶ rather than questions that directly affect his rights to a fair trial, such as evidentiary rulings, which he does have standing to contest;

On the basis of the foregoing,

FINDS that the Trial Chamber erred in holding that Rule 77 of the Rules was applicable to the issue before it;

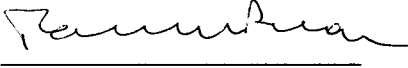
FINDS further that Mr. Šešelj lacks standing to appeal any decision by the Trial Chamber regarding the initiation of contempt proceedings; and

CONSEQUENTLY DISMISSES the Appeal.

Judge Mohamed Shahabuddeen appends a Declaration to the present Decision.

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

Done this 14th of December 2007,
At The Hague,
The Netherlands.



Judge Fausto Pocar
President

[Seal of the International Tribunal]

Decision on Defence Appeal Motion Pursuant to Rule 77(J) on Both Imposition of Interim Measures and an Order Pursuant to Rule 77(C)(iii), 23 June 2005, para. 29 ("AFRC Decision").

¹⁴ Decision on Certification, p. 1.

¹⁵ See *Prosecutor v. Zlatko Aleksovski*, IT-95-14/1-AR77, Decision on Application of Mr. Nobile for Leave to Appeal the Trial Chamber Finding of Contempt, 22 December 1998, p.1, where the Bench of the Appeals Chamber did "not consider the Office of the Prosecutor ("Prosecution") to be a party to the contempt proceedings". See also, *Prosecutor v. Zlatko Aleksovski*, IT-95-14/1-AR77, Judgement on Appeal by Anto Nobile against Finding of Contempt, 30 May 2001, para. 24; *Prosecutor v. Duško Tadić*, IT-94-1-A-AR77, Order on the Prosecution Motion for Leave to Participate in the Present Appeal, 26 February 2001.

¹⁶ See SCSL, *AFRC Decision*, para. 33. See also SCSL, *The Prosecutor v. Brima, Kamara and Kanu* ("AFRC"), SCSL-04-16-AR77, Decision on Joint Defence Appeal Against the Decision on the Report of the Independent Counsel pursuant to Rules 77(C)(iii) and 77(D), 17 August 2005, para. 16.

DECLARATION OF JUDGE SHAHABUDEEN

1. I agree with the outcome of the decision of the Appeals Chamber but not with the reasoning. I give my views below.

Introduction

2. Trial Chamber III had before it a motion by Mr. Šešelj for leave to file an interlocutory appeal (certification). The Trial Chamber denied the motion, holding that it had no jurisdiction to determine it for the reason that, in the view of the Trial Chamber, Mr. Šešelj had a right under Rule 77(J) to appeal directly to the Appeals Chamber, that, in other words, he did not need certification. So Mr. Šešelj's subsequent 'Notice of Appeal' relates to an appeal, and not to an interlocutory appeal as he would have preferred.

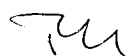
3. The Appeals Chamber considers that the Trial Chamber's interpretation of Rule 77(J) was incorrect – a view which I respectfully share and which corresponds to a view held by Mr. Šešelj.¹ The remedy should be to remand the matter to the Trial Chamber for it to resume consideration of Mr. Šešelj's motion for certification in the light of the correct interpretation of the Rule. But it is not necessary to do so, because all the elements of a final decision by the Appeals Chamber are at hand. And so I agree with the dismissal of Mr. Šešelj's appeal.

Mr. Šešelj's right to request the Trial Chamber to exercise its power to 'initiate' contempt proceedings did not depend on whether he had 'standing' in the proposed contempt case

4. However, I am not able to support the view that the decision of the Appeals Chamber should be based on 'standing'. Mr. Šešelj was really interested in getting the Trial Chamber to 'initiate' contempt proceedings against members of the prosecution team engaged in a prosecution against him. It is argued that he could not be party to the contempt case and would have no 'standing' in it, that he therefore had no right to request the Trial Chamber to 'initiate' contempt proceedings, and that consequentially he also had no right to bring other proceedings in relation thereto.

5. I accept that Mr. Šešelj would have no 'standing' in the contempt case, but am not persuaded that such 'standing' was a prerequisite of his right to request the Trial Chamber to

¹ *Prosecutor v. Vojislav Šešelj*, IT-03-67-PT, Professor Vojislav Šešelj's Notice of Appeal against Trial Chamber III Decision of 19 July 2007, submitted on 2 November 2007, pp. 4-5, 12-13.



‘initiate’ contempt proceedings or to seek leave to appeal a related decision of the Trial Chamber. ‘Standing’ in the contempt case is different from capacity to request the Trial Chamber to ‘initiate’ contempt proceedings. ‘Standing’ is usually employed in connection with capacity to participate in legal proceedings. Here what is in issue is the capacity of a person to ask the Trial Chamber to ‘initiate’ proceedings. Has he got the capacity, or has he not? I do not see that ‘standing’ provides an answer one way or another: a legal tag is not helpful. The answer has to be given by the application of normal principles of law to the question whether a person has legal capacity to do a given act.

6. Rule 77(C) of the Rules provides that when ‘a Chamber has reason to believe that a person may be in contempt of the Tribunal, it may [among other things] (iii) initiate proceedings itself’. Mr. Šešelj’s motion of 23 March 2007 ‘requests that Trial Chamber III, in accordance with Rule 77 of the Rules, instigate and execute proceedings for contempt ...’.² In its order postponing a determination of this request, the Trial Chamber correctly referred to the request as a ‘request for the initiation and execution of contempt proceedings ...’.³

7. Thus, it was clear that Mr. Šešelj recognized that the power to ‘initiate’ contempt proceedings lay with the Trial Chamber. He did not suggest that he himself had a right to ‘initiate’ such proceedings. But it seems to me that he had a right to request the Trial Chamber to exercise its power to ‘initiate’ such proceedings. Why? Because, although he would have no ‘standing’ in the contempt case proper, he had a right to a fair trial in his own case. That right to a fair trial is meaningless unless it gives a right to complain to the Trial Chamber about the prosecution against him being conducted in a manner which may do harm to his right to a fair trial and to move it to exercise its power to initiate contempt proceedings.

8. The contempt case, if it were brought, would, according to Mr. Šešelj, involve serious allegations against members of the Office of the Prosecutor of suborning, threatening and otherwise illegally pressuring potential witnesses for the prosecution in the case now pending against Mr. Šešelj. It is lamentable if an accused in those circumstances has no competence to request the Trial Chamber to exercise its power to ‘initiate’ contempt proceedings; nor does the law command so curious a result.

² *Prosecutor v. Vojislav Šešelj*, IT-03-67-PT, Motion by Professor Vojislav Šešelj for Trial Chamber III to Instigate Proceeding for Contempt of the Tribunal against Carla Del Ponte, Hildegard Uertz-Retzlaff and Daniel Saxon, 8 March 2007. English translation filed 23 March 2007, p. 23.

9. In sum, I am unable to agree with the proposition that, since, in respect of contempt proceedings, Mr. Šešelj ‘cannot be a party and has no standing’, he has no capacity to move the Trial Chamber to initiate those proceedings. The question is not whether he would have ‘standing’ in the contempt case; the question is whether he had the legal capacity for the limited purpose of requesting the Trial Chamber to exercise its power to ‘initiate’ contempt proceedings. The former question does not govern the latter. His right to a fair trial indicates an affirmative answer to the latter question.

Mr. Šešelj did raise questions that directly affect his rights to a fair trial

10. The decision of the Appeals Chamber states that Mr. Šešelj did not raise ‘questions that directly affect his rights to a fair trial, such as evidentiary rulings, which he does have standing to contest’.⁴ I am puzzled: the whole thesis of Mr. Šešelj’s case was that the fairness of his own trial would be directly affected, in the sense that there were serious allegations of misconduct of members of the prosecution team committed in relation to the trial.⁵

11. The pleadings have to be read as a whole. Statements are not to be construed as if they were each made in hermetically sealed compartments. As was noted by Mr. Šešelj at page 15 of his ‘Notice of Appeal’:

Although formally this motion can be considered only with respect to the Trial Chamber Decision of 19 July 2007, Professor Vojislav Šešelj points out that it is important to bear in mind that his Motions (of 8 March 2007 and 14 June 2007) make up a unified whole, as do the Order and the Decision of the Trial Chamber (of 15 May 2007 and 19 July 2007 respectively), because they deal with contempt of the International Tribunal, of which the most senior representatives of the prosecution are ‘suspected’.

Thus, Mr. Šešelj was not relying merely on his formal Notice of Appeal; he was relying on all of his connected pleadings.

³ *Prosecutor v. Vojislav Šešelj*, IT-03-67-PT, Order Regarding Mr. Šešelj’s Motion for Contempt Proceedings, 15 May 2007, p. 3.

⁴ *Prosecutor v. Vojislav Šešelj*, IT-03-67-PT, Appeals Chamber Decision on Vojislav Šešelj’s Appeal Against the Trial Chamber’s Decision of 19 July 2007, p. 3.

⁵ See *Prosecutor v. Vojislav Šešelj*, IT-03-67-PT, Order Regarding Mr. Šešelj’s Motion for Contempt Proceedings, 15 May 2007, pp. 13, 14 and 15, for Mr. Šešelj’s use of the words ‘fair trial’ or their cognates. See also on this point, as well as on the issue of consequences of threats to witnesses, *Prosecutor v. Vojislav Šešelj*, IT-03-67-PT, Professor Vojislav Šešelj’s Motion for Leave to File an Interlocutory Appeal Against the Decision of Trial Chamber III of 19 July 2007, 15 August 2007. English translation received on 28 August 2007, pp. 4-5. On the latter point, see further *Prosecutor v. Vojislav Šešelj*, IT-03-67-PT, Professor Vojislav Šešelj’s Motion for Trial Chamber III to Review its Order of 15 May 2007 Postponing a Decision on the Motion to Instigate Contempt Proceedings Until After the Completion of the Trial, 5 June 2007, p. 9.

12. Mr. Šešelj's 'Notice of Appeal', at page 4, refers to his 'Motion for Review' of 14 June 2007. At page 6, the latter noted that he requested that the representatives of the prosecution 'be found criminally responsible for contempt of court, because they knowingly and wilfully interfered with the administration of justice'. At page 9, he alleged that 'potential witnesses ... were threatened, intimidated, bribed or otherwise improperly coerced by Prosecution representatives ...'; the context makes it clear that what was being spoken of was evidence to be given in the prosecution case against Mr. Šešelj. At page 6, there are references to his right to a 'fair trial'. It is clear from the last paragraph of his 'Notice of Appeal' that what he was saying was that coercion of potential prosecution witnesses interfered with his 'right to a fair trial'.

13. Thus, it is the case that Mr. Šešelj was alleging that his right to a fair trial in the prosecution now pending against him would be prejudiced by a failure to initiate contempt proceedings. In other words, he was raising 'questions that directly affect his rights to a fair trial', to use the words of the Appeals Chamber's present decision. It is enough to observe that the Appeals Chamber accepts that Mr. Šešelj 'does have standing to contest' such questions.

But, in the specific case, Mr. Šešelj's right to a fair trial could be satisfied by his right to examine and cross-examine witnesses

14. However, in the specific case, Mr. Šešelj's right to a fair trial could be satisfied by his right to examine and cross-examine witnesses; the prosecution against him is not a case in which the relevant material could not be made available to the court through the exercise of the latter right. In this respect, the Trial Chamber correctly observed that –

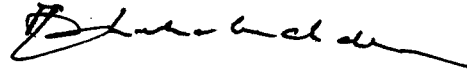
a challenge to the admissibility of any evidence should be dealt with during the trial and, particularly, through the examination and cross-examination of the witnesses identified in the Motion.⁶

Since Mr. Šešelj's right to a fair trial could be satisfied in that way – a way that has been accepted by the Trial Chamber – it would be incorrect to take the view that a motion inviting the Trial Chamber to 'initiate' separate proceedings was in order. It is this consideration, and not considerations of 'standing', which justifies today's decision to dismiss his appeal.

⁶ *Prosecutor v. Vojislav Šešelj*, IT-03-67-PT, Order Regarding Šešelj's Motion for Contempt Proceedings, 15 May 2007, p. 2, penultimate paragraph.

15 I would add that there appears to be no good reason why Mr. Šešelj's trial in the case against him must await the conclusion of a new case. Whatever may have led to that approach, it is enough to observe that the approach could stretch into the future to exceed tolerable limits of Mr. Šešelj's right to an expeditious trial, as was in substance pointed out by the Trial Chamber.⁷

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



Mohamed Shahabuddeen

Dated 14 December 2007
At The Hague
The Netherlands

[Seal of the Tribunal]

⁷ *Ibid.*, p. 3.

