



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: 27 February 2009

Original: English

IN TRIAL CHAMBER III

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

Acting Registrar: Mr. John Hocking

Decision of: 27 February 2009

PROSECUTOR

V

VOJISLAV ŠEŠELJ

PUBLIC

**DECISION ON PROSECUTION MOTION FOR CERTIFICATION TO
APPEAL THE TRIAL CHAMBER'S DECISION DENYING ACCESS TO
THE FULL RECORD OF IT-03-67-R77.1**

Office of the Prosecutor

Mr. Daryl Mundis
Ms. Christine Dahl

The Defence in Case IT-03-67-R77.1

Mr. Ljubiša Petković

The Accused in Case IT-03-67-T

Mr. Vojislav Šešelj

Counsel for Ljubiša Petković

Ms. Branislava Isailović

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 Prosecution motion filed on 29 October 2008 (“Motion”),¹ which seeks certification to appeal the Trial Chamber’s “Decision on Requests for Disclosure from the Prosecution and the Accused in Case IT-03-67-T with Regard to Case IT-03-67.R77.1” (“Decision”).²

II. BACKGROUND

2. The Trial Chamber notes that the procedural history underlying the Decision is detailed therein, as well as in the Judgement rendered in Case No. IT-03-67.R77.1 (“*Petković* Judgement” and “*Petković* Case”, respectively),³ and that only its most salient aspects need be presently recalled.

3. The Trial Chamber initiated contempt proceedings pursuant to Rule 77 of the Rules of Procedure and Evidence (“Rules”) against Mr. Ljubiša Petković (“Petković”) for having refused to obey the subpoena it issued pursuant to Rule 98 of the Rules ordering him to appear as a witness in Case Number IT-03-67 (“*Šešelj* Case”).⁴

4. Following an initial appearance on 29 Mai 2008 in the *Petković* Case, two status conferences were held before Judge Lattanzi, the pre-trial Judge, on 4 July 2008 and 18 July 2008.⁵

5. On 3 September 2008, a trial was held in the *Petković* Case and the *Petković* Judgement was subsequently issued on 11 September 2008, in both a confidential and a public redacted form, finding Petković guilty of contempt pursuant to Rule 77(A)(iii) of the Rules.⁶

6. On 9 September 2008, the Prosecution filed a confidential motion requesting access to transcripts of all the hearings as well as all the exhibits in the *Petković* Case, be they public or under

¹ Prosecution Motion for Certification to Appeal the Trial Chamber’s Decision Denying Access to the Full Record of IT-03-67-R77.1, 29 October 2008 (“Motion”).

² Decision on Requests for Disclosure from the Prosecution and the Accused in Case IT-03-67-T with Regard to Case IT-03-67.R77.1, original in French dated 22 October 2008 (“Decision”).

³ *In the matter of Ljubiša Petković*, Case No. IT-03-67-R77.1, Judgement, confidential, original in French dated 11 September 2008 (“*Petković* Judgement”).

⁴ *In the matter of Ljubiša Petković*, Case No. IT-03-67-R77.1, Order in Lieu of an Indictment for Contempt Against Ljubiša Petković, confidential, 13 May 2008; see also *In the matter of Ljubiša Petković*, Case No. IT-03-67-R77.1, Order to Lift Confidentiality, 28 May 2008.

⁵ *Petković* Judgement, para. 19.

⁶ *Petković* Judgement, para. 80.

seal.⁷ On 16 September 2008, the Prosecution filed an *addendum* to its 9 September 2008 motion requesting disclosure of the confidential version of the *Petković* Judgement (collectively, “Prosecution Access Motion”).⁸

7. On 19 September 2008, the accused in the present case, Mr. Vojislav Šešelj (“Šešelj”), filed a motion requesting access to the record of the trial hearing held on 3 September 2008 as well as any subsequent hearings in the *Petković* Case (“Šešelj Access Motion”).⁹

8. On 22 October 2008, the Trial Chamber issued its Decision, denying the Prosecution and Šešelj Access Motions in their entirety. Specifically, the Trial Chamber recalled that the *Petković* Case concerned only Petković’s failure to comply with the Trial Chamber’s subpoena in the *Šešelj* Case and that “neither the Prosecution nor [Šešelj] has shown that the disclosure of the requested documents followed a ‘legitimate forensic purpose’”.¹⁰ Further, the Trial Chamber recalled that it had ordered closed sessions and the placing of exhibits under seal to protect Petković’s security and private life, and that “the information contained therein is not likely to help the case of either the Prosecution or the Accused”.¹¹

III. PROSECUTION ARGUMENTS

9. In its Motion, the Prosecution requests, pursuant to Rule 73(B) of the Rules, that the Trial Chamber grant certification to appeal the Decision.¹² It argues that the Decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings.¹³ Specifically, the Prosecution contends that the Decision prevents it from being fully informed of matters that have a bearing on evidence it intends to elicit from Petković in the *Šešelj* Case — namely whether he was subjected to acts of intimidation or pressure by the Prosecution — as well as from other witnesses who may testify in the *Šešelj* Case.¹⁴ The Prosecution adds that the Decision involves a significant issue in that it balances the rights of a party to have access to material to prepare its case

⁷ *In the matter of Ljubiša Petković*, Case No. IT-03-67-R77.1, Prosecution Motion Seeking Access to Trial Record, confidential, 9 September 2008. This motion was also filed the same day by the Prosecution in the *Šešelj* Case.

⁸ *Addendum* to Prosecution Motion Seeking Access to Trial Record, confidential, 16 September 2008.

⁹ Motion of Professor Vojislav Šešelj for Trial Chamber III to Provide Him with a Recording of the Trial of Ljubiša Petković for Contempt of the Tribunal (linked with Case IT-03-67-P[sic]77.1), confidential, 19 September 2008.

¹⁰ Decision, pp. 3-4.

¹¹ Decision, p. 4.

¹² Motion, paras 9, 19.

¹³ Motion, paras 12-13.

¹⁴ Motion, para. 12.

against the need to guarantee the protection of witnesses, which the Appeals Chamber has indicated meets the elements for an interlocutory appeal.¹⁵

10. The Prosecution also submits that an “immediate resolution” by the Appeals Chamber at this stage is necessary given that its case in chief is drawing to a close and that it may otherwise be deprived of its ability to properly cross-examine Petković and other witnesses in the *Šešelj* Case.¹⁶ It notes that interlocutory review of the Decision will not delay the proceedings as Petković’s appearance before the Trial Chamber has yet to be rescheduled.¹⁷

11. The Accused did not respond to the Motion within the 14-day deadline set out in Rule 126*bis* of the Rules.¹⁸

IV. APPLICABLE LAW

12. In accordance with Rule 73(B) of the Rules, decisions on all motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings. A Trial Chamber must thus first verify whether the two cumulative conditions set out in Rule 73(B) of the Rules have been met before determining whether to grant certification.

13. The purpose of a motion for certification is not to demonstrate that the reasoning of an impugned decision is incorrect, but to demonstrate that the conditions set out in Rule 73(B) of the Rules have been met. Moreover, even if the conditions set out in Rule 73(B) of the Rules are satisfied, certification remains a matter within the discretionary power of the Trial Chamber.¹⁹

V. DISCUSSION

14. The Trial Chamber notes that it has issued two significant decisions following the filing of the Motion. First, the Trial Chamber issued a decision on 6 November 2008 (“6 November 2008 Decision”), wherein it deemed Petković to be an “unavailable person” under Rule 92*quater* of the Rules given his then-current psychological state and admitted four of his written declarations into

¹⁵ Motion, paras 13-14.

¹⁶ Motion, paras 16-17.

¹⁷ Motion, para. 18.

¹⁸ See Procès-verbal of reception of BCS translation signed by the Accused on 18 November 2008.

¹⁹ Decision on Prosecution Motion for Certification to Appeal the Decision of 7 January 2008, original in French dated 21 May 2008, paras 10-12.

evidence.²⁰ The Trial Chamber noted that “if Ljubiša Petković were to come and testify in the future in the present case, the [6 November 2008 Decision] would become moot since the underlying conditions of Ljubiša Petković’s incapability to testify would no longer be met”.²¹

15. Second, the Trial Chamber issued a majority decision on 11 February 2009 adjourning the hearings for the Prosecution’s remaining witnesses (“11 February 2009 Decision”).²² The Prosecution’s remaining witnesses are not presently appearing before the Trial Chamber and will only resume doing so following the end of the adjournment.²³

16. The Trial Chamber recalls that the Prosecution states that it seeks access to the full record in the *Petković* Case in order to properly cross-examine Petković and other witnesses in the *Šešelj* Case.²⁴ The Trial Chamber considers that an “immediate resolution” of this issue by the Appeals Chamber at this stage would not materially advance the proceedings given that witnesses are not presently appearing before the Trial Chamber. Further, the Trial Chamber notes that Petković is not currently scheduled to appear as a witness following the resumption of the hearings.

17. In light of the foregoing, the Trial Chamber considers that the Motion does not concern an issue whose immediate resolution by the Appeals Chamber may materially advance the proceedings. Therefore, in accordance with Rule 73(B) of the Rules, the Trial Chamber need not determine whether the Decision also involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

18. The Trial Chamber notes that the present decision does not foreclose reconsideration, be it *proprio motu* or at the behest of one of the Parties, of the issue of access to the full record in the *Petković* case should it be warranted in light of new circumstances.²⁵

²⁰ Decision Admitting the Prior Statements of Ljubiša Petković Pursuant to Rule 92 *quater* of the Rules, original in French dated 6 November 2008.

²¹ Decision Admitting the Prior Statements of Ljubiša Petković Pursuant to Rule 92 *quater* of the Rules, original in French dated 6 November 2008, p. 4.

²² See ‘Décision relative à la requête de l’Accusation aux fins d’ajournement avec en annexe l’opinion dissidente du Juge Antonetti’, issued in both a confidential and public redacted version, 11 February 2009.

²³ See ‘Décision relative à la requête de l’Accusation aux fins d’ajournement avec en annexe l’opinion dissidente du Juge Antonetti’, issued in both a confidential and public redacted version, 11 February 2009, p. 3. The Trial Chamber notes however that witness VS-1029 is still scheduled to appear before the Trial Chamber prior to the start of the adjournment. Further, the Trial Chamber intends to hold periodic hearings with the parties to address procedural matters that may arise during the adjournment.

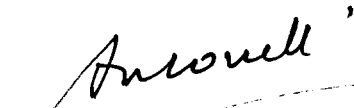

²⁴ Motion, paras 16-17.

²⁵ See *Prosecutor v. Galić*, Case No. IT-98-29-A, Decision on Defence’s Request for Reconsideration, 16 July 2004, p. 2;

VI. DISPOSITION

19. Accordingly, the Trial Chamber, pursuant to Rule 73(B) of the Rules, **DENIES** the Motion.

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



Judge Jean-Claude Antonetti
Presiding

Dated this twenty-seventh day of February 2009
At The Hague
The Netherlands

[Seal of the Tribunal]