



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: 3 December 2010
Original: ENGLISH
French

IN TRIAL CHAMBER III

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

Registrar: Mr John Hocking

Decision of: 3 December 2010

THE PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC DOCUMENT

**REDACTED VERSION OF “DECISION ON PROSECUTION’S REQUEST
FOR CERTIFICATION TO APPEAL THE DECISION OF 29 JUNE 2010”
FILED ON 23 JULY 2010**

The Office of the Prosecutor

Mr Matthias Marcussen

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 request, registered confidentially on 6 July 2010, by the Office of the Prosecution (“Prosecution”) requesting certification to appeal the decision rendered confidentially on 29 June 2010 and related to the motion of Vojislav Šešelj (“Accused”) for contempt against Carla Del Ponte, Hildegard Uertz-Retzlaff and Daniel Saxon.

II. PROCEDURAL BACKGROUND

2. On 23 March 2007, a motion for contempt was submitted, in which the Accused alleged pressure or intimidation from the Prosecution on [redacted] (“Motion for Contempt”).¹

3. The Prosecution’s response was filed on 12 April 2007, confidentially and partially *ex parte*.²

4. By Order dated 15 May 2007, rendered publicly, Chamber III³ ordered a stay in ruling upon the Motion for Contempt, until the conclusion of the trial in order to avoid delaying the commencement of this trial (“Order of 15 May 2007”).⁴

5. On 14 June 2007, the Accused filed a request seeking reconsideration of the Order of 15 May 2007.⁵

6. On 19 July 2007, the Chamber⁶ rendered a public decision reconfirming the Order of 15 May 2007 (“Decision of 19 July 2007”).⁷

¹ English translation of the BCS original of “Motion by Professor Vojislav Šešelj for Trial Chamber III to Instigate Contempt Proceedings for Contempt of Tribunal against Carla Del Ponte, Hildegard Uertz-Retzlaff and Daniel Saxon”, 23 March 2007.

² “Prosecution Response to Vojislav Šešelj Motion to Instigate Contempt Proceedings with confidential annexes A-J and Confidential & *Ex Parte* Annex K”, 12 April 2007, confidential and partially *ex parte*.

³ The Chamber was then composed of Judges Robinson, Antonetti and Bonomy.

⁴ “Order Regarding Mr. Šešelj’s Motion for Contempt Proceedings”, public, 15 May 2007.

⁵ “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 Completion of the Trial”, confidential, 14 June 2007.

7. On 2 November 2007, the Accused lodged a direct, public appeal of the Decision of 19 July 2007, based on Rule 77 (J) of the Rules of Procedure and Evidence (“Rules”). On 14 December 2007, the Appeals Chamber dismissed this request in a public decision.⁸

8. On 29 June 2010, the Chamber rendered a decision along with a confidential version and a redacted public version, whereby, on the one hand, it reconsidered *proprio motu* the Order of 15 May 2007 in light of certain new circumstances that surfaced as the trial unfolded and, on the other hand, it ordered that an *amicus curiae* be appointed to investigate the allegations of contempt brought by the Accused against the Prosecution (“Decision of 29 June 2010”).

9. [redacted].⁹ [redacted].¹⁰

10. On 6 July 2010, the Prosecution confidentially filed a request seeking certification to appeal the Decision of 29 June 2010 (“Request”).¹¹

11. [redacted].¹²

12. [redacted].¹³

13. [redacted].¹⁴

14. [redacted].¹⁵ The Prosecution likewise lodged a direct appeal on the merits of the Decision of 29 June 2010, in a filing dated 14 July 2010.¹⁶

15. [redacted].¹⁷

⁶ See *supra*, footnote 3.

⁷ “Decision on the Accused’s Motion for Review of the Order of 15 May 2007”, public, 19 July 2007.

⁸ “Decision on Vojislav Šešelj’s Appeal Against the Trial Chamber’s Decision of 19 July 2007”, public, 14 December 2007.

⁹ [redacted].

¹⁰ [redacted].

¹¹ [“Prosecution Request for Certification to Appeal Decision of 29 June 2010”, public redacted version, 3 November 2010].

¹² [redacted].

¹³ [redacted].

¹⁴ [redacted].

¹⁵ [redacted].

¹⁶ [“Notice of Filing of Public Redacted Versions of Prosecution’s Appeal of the Trial Chamber’s Decision of 29 June 2010 and Related Addendum”, 14 October 2010].

III. ARGUMENTS OF THE PARTIES

16. In its Request, the Prosecution respectfully requests certification to appeal the Decision of 29 June 2010, submitting that the two conditions established by Rule 73 (B) of the Rules have been met, namely, that the decision involves an issue likely to significantly affect the fair and expeditious conduct of the trial or its outcome,¹⁸ and that the immediate resolution thereof by the Appeals Chamber may materially advance the proceedings.¹⁹

17. The Prosecution asserts three arguments in support of the allegation that the first condition laid down in Rule 73 (B) of the Rules has been met.

18. The Prosecution contends, firstly, that the Decision of 29 June 2010 violates its right to a fair trial and casts doubt upon the impartiality of the Judges of the Chamber.²⁰ The Prosecution asserts, in particular, that the Chamber itself held that it would not hear allegations of contempt against the Accused, as this might result in it forfeiting impartiality in the case, and that the same logic ought to be applied to the allegations of contempt against the Prosecution.²¹

19. The Prosecution contends, secondly, that the Decision of 29 June 2010 was taken without the Prosecution being heard and without a correct assessment of the evidence.²²

20. The Prosecution asserts, thirdly, that the Decision of 29 June 2010 stands to hamper its ability to present Prosecution evidence and stands to delay the progress of the case.²³

21. The Prosecution then alleges that the second condition laid down in Rule 73 (B) of the Rules is met on the ground, specifically, that the errors found in the

¹⁷ [redacted].

¹⁸ Request, paras 4-15.

¹⁹ Request, paras 16-19.

²⁰ Request, paras 4-9.

²¹ Request, paras 4-5.

²² Request, paras 10-11.

²³ Request, para. 15.

Decision of 29 June 2010 must be promptly corrected to forestall the risks of a new trial and of additional delays in this one.²⁴

IV. APPLICABLE LAW

22. Rule 73 (B) of the Rules provides that “[d]ecisions 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.”

23. The purpose of a request for certification to appeal is not to establish that an impugned decision has not been decided correctly, rather it is to establish that the conditions laid down by Rule 73 (B) of the Rules have been met.²⁵

V. DISCUSSION

24. Regarding the first argument of the Prosecution concerning a fair trial and the impartiality of the Judges, the Chamber observes that the Decision of 29 June 2010 affords the Prosecution rights it would not have had if the Chamber had proceeded as the Prosecution now wishes, namely, by applying the Practice Direction Concerning Proceedings for Contempt.²⁶ In fact, although the Chamber does not consider the Direction on Contempt Proceedings applicable in this instance, had the Chamber at the very least transposed, *mutatis mutandis*, the principles of this direction, doing so would have pre-supposed a purely confidential and *ex parte* filing by the Prosecution of the Decision of 29 June 2010, which would have prevented the Prosecution from knowing about the decision and then later fashioning the various requests occasioned by this decision.

²⁴ Request, paras 18-19.

²⁵ *Milutinović* Decision on Wesley Clark, para. 4. See also *The Prosecutor v. Slobodan Milošević*, Case No. IT-05-87-T, “Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for *voir dire* proceeding”, 20 June 2005.

²⁶ See [redacted] “Practice Direction on Procedure for the Investigation and Prosecution of Contempt Before the International Tribunal (IT/227)”, adopted on 6 May 2004 (“Practice Direction on Contempt Proceedings”).

25. In addition to that, the Chamber notes that the Decision of 29 June 2010 provides that the parties will be required to disclose to the *amicus curiae* all documents and information which the *amicus curiae* may deem useful, which implies that the parties will not be excluded from the investigative proceedings and will be able to communicate with the *amicus curiae*.²⁷ Moreover, even if the Chamber did not expressly state it in the Decision of 29 June 2010, it perceives no reason that the parties should not, if they wish, disclose to the *amicus curiae* any documents they may consider useful or ask him to follow through with any measures they deem necessary.

26. The Chamber likewise considers that its impartiality is beyond question given that it ordered an investigation, explaining that it “refus[ed] to allow any doubt to fester concerning a possible violation of the rights of the Accused and concerning the investigation techniques employed by certain members of the Prosecution in this case”.²⁸ These doubts gained currency not only through the introduction of new factors indicated by some of the testimony heard during these proceedings, but also through a document disclosed by the Prosecution to the Accused, which was the Letter of 23 December 2009. This letter addresses the circumstances surrounding the interview of Witness Zoran Rankić (formerly VS-017), which took place on 4 August 2003 with Prosecution investigator [redacted], as related by interpreter [redacted], who told of certain problems that were characteristic of this interview.²⁹ The Chamber wishes to stress here that, in hopes of clarifying matters, it took into consideration the interest of justice and the obligation to seek the truth.³⁰

27. When it comes to the allegation of partiality based on the Chamber’s recusal of itself from the allegations of contempt against the Accused but not from the allegations of contempt against the Prosecution, the Chamber considered that the situation was different: as concerns the allegations against the Accused, the Chamber

²⁷ Decision of 29 June 2010, para. 32(3).

²⁸ Decision of 29 June 2010, para. 29.

²⁹ The contents of this letter were mentioned in the public session of 12 May 2010, T(F), pp. 16003-16005. [redacted].

³⁰ The Chamber thinks that its approach to the unusual situation in which it currently finds itself, concerning the allegations of contempt for intimidation and pressure on witnesses, finds support in the Appeals Judgement rendered in the *Haradinaj* Case (see *The Prosecutor v. Ramush Haradinaj, Idriz Balaj, Lahi Bahimaj*, Case IT-04-84-A, 19 July 2010 (registered 21 July 2010)).

found that it was unable to calmly adjudicate the Accused in the main proceedings after it adjudicated the Accused regarding the allegations of contempt against him. On the other hand, the only impact of the investigation ordered by the Decision of 29 June 2010 is to allow the Chamber, once the trial has ended, to proceed to conduct a final assessment of all of the exhibits admitted into evidence, both Prosecution and Defence, and more specifically, to create conditions allowing it to assess the credibility of the witnesses more effectively.

28. The Chamber finds furthermore that the fact that it hopes, at the close of the trial, to proceed in an efficient and impartial manner to assess conclusively the exhibits admitted into evidence, both Prosecution and Defence, does not render the Chamber partial and would not in any way create the impression for a third-party observer that the Chamber is partial.

29. Concerning the second argument raised by the Prosecution, according to which the Decision of 29 June 2010 was taken without the Prosecution having been heard and without a correct assessment of the evidence, the Chamber finds that it is clear from the said decision that the arguments of the Prosecution contained in its response to the Accused's motion for contempt against the Prosecution were indeed taken into consideration.³¹

30. As concerns the Prosecution's third argument, according to which the Decision of 29 June 2010 prevents it from continuing to bring evidence for the Prosecution and is impeding the progress of this case, the Chamber concludes that the Prosecution has had 120 hours to present its case and that almost all of the witnesses who appeared at the outset on the 65 *ter* List of Prosecution Witnesses (approximately 80 witnesses) have been heard, except for those who were declared unavailable under Rule 92 *quater* of the Rules, or those who were withdrawn.

³¹ Decision of 29 June 2010, paras 19-23.

31. The Chamber finds that the phase for presenting evidentiary material from the Prosecution will close once the Chamber has ruled upon the pending requests that were filed, with exceptions, prior to 1 June 2010.³²

32. The Chamber further observes that the investigation ordered by the Decision of 29 June 2010 will proceed at the same time as the case, precisely to avoid any additional slowdown in the progress of the trial.

33. The Chamber thus considers that the Prosecution has not established that the Chamber violated its right to a fair trial.

34. For all of the reasons stated above, the Chamber holds that the Decision of 29 June 2010 does not involve an issue likely to significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. The first condition of Rule 73 (B) has therefore not been satisfied.

35. The two conditions laid down in Rule 73 (B) of the Rules are cumulative, therefore it is not necessary for the Chamber to enter into the arguments submitted by the Prosecution in support of the notion that the second condition of Rule 73 (B) of the Rules has been met.

VI. DISPOSITION

36. For the foregoing reasons, pursuant to Articles 21(2) and 22 of the Statute and Rules 54, 73 (B) and 77 of the Rules,

DENIES the Request.

ORDERS that the Letter of 23 December 2003 annexed hereto be admitted into evidence.

³² See Oral Decision of 11 May 2010, fixing 1 June 2010 as the deadline for filing Prosecution requests for consideration in the 98 *bis* proceeding (Hearing of 11 May 2010 T(F), p. 15880); Oral Decision of 14 June 2010, granting the Prosecution leave to seize the Chamber of a request to admit evidence relating to Witnesses VS-026 and VS-032 after their testimony in this case, if the Chamber decides they are able to testify, or within at most a period of 3 days following the decision of the Chamber that they should not appear for the sake of testifying (Hearing of 14 June 2010, T(F), pp. 1095-16096); "Order on Prosecution Motion for Extension of Time to Seek Addition of Materials Belonging to General Mladić to the 65 *ter* List of Exhibits", 27 May 2010. The Chamber wishes to stress that the time required for translating the requests and responses explains why certain decisions are still pending.

ORDERS the Registry to assign a number to the letter.

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

 /signed/
Jean-Claude Antonetti
Presiding Judge

Done this third day of December 2010
At The Hague
The Netherlands

[Seal of the Tribunal]