



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 Nos IT-02-54-Misc.5
&
IT-02-54-Misc.6
Date: 18 July 2011
Original: English

IN A SPECIALLY APPOINTED CHAMBER

Before: Judge Bakone Justice Moloto, Presiding
Judge Alphons Orié
Judge Guy Delvoie

Registrar: Mr John Hocking

Decision of: 18 July 2011

PROSECUTOR

v.

SLOBODAN MILOŠEVIĆ

PUBLIC

DECISION ON THE INITIATION OF CONTEMPT INVESTIGATIONS

Office of the Prosecutor

Mr Alan Tieger
Ms Hildegard Uertz-Retzlaff
Mr Mathias Marcussen

The Accused in Case no. IT-95-5/18-T

Radovan Karadžić

Standby Counsel in Case no. IT-95-5/18-T

Richard Harvey

The Accused in Case no. IT-03-67-T

Vojislav Šešelj

I. Procedural history

1. On 28 January 2011, the Accused Radovan Karadžić requested the President of the Tribunal to, *inter alia*, consider appointing a Trial Chamber to determine whether an *amicus curiae* should be appointed pursuant to Rule 77 (C) (ii) of the Tribunal's Rules of Procedure and Evidence ("Rules") to investigate any interference with the proper administration of justice caused by the revelation of Slobodan Milošević's private thoughts, legal strategy, and health issues.¹ Karadžić submits that through a revelation by *WikiLeaks* it has become clear that the former Commanding Officer of the United Nations Detention Unit, Timothy McFadden, revealed personal information about Slobodan Milošević to the United States Government.²
2. On 9 February 2011, the Accused Vojislav Šešelj requested the President of the Tribunal to take the appropriate action in relation to instituting criminal proceedings against Timothy McFadden.³ Šešelj appended newspaper clippings to his submission which relied on the *WikiLeaks* information discussing personal information about Slobodan Milošević.⁴ Šešelj argues that his request has a strong basis in Rule 77 (A) (ii) of the Rules and that McFadden disclosed confidential information in violation of Rule 11 of the Rules Governing the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal ("Rules of Detention").⁵
3. On 11 March 2011, the President of the Tribunal ordered that this Chamber examine the requests that a determination be made as to whether proceedings pursuant to Rule 77 (C) of the Rules should be initiated.⁶

II. Applicable law

4. Rule 77 of the Rules provides, in relevant parts:

(A) The Tribunal in the exercise of its inherent power may hold in contempt those who knowingly and wilfully interfere with its administration of justice, including any person who

(i) being a witness before a Chamber, contumaciously refuses or fails to answer a question;

¹ *Prosecutor v. Radovan Karadžić*, Case no. IT-95-5/18-T, Request for Reversal of Decision to Monitor Telephone Calls, 28 January 2011 ("Karadžić Request"), para. 14.

² Karadžić Request, paras 2, 10-12, 14, 26-27, Annex B.

³ *Prosecutor v. Vojislav Šešelj*, Case no. IT-03-67-T, Criminal Report Against the former UN Detention Unit Commanding Officer Timothy McFadden, 9 February 2011 ("Šešelj Request"), paras 1, 5-6.

⁴ Šešelj Request, Appendix 1.

⁵ Šešelj Request, paras 5, 7. The Rules of Detention were most recently amended on 21 July 2005 and currently bear document number IT38/Rev.9.

⁶ Order Assigning a Specially Appointed Chamber, 11 March 2011 (Confidential and *Ex Parte*); Order Assigning Judges to Decide a Motion for the Initiation of a Contempt Investigation, 11 March 2011 (Confidential and *Ex Parte*). On the basis of the information provided by Karadžić and Šešelj, the Chamber will exclusively deal with whether there are reasons to believe that Mr McFadden committed contempt of court.

(ii) discloses information relating to those proceedings in knowing violation of an order of a Chamber;

(iii) without just excuse fails to comply with an order to attend before or produce documents before a Chamber;

(iv) threatens, intimidates, causes any injury or offers a bribe to, or otherwise interferes with, a witness who is giving, has given, or is about to give evidence in proceedings before a Chamber, or a potential witness; or

(v) threatens, intimidates, offers a bribe to, or otherwise seeks to coerce any other person, with the intention of preventing that other person from complying with an obligation under an order of a Judge or Chamber.

[...]

(C) When a Chamber has reason to believe that a person may be in contempt of the Tribunal, it may:

(i) direct the Prosecutor to investigate the matter with a view to the preparation and submission of an indictment for contempt;

(ii) where the Prosecutor, in the view of the Chamber, has a conflict of interest with respect to the relevant conduct, direct the Registrar to appoint an *amicus curiae* to investigate the matter and report back to the Chamber as to whether there are sufficient grounds for instigating contempt proceedings; or

(iii) initiate proceedings itself.

5. According to Rule 11 of the Rules of Detention, “all information concerning detainees shall be treated as confidential and made accessible only to the detainee, his counsel and persons authorized by the Registrar”.

6. Rule 34 (C) of the Rules of Detention states that “information related to the physical and mental health of detainees shall be kept confidential by the Registrar”.

7. According to Regulation 1.2 (i) of the United Nations Staff Regulations,

[s]taff members shall exercise the utmost discretion with regard to all matters of official business. They shall not communicate to any Government, entity, person or any other source any information known to them by reason of their official position that they know or ought to have known has not been made public, except as appropriate in the normal course of their duties or by authorization of the Secretary-General. These obligations do not cease upon separation from service.⁷

8. According to Rule 1.2 (d) of the United Nations Staff Rules,

[d]isciplinary procedures set out in article X of the Staff Regulations and chapter X of the Staff Rules may be instituted against a staff member who fails to comply with his or her obligations and the standards of conduct set out in the Charter of the United Nations, the Staff

⁷ The current United Nations Staff Regulations were promulgated on 1 January 2011 and bear document number ST/SGB/2011/1.

Regulations and Staff Rules, the Financial Regulations and Rules and administrative issuances.⁸

III. Discussion

9. The information allegedly revealed to government officials of the United States of America by Mr McFadden concerns Slobodan Milošević's personal preferences, private communications with his wife, views about his advisors, and information about his health. Having consulted the relevant Rules and Regulations, the Chamber is of the view that such information is to be treated confidentially by those persons having access to it. Furthermore, as a staff member of the Tribunal, Mr McFadden was under a duty not to share confidential information with any Government, entity, person or any other source. Accordingly, the Chamber finds that the information tends to show that Mr McFadden may have breached his duty not to disclose confidential information.

10. The Chamber will now analyse whether this possible breach of confidentiality interfered with the Tribunal's administration of justice pursuant to Rule 77 (A) of the Rules.

11. The *actūs rei* of contempt of the Tribunal are listed in Rule 77 (A) of the Rules. None of the enumerated acts apply to the present situation. However, the list of acts contained in Rule 77 (A) (i)-(v) of the Rules is not exhaustive, merely representing examples of acts interfering with the Tribunal's administration of justice.⁹ Accordingly, contempt can also be committed through knowingly and wilfully interfering with the Tribunal's administration of justice in other ways. The meaning of the term "administration of justice" in Rule 77 of the Rules is to be interpreted in light of the enumerated *actūs rei* in Rule 77 (A), which concern matters closely related to the functioning of the judicial proceedings before the Tribunal. In addition, the Chamber recalls that the Tribunal possesses an inherent jurisdiction to deal with contempt, deriving from its judicial function, to ensure that its exercise of jurisdiction is not frustrated and that its basic *judicial functions* are safeguarded.¹⁰

12. In the present case, the information allegedly revealed concerns three main categories: personal matters, information on Milošević's health, and Milošević's alleged views about his advisors. The specific information allegedly revealed to the United States Government in relation to personal matters, for example what type of books Milošević liked

⁸ The current United Nations Staff Rules were promulgated on 1 January 2011 and bear document number ST/SGB/2011/1.

⁹ See *In the Case Against Florence Hartmann*, Case no. IT-02-54-R77.5, Judgement on Allegations of Contempt, 14 September 2009 ("Hartmann Judgement"), para. 19; *Prosecutor v. Zlatko Aleksovski*, Case no. IT-95-14/1-AR77, Judgement on Appeal by Anto Nobile Against Finding of Contempt, 30 May 2001, para. 39.

¹⁰ Emphasis added; see *Prosecutor v. Duško Tadić*, Case no. IT-94-1-A-R77, Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 January 2000, para. 13 and references cited therein.

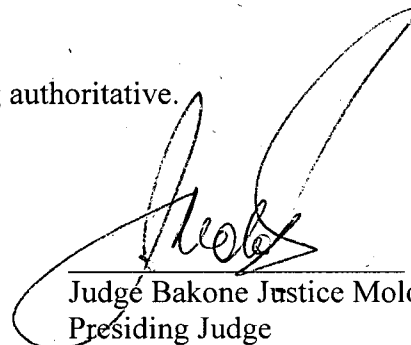
to read or how often he spoke to his wife, is irrelevant to the judicial proceedings of the Tribunal. The category of health-related matters or that of an accused's views about his advisors could have an impact on the judicial proceedings. The specific information allegedly revealed to the United States Government related to these categories, for example that despite Milošević's public disdain for the *amici curiae*, his legal associates often liaised with them or that Milošević's medical problems worsened under stress or that he refused certain recommendations by doctors, is of such general nature however that its disclosure is not of a kind that interferes with the Tribunal's administration of justice. The Chamber therefore finds no reason to believe that Mr McFadden's conduct interfered with the Tribunal's administration of justice pursuant to Rule 77 (A) of the Rules.¹¹

13. The Chamber stresses however that even though the alleged conduct does not fall within the ambit of Rule 77 of the Rules, it has carefully considered the matter and is cognizant that the alleged conduct may bring the institution of the International Tribunal into disrepute. Considering that Mr McFadden may have breached a duty, the Chamber clarifies that the mere fact that the alleged conduct does not fall within the ambit of Rule 77 does not exclude other remedies to address the matter. The matter can be dealt with pursuant to the UN Staff Rules and Regulations, by any internal measures to prevent repetition of such conduct, and/or by any external judicial or non-judicial measures.

IV. Disposition

14. For the foregoing reasons, the Chamber **DECLINES** to make use of its powers pursuant to Rule 77 (C) of the Rules.

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



Judge Bakone Justice Moloto
Presiding Judge

Dated this eighteenth day of July 2011
At The Hague
The Netherlands

[Seal of the Tribunal]

¹¹ It follows that Šešelj's claim of a violation of Rule 77 (A) (ii) of the Rules similarly fails. Furthermore, the claim seemingly ignores that Rule 77 (A) (ii) requires a violation of a specific Chamber order.
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