

IT-03-67-AR77.2
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02 September 2008

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**UNITED
NATIONS**



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-AR77.2
Date: 2 September 2008
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

Order of: 2 September 2008

PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC

**ORDER ISSUING A PUBLIC REDACTED VERSION OF
“DECISION ON THE PROSECUTION’S APPEAL AGAINST
THE TRIAL CHAMBER’S DECISION OF 10 JUNE 2008”**

Office of the Prosecutor
Mr. Daryl Mundis

Counsel for the Accused
Mr. Vojislav Šešelj

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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 (“International Tribunal”),

NOTING the confidential “Decision on the Prosecution’s Appeal Against the Trial Chamber’s Decision of 10 June 2008” (“Decision”), rendered by the Appeals Chamber on 25 July 2008;


CONSIDERING Article 21(2) of the Statute of the International Tribunal and the general importance of transparency of the proceedings of the International Tribunal;

CONSIDERING that the Decision clarifies important legal issues and that it would be in the interests of justice to render a public redacted version of the Decision;

HEREBY ISSUES a public redacted version of the Decision.

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

Done this 2nd day of September 2008,
At The Hague,
The Netherlands.



Judge Fausto Pocar
Presiding

[Seal of the International Tribunal]

**UNITED
NATIONS**



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-AR77.2

Date: 25 July 2008

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: 25 July 2008

PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC REDACTED VERSION

**DECISION ON THE PROSECUTION'S APPEAL AGAINST
THE TRIAL CHAMBER'S DECISION OF 10 JUNE 2008**

Office of the Prosecutor:

Mr. Daryl Mundis

Counsel for the Accused:

Mr. Vojislav Šešelj

1. 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) is seized of a confidential appeal by the Office of the Prosecutor (“Prosecution”)¹ against the confidential “Decision on Motions by the Prosecution and the Accused to Instigate Contempt Proceedings Against Ms Dahl (From the Office of the Prosecutor) and Mr Vučić (Associate of the Accused)” (“Impugned Decision”), rendered by Trial Chamber III (“Trial Chamber”) on 10 June 2008.²

I. BACKGROUND

2. [redacted], pursuant to Rule 77 of the Rules of Procedure and Evidence of the International Tribunal (“Rules”), the Prosecution requested an order from the Duty Judge directing the Prosecution to investigate the possibility that Aleksandar Vučić (“Vučić”), an associate of Vojislav Šešelj, committed contempt of the Tribunal.³ On 30 January 2008, the Trial Chamber granted the Prosecution’s request, [redacted].⁴ The Trial Chamber further held that the Prosecution had a conflict of interest with respect to the relevant conduct and accordingly directed the Registry, pursuant to Rule 77(C)(ii) of the Rules, “to appoint an *amicus curiae* to investigate the case and to report back to the Chamber as to whether there are sufficient grounds for instigating contempt proceedings.”⁵ After the *amicus curiae* filed the report on 17 April 2008,⁶ the Trial Chamber ordered the Republic of Serbia to organize additional hearings by [redacted] to complete the report.⁷ Reports from [redacted] on the requested hearings were filed confidentially and *ex parte* [redacted].⁸ On 10 June 2008, the Trial Chamber rendered the Impugned Decision, finding, *inter alia*, that based on the conclusions of the *amicus curiae*, sufficient grounds did not exist to instigate

¹ Confidential Prosecution’s Appeal Brief, 26 June 2008 (“Appeal”). The Appeals Chamber notes that the Appeal was received by the Registry on 25 June 2008.

² The Appeals Chamber notes that a public, redacted version of the Impugned Decision was issued on 8 July 2008 and that the English version was filed on 18 July 2008.

³ [redacted]. See also Appeal, para. 10.

⁴ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, confidential Decision on Motions by the Prosecution and the Accused to Implement Rule 77 of the Rules of Procedure and Evidence, 30 January 2008 (“Decision of 30 January”), para. 38.

⁵ Decision of 30 January, para. 38.

⁶ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, *ex parte* Report of Amicus Curiae’s Findings About the Contempt Allegations Against Mrs Christine Dahl and Mr Aleksandar Vučić, 17 April 2008 (“Amicus Curiae Report”). See also Impugned Decision, para. 7.

⁷ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, confidential and *ex parte* Order for Additional Inquiries further to the Report of the Amicus Curiae, 24 April 2008 (“Additional Inquiries”). See also Impugned Decision, para. 8.

⁸ Impugned Decision, para. 9.

contempt proceedings against Vučić.⁹ The Prosecution filed both a Notice of Appeal and its Appeal against the Impugned Decision on 25 June 2008.¹⁰

II. STANDARD OF REVIEW

3. The Appeals Chamber recalls that decisions relating to the general conduct of trial proceedings are matters within the discretion of the Trial Chamber.¹¹ The Impugned Decision, which concerns whether sufficient grounds exist to instigate contempt proceedings against Vučić, is such a discretionary decision to which the Appeals Chamber must accord deference. This deference is based on the recognition by the Appeals Chamber of “the Trial Chamber’s organic familiarity with the day-to-day conduct of the parties and practical demands of the case.”¹²

4. In order to successfully challenge a discretionary decision, a party must demonstrate that the Trial Chamber has committed a “discernible error” resulting in prejudice to that party.¹³ The Appeals Chamber will only overturn a Trial Chamber’s discretionary decision where it is found to be (1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber’s discretion.¹⁴ The Appeals Chamber will also consider whether the Trial Chamber has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations in reaching its decision.¹⁵

III. APPLICABLE LAW

5. Rule 77(A) of the Rules provides, in relevant part, that

⁹ Impugned Decision, para. 48.

¹⁰ Confidential Prosecution’s Notice of Appeal, 25 June 2008.

¹¹ See *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber’s Decision on the Assignment of Defense Counsel, 1 November 2004 (“*Milošević* Decision of 1 November 2004”), para. 9.

¹² See *Prosecutor v. Zdravko Tolimir et al.*, Case No. IT-04-80-AR73.1, Decision on Radivoje Miletic’s Interlocutory Appeal Against the Trial Chamber’s Decision on Joinder of Accused, 27 January 2006, para. 4. See also *Milošević* Decision of 1 November 2004, para. 9.

¹³ See *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR73.4, Decision on Appeal Against the Trial Chamber’s Decision (No. 2) on Assignment of Counsel, 8 December 2006 (“*Šešelj* Decision of 8 December 2006”), para. 18 (citing *Prosecutor v. Mićo Stanišić*, Case No. IT-04-79-AR65.1, Decision on Prosecution’s Interlocutory Appeal of Mićo Stanišić’s Provisional Release, 17 October 2005, para. 6).

¹⁴ *Šešelj* Decision of 8 December 2006, para. 18 (citing *Milošević* Decision of 1 November 2004, para. 9).

¹⁵ See *Prosecutor v. Rasim Delić*, Case No. IT-04-83-AR73.1, Decision on Rasim Delić’s Interlocutory Appeal Against Trial Chamber’s Oral Decisions on Admission of Exhibits 1316 and 1317, 15 April 2008, para. 6. See also *Šešelj* Decision of 8 December 2006, para. 18; *Milošević* Decision of 1 November 2004, para. 9; *Prosecutor v. Milošević*, Case Nos. IT-99-37-AR73, IT-01-50-AR73, and IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002 (“*Milošević* Decision of 18 April 2002”), para. 5.

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

[...]

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

[...]

6. Under Rule 77(C) of the Rules, a Chamber that “has reason to believe that a person may be in contempt of the Tribunal” 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.

7. Pursuant to Rule 77(D) of the Rules, if a Chamber considers that there are sufficient grounds to proceed against a person for contempt, it may:

- (i) in circumstances described in paragraph (C)(i), direct the Prosecutor to prosecute the matter; or
- (ii) in circumstances described in paragraph (C)(ii) or (iii), issue an order in lieu of an indictment and either direct *amicus curiae* to prosecute the matter or prosecute the matter itself.

8. Rule 77(J) of the Rules provides that “[a]ny decision rendered by a Trial Chamber” under Rule 77 is subject to appeal. The Appeals Chamber has interpreted this provision as allowing for appeals against decisions disposing of the contempt case only.¹⁶

IV. DISCUSSION

A. Preliminary Issue

9. Before addressing the merits of the Appeal, the Appeals Chamber will address the preliminary issue of whether the Prosecution has the right to appeal the Impugned Decision under Rule 77(J) of the Rules.¹⁷

¹⁶ See *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR77.1, Decision on Vojislav Šešelj’s Appeal Against the Trial Chamber’s Decision of 19 July 2007, 14 December 2007, p. 2.

¹⁷ Appeal, paras 12-18.

10. The Prosecution submits that an appeal as of right lies from the Impugned Decision since it was rendered under Rule 77(D) of the Rules, and pursuant to Rule 77(J), any decision rendered by the Trial Chamber under Rule 77 is subject to appeal.¹⁸ The Prosecution notes that the Appeals Chamber has interpreted Rule 77(J) as applying only to decisions disposing of the contempt case and asserts that the Trial Chamber disposed of the contempt case within the meaning of this provision when it decided not to proceed against Vučić for contempt.¹⁹

11. The Prosecution also argues that it has standing to appeal the Impugned Decision because it directly affects the fairness of the proceedings.²⁰ In this regard, the Prosecution asserts that the Trial Chamber's failure to ensure that protective measures are respected or to prosecute any breach of such measures undermines the Prosecution's ability to present its case.²¹ The Prosecution also asserts that when a Trial Chamber incorrectly applies the governing legal standard to a Prosecution request to initiate contempt proceedings, the Prosecution has an interest in ensuring that the legal error is corrected and that the contempt is prosecuted.²²

12. The Appeals Chamber considers that a decision dismissing a request to initiate contempt proceedings is a decision disposing of the contempt case within the meaning of Rule 77(J) of the Rules. The Appeals Chamber notes that in the Impugned Decision, the Trial Chamber held that sufficient grounds did not exist to instigate contempt proceedings against Vučić, which in effect dismissed the Prosecution Request to initiate contempt proceedings.²³ The Appeals Chamber accordingly finds that an appeal as of right lies from the Impugned Decision under Rule 77(J) of the Rules.

13. The Appeals Chamber also considers that a party in proceedings before the International Tribunal has the right to request the Trial Chamber to exercise its discretionary power to initiate contempt proceedings for alleged conduct that, if proven, would harm that party's right to a fair trial. The Appeals Chamber further considers that the right to make such a request, by implication, gives rise to a corresponding right to challenge any incorrect application of the legal standard governing such requests. Accordingly, the Appeals Chamber finds that, in light of the Prosecution's submission that the Trial Chamber applied an incorrect legal standard when considering the Prosecution Request, which denied the Prosecution a fair opportunity to present its

¹⁸ Appeal, para. 12, citing Impugned Decision, para. 51.

¹⁹ Appeal, paras 13-14.

²⁰ Appeal, para. 18.

²¹ Appeal, para. 18.

²² Appeal, para. 18.

²³ Impugned Decision, para. 51.

case and thus implicated the Prosecution's right to a fair trial,²⁴ the Prosecution can challenge the Impugned Decision under Rule 77(J) of the Rules.

B. Appeal

14. The Prosecution submits that in disposing of contempt proceedings against Vučić, the Trial Chamber incorrectly applied the governing legal standard.²⁵ Specifically, the Prosecution asserts that the Trial Chamber erred in interpreting the "sufficient grounds" standard under Rule 77(D) of the Rules to require a finding of contempt "beyond reasonable doubt" when it only requires a finding of a *prima facie* case of contempt.²⁶ The Prosecution argues that the evidence before the Trial Chamber established a *prima facie* case that Vučić disclosed the identity of witness [redacted] in knowing violation of a Chamber order, and that consequently, had the Trial Chamber applied the correct legal standard, it would have found that there are sufficient grounds to proceed against Vučić for contempt.²⁷ The Prosecution accordingly requests the Appeals Chamber to: (1) find that there are sufficient grounds to prosecute Vučić for contempt; (2) remand the matter to the Trial Chamber for issuance of an order in lieu of an indictment; and (3) either direct the *amicus curiae* to prosecute the matter or prosecute the matter itself.²⁸

15. The Appeals Chamber notes that in the Impugned Decision, the Trial Chamber considered the *amicus curiae*'s conclusion that sufficient grounds did not exist to instigate contempt proceedings against Vučić because although "the material ground of contempt in accordance with Rule 77(A)(ii) of the Rules has been proven," the mental element of contempt had not been "establish[ed]."²⁹ The Trial Chamber further considered the *amicus curiae*'s conclusion that in order to establish the mental element of contempt, "it would have to be proven that Mr Vučić had effective knowledge of the protected status of Witness [redacted]."³⁰ The Trial Chamber concluded that "[a]s indicated by the *amicus curiae* [...], the Chamber does not have sufficient elements to determine whether Mr Vučić had effective knowledge of the protected witness status of [redacted] and thus deliberately revealed in public the fact that Witness [redacted] was to testify before the Tribunal as a witness for the Prosecution."³¹

²⁴ Appeal, paras 7, 18, and 35.

²⁵ Appeal, paras 6, 23, 27, and 35.

²⁶ Appeal, paras 6, 23-27, and 35.

²⁷ Appeal, paras 27-34.

²⁸ Appeal, paras 8 and 35.

²⁹ Impugned Decision, paras 39, 40, and 48.

³⁰ Impugned Decision, para. 40.

³¹ Impugned Decision, para. 48.

16. The Appeals Chamber considers that in finding that it did not have sufficient elements “to determine” whether Vučić committed contempt of the Tribunal, based on the conclusions of the *amicus curiae* that the mental element of contempt had not been “establish[ed]” and that it would have to be “proven” that Vučić had effective knowledge that [redacted] was a protected witness, the Trial Chamber required a final finding of contempt. The Appeals Chamber recalls, however, that the “sufficient grounds” standard under Rule 77(D) of the Rules requires the Trial Chamber only to establish whether the evidence before it gives rise to a *prima facie* case of contempt of the Tribunal and not to make a final finding on whether contempt has been committed.³² The Appeals Chamber accordingly finds that the Trial Chamber applied an incorrect legal standard when considering the Prosecution Request, which amounts to a discernible error.

V. DISPOSITION

17. On the basis of the foregoing, the Appeals Chamber **GRANTS** the Appeal in part and **REMANDS** the Impugned Decision to the Trial Chamber to reconsider whether sufficient grounds exist to proceed against Vučić for contempt in light of the correct legal standard.

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

Done this 25th day of July 2008,
At The Hague,
The Netherlands.

Judge Fausto Pocar
President

[Seal of the Tribunal]

³² See *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-T, Order Concerning Allegations Against Milka Maglov, 15 April 2003, p. 3. See also *Prosecutor v. Josip Jović*, Case Nos. IT-95-14 & 14/2-R77, Decision on Review of Indictment and Order for Non-disclosure, 12 September 2005, pp. 1-2; *Prosecutor v. Ivica Marijačić and Markica Rebić*, Case No. IT-95-14-R77.2, Decision on Review of Indictment, 26 April 2005, pp. 1-2