

## COMMENTARY

### **Compromising International Criminal Justice:**

### **How Šešelj Runs His Trial**

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Even before it truly started, the prosecution of Serbian nationalist Vojislav Šešelj seemed to reach a climax. Engaged on a collision course with the ICTY Trial Chamber, the accused began a hunger strike on 10 November 2006 until various demands of his were met, the most important of them being reinstating his full right to self-representation entailing – in his view – dismissal of stand-by counsel. The matter of self-representation constituted an ongoing struggle between the accused and the Trial Chamber. Because of Šešelj's obstructionist and offensive conduct, varying from insults to ignoring court orders and consistent non-compliance with formal requirements regarding the submission of motions, the Trial Chamber put the accused's defence increasingly in the hands of court-appointed counsel. This started with the imposition of standby counsel on 9 May 2003. The particular characteristic of standby counsel is that he or she assists the accused, where necessary and appropriate, but that the latter remains in control of his own defence. However, an accused at the ICTY may, in exceptional circumstances, also be assigned counsel, who will then be in full charge of the defence, leaving to the accused only a marginal role in his own defence. The ICTY Trial Chamber took this drastic measure on 21 August 2006, because the conduct of the accused led 'the Chamber to conclude that there is a strong indication that his self-representation may substantially and persistently obstruct the proper and expeditious conduct of a fair trial'. On appeal, this decision was reversed on 20 October 2006, exclusively on the ground of failure by the Trial Chamber to issue a formal warning to the accused that his right to self-representation would be revoked in case of continuing misconduct. Following this decision, the Trial Chamber restored on 25 October the status quo prior to the assignment of counsel, which is self-representation with standby counsel to assist or, when necessary, to take over. Šešelj expressed fierce opposition to this decision, as he interpreted the Appeals Chamber reversal as a full restoration of the situation of self-representation, without any role for standby counsel. This was – among

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other things – reason for him to go on hunger strike. The hunger strike was, along with other instances of obstructionist behaviour, reason for the Trial Chamber to increase the role of counsel and – after several formal warnings – it decided to impose counsel on Šešelj on 27 November 2006.

Against the above background and with the rapidly deteriorating health of the accused the authorities of the Tribunal were not to be envied, to say the least. Urgent action seemed required, but the decisions that followed – the Trial Chamber's decision of 6 December and the Appeals Chamber's intervention of 8 December – leave much to be desired. Especially the Appeals Chamber's decision is of lamentable quality and distorts the law in an effort to achieve the desired result. The implications for the credibility and legitimacy of the ICTY in the long run have yet to be determined, but the following conclusion may be drawn at this stage: Šešelj runs in fact his own trial and by doing so seems to have come closer to his clearly stated purpose after having voluntarily surrendered into the jurisdiction of the Tribunal, namely 'shatter the Tribunal in The Hague ...'.

Let us start with the 6 December 'force-feed order'. Whereas the title of this decision seems to reveal great urgency, the actual disposition leaves a considerable discretion to the Dutch authorities. The Trial Chamber in fact orders the Netherlands to provide medical services, which may include drip-feeding, but only to the extent that such services are not contrary to compelling internationally accepted standards of medical ethics or binding rules of international law. It is quite disconcerting that the analysis of these international standards and rules is left to the host-state and not performed by the Trial Chamber itself. The latter as an international tribunal is best placed to do so. In the decision one encounters some general and also unfortunate considerations. The most troubling is that the order is essentially based on the Trial Chamber's 'responsibility to contribute to the performance of the Tribunal's judicial role in furtherance of the mission assigned to it by the international community'. In other words, Šešelj must be kept alive in order for his trial to continue. From a human rights perspective this is a highly questionable position. Rather, as follows from ECHR case law, force-feeding may amount to inhuman or degrading treatment unless it is done to meet a state's positive obligations to ensure the right to life. This should be mentioned as the primary, even sole reason, to order drip-feeding. Of course, the Registry carries responsibility for the persons in detention, but intervention by the Trial Chamber to ensure the right to life is fully appropriate as any drip-feeding order requires a judicial basis. As to the medical ethical standards, the order contains a puzzling reference to the 2006 Declaration of the World Medical Association (WMA), that – according to the Chamber – should be taken into account by the Dutch authorities. However, why has the Chamber then failed to mention and incorporate in its order the unequivocal language of section 21 of the WMA Declaration on Hunger Strikers which reads as follows: 'Forcible feeding is never ethically acceptable'? More concretely, does this unequivocal ethical standard not make implementation of the order unacceptable? One would very much like to be informed in more detail of the Chamber's views on these thorny but highly relevant issues.

The Trial Chamber thus has fallen short of its primary duty to offer an adequate legal analysis underlying the 'urgent order' and has inappropriately put highly complex legal issues and ethical dilemmas on the plate of the host State.

The latter was prevented from taking any action by the Appeals Chamber decision of 8 December 2006, in which Šešelj's right to self-representation was fully restored. As a result of this decision, the accused ended his hunger strike. While the decision should, according to the Appeals Chamber, not be 'construed as evidence ... rewarding Šešelj's behaviour', there simply is no other way to view it. It is absolutely clear that without the urgency of the accused's rapidly deteriorating health the Appeals Chamber would not have intervened. The result is a heavily compromised decision with lamentable legal reasoning. The Appeals Chamber's central point appears to be that the intention of its previous decision was to give the accused a clean slate, entailing also dismissal of standby counsel. However, this does not transpire from the 20 October decision. Rather, the gist of that decision was that Šešelj was just one official warning away from complete take over of his defence. In other words, he should be pleased that the status quo of standby counsel was the result of that appeal. Attributing any other intention to that decision is simply distorting the facts and the law. The Appeals Chamber would have been commended for simply admitting that a new and urgent situation arose which might call for a different approach.

The broader implications of the decision are damaging from several perspectives. First, the Tribunal demonstrates its susceptibility to blackmail by an accused. What is next? Other accused may follow this and Šešelj may try the hunger strike on other occasions when decisions are taken he does not like. Second, the law on self-representation is turned on its head. It seemed that case law was emerging according to which Trial Chambers enjoy substantive discretion to curtail self-representation with a view to protect an effective defence and to preserve the integrity and progress of the proceedings. The question now is whether the Appeals Chamber is moving to a broader scope of the right to self-representation, based on – among other things – the difficult position of defence counsel representing an unwilling client or whether this is a momentary lapse of reason compelled by the urgent circumstances of the case and soon to be forgotten. The latter view is in all respects to be preferred.