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-T

Date: 27 April 2009

Original: ENGLISH
French

IN TRIAL CHAMBER III

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

Acting Registrar: **Mr John Hocking**

Order of: **27 April 2009**

THE PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC

DECISION ON THE ACCUSED'S MOTION CONCERNING THE RESTRICTIONS ON HIS COMMUNICATION WITH RADOVAN KARADŽIĆ

The Office of the Prosecutor

Mr Daryl Mundis
Ms Christine Dahl

The Accused

Mr Vojislav Šešelj

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");

SEIZED of the Motion by Vojislav Šešelj ("Accused") to lift the restrictions on his communication with Radovan Karadžić ("Motion"), filed on 3 February 2009,[1]

NOTING the submissions presented by the Registry on 13 February 2009 ("Submissions")[2] pursuant to Rule 33 (B) of the Rules of Procedure and Evidence ("Rules"),

CONSIDERING that in the Motion, the Accused argues that since the arrival of Radovan Karadžiat the United Nations Detention Unit ("Detention Unit") on 30 July 2008, he has been banned from communicating with Karadžić and, consequently, he requests that, in full respect of his right to a fair trial and his right to have adequate time and facilities for the preparation of his defence, these restrictions be lifted so that he may speak with Mr Karadžić and thus determine whether it is appropriate to call Mr Karadžić as a defence witness,[3]

CONSIDERING that the Accused adds that his motion is not only justified but also urgent, considering the fact that he is banned from having privileged communications with his legal advisors and that it is virtually impossible for his associates to contact Mr Karadžić,[4]

CONSIDERING that the Accused also points out that insofar as the current restrictions jeopardise his right to a fair trial, the Chamber is competent to rule on his Motion,[5]

---

[1] Original in BCS, English translation titled "Motion by Professor Vojislav Šešelj for the Trial Chamber to Lift the Prohibition on Communication with Radovan Karadžić", submitted on 15 January 2009 and filed on 3 February 2009.
[2] Registry Submission Pursuant to Rule 33 (B) Regarding the Accused's Motion Concerning his Communication with Radovan Karadžić, submitted on 12 February 2009 and filed on 13 February 2009.
[3] Motion, pp. 3-4.
[4] Motion, p. 4.
[5] Motion, p. 4.

CONSIDERING that in its Submissions, the Registry argues that the Accused did not follow the prescribed procedure and wrongly seized the Chamber when in fact, pursuant to Rules 80 and 81 of the Rules of Detention[6] and the Regulations for the Establishment of a Complaints Procedure for Detainees,[7] he should have submitted a complaint to the Commanding Officer of the Detention Unit, and if necessary, submitted a written complaint to the Registrar, who has a duty to immediately inform the President who, pursuant to the Regulations for the Establishment of a Complaints Procedure for Detainees, is the competent authority to examine a complaint concerning detention,[8]

CONSIDERING that the Registry notes that in any event, no segregation measures or communications restrictions have been imposed in this case and that the Accused may request that the authorities of the Detention Unit arrange a meeting with another accused, but that for this purpose he must file a reasoned request to the Commanding Officer of the Detention Unit[9] in accordance with the provisions of the Regulations to Govern the Supervision of Visits to and Communications with Detainees,[10]

CONSIDERING that the Registry indicates moreover that even if segregation measures were imposed, it could nevertheless organise a meeting between the Accused and another detainee in order to enable the Accused to evaluate whether the detainee should be called as a defence witness, specifying that in such a case, additional measures would need to be adopted to safeguard the legitimacy and integrity of such a meeting,[11]

CONSIDERING that in its Decision of 9 April 2009,[12] the Appeals Chamber reaffirmed that a Trial Chamber cannot appropriate for itself a power which is

[6] Rules Governing the Detention of Persons Awaiting Trial or Appeal before the Tribunal or otherwise Detained on the Authority of the Tribunal (IT/38REV.9), 21 July 2005 ("Rules of Detention").
[7] Regulations for the Establishment of a Complaints Procedure for Detainees (IT/96), April 1995 ("Regulations on Filing a Complaint by a Detainee").
[8] Submissions, paras. 3-5.
[9] Observations, paras. 7-8.
[10] (IT-98-REV.3), 22 July 1999.
[11] Observations, para. 9.
[12] Decision on the Registry Submission Pursuant to Rule 33 (B) Following the President's Decision of 17 December 2008, 9 April 2009 ("Decision of 9 April 2009").

conferred elsewhere, and may only step in under its inherent power to ensure that proceedings are fair once all available remedies have been exhausted,[13]

CONSIDERING that in this case, the Chamber notes that Rules 80 and 81 of the Rules of Detention recognise a detainee's right to file a complaint concerning the conditions of detention and that this procedure is described in more detail in Articles 1 to 7 of the Regulations for the Establishment of a Complaints Procedure for Detainees,

CONSIDERING that there is therefore express provision for remedies against any decision relating to detention,

CONSIDERING moreover that it is not disputed that the Accused did not exhaust all the remedies thus established,

FOR THE FOREGOING REASONS, pursuant to Rules 80 and 81 of the Rules of Detention and Articles 1 to 7 of the Regulations for the Establishment of a Complaints Procedure for Detainees

FINDS that at this stage it is not for this Trial Chamber to examine the present Motion.

The separate opinion of Judge Antonetti is filed on the same day as this decision.

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

/signed/
Jean-Claude Antonetti
Presiding Judge

Done this twenty-seventh day of April 2009
At The Hague
The Netherlands

[Seal of the Tribunal]

[13] Decision of 9 April 2009, paras. 16, 20-21.

SEPARATE OPINION OF JUDGE ANTONETTI

I agree with the analysis of this decision, which finds that the Chamber is not competent at this stage to deal with the Accused's Motion, in accordance with the Appeals Chamber's decision of 9 April 2009.

Consequently, the challenge to a ban issued by the head of the prison must be made before the competent authorities, namely the Registry and the President of the Tribunal.

Undeniably, the Appeals Chamber did not make a distinction between the **administrative function** of the President of the Tribunal and the **jurisdictional function** of a Chamber seized of **the same issue**.

The ban on communication between a self-representing detainee and a fellow detainee for the purpose of the fellow detainee serving as a defence witness, if it falls within the discretionary power of the administrative authority (the Registrar or the Tribunal President) when the full exercise of the rights of the Defence is at issue, poses a genuine problem at the legal level.

The Statute does not allow the **Registrar** or any other administrative authority to interfere with the scope of application of Article 21 of the Statute, notably in the context of restriction on these rights. The Appeals Chamber adopted another approach, being directly seized by the Registrar, although Article 25 of the Statute specifies that the sole persons who are authorised to file appeals are:

- **Persons convicted**
- **The Prosecutor**

The Registrar is not on this list.

The fact that Article 15 of the Statute provides that Rules will govern appeals does not, in my view allow those Rules to run counter to tenor of Article 25 because of the principle of the hierarchy of legal norms established by legal theoretician Hans KELSEN (*Pure Theory of Law*).

Considering the Appeals Chamber's decision, it would have been unrealistic to render any other decision, unless to waste both time and energy. This is the sole reason why I agree with this decision, affirming that it is necessary to respect the following principle: after the administrative authority has been seized, in accordance with the decision of the Appeals Chamber, there will always be a possibility for the Accused to seize the Trial Chamber in case of an unfavourable decision by the President of the Tribunal acting in his administrative capacity.

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

/signed/
Jean-Claude Antonetti
Presiding Judge

Done this twenty-seventh day of April 2009
At The Hague
The Netherlands

[Seal of the Tribunal]