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: 10 April 2015

Original: ENGLISH
French

IN TRIAL CHAMBER III

Before: **Judge Jean-Claude Antonetti, Presiding**
Judge Mandiaye Niang
Judge Flavia Lattanzi

Registrar: **Mr John Hocking**

Decision of: **10 April 2015**

THE PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC

INTERLOCUTORY DECISION BEFORE RULING ON THE MERIT OF THE REVOCATION OF THE PROVISIONAL RELEASE OF THE ACCUSED

The Office of the Prosecutor

Mr Serge Brammertz
Mr Mathias Marcussen

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") is seized of the matter of the provisional release of Vojislav Šešelj ("Accused") following the referral by the Appeals Chamber.[1]

Procedural Background

1. On 6 November 2014, the Chamber ordered *proprio motu* the provisional release of the Accused, who was seriously ill and was not receiving the care needed for the continuing deterioration of his health because of disagreements on the medical protocol of the United Nations Detention Unit. The decision of the President of the Tribunal, acting as the authority supervising the Registry and the Detention Unit, did not succeed in breaking this deadlock.

2. In view of the circumstances, and in spite of scant cooperation from the Accused, the Chamber took it upon itself, in a humanitarian step and in order to avoid a tragic outcome to which a lack of action would irremediably lead, to release the Accused to enable him to receive the appropriate treatment in his own country. This measure was not only urgent; it also put an end to the very long provisional detention which, as time went on, became more and more irreconcilable with the presumption of innocence and the guarantees of a fair trial.

3. The provisional release was accompanied by two restrictions: not to interfere with witnesses and for the Accused to return to the Tribunal when required to do so.[2]

4. On 13 January 2015, the Chamber dismissed the motion of the Office of the Prosecutor ("Prosecution") seeking the revocation of the provisional release of the

[1] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR65/1, "Decision on Prosecution Appeal Against the Decision on the Prosecution Motion to Revoke the Provisional Release of the Accused", 30 March 2015, public ("Decision on 30 March 2015").
[2] "Order on the Provisional Release of the Accused *Proprio Motu*", 6 November 2014, public with confidential annex; "Order Lifting the Confidentiality of the Annex to Order of 6 November 2014", 25 November 2014, public.

Accused ("Decision of 13 January 2015"), deeming that the Accused had not violated the two restrictions imposed on him by the Chamber.[3]

5. In its Decision of 30 March 2015, the Appeals Chamber, by a majority, partially granted the Prosecution appeal against the Decision of 13 January 2015. It deemed that the Chamber had failed in its ongoing obligation to ensure that the conditions imposed on the initial provisional release of the Accused were respected, and that by stating that he would not appear voluntarily before the Tribunal when so required, the Accused no longer fulfilled one of the requirements. The Appeals Chamber consequently deemed that the previously granted provisional release should be revoked. Nonetheless, it considered that the Trial Chamber was better placed to execute such a measure.[4]

Reasoning behind the Decision

6. The Chamber notes the decision of the Appeals Chamber with regard to the ongoing conditions of provisional release of the Accused and the consequences that the Appeals Chamber applied automatically, that is, the revocation of the provisional release.

7. In the exercise of its discretionary power on the matter of provisional release - which the Appeals Chamber recalled[5] - the Chamber deems that the interest of justice and compelling reasons that go to the basic rights of the Accused to benefit from the appropriate medical treatment necessitate that it first obtains information on the health of the Accused before ruling on the revocation. An immediate revocation of the provisional release, without taking time to find how the medical treatment of the Accused is progressing, could undo all the efforts that justified the measure in the first place.

8. Moreover, the information to be collected will assist the Chamber in its re-evaluation of the provisional release of the Accused.

[3] "Decision on Prosecution Motion to Revoke Provisional Release", 13 January 2015, public.
[4] Decision of 30 March 2015, more specifically, paras 10, 18, 19, 20 and 22.

FOR THE FOREGOING REASONS, the Chamber,

PURSUANT TO Rules 54 and 65 of the Rules of Procedure and Evidence,

BEFORE RULING ON THE MERIT OF REVOCATION

ORDERS the Registry to contact the medical team treating Vojislav Šešelj in order to present the Chamber as soon as possible with an updated report on the medical condition of the Accused.

Presiding Judge Jean-Claude Antonetti attaches separately a separate concurring opinion.

Judge Mandiaye Niang attaches to this decision a separate concurring opinion.

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

/signed/
Jean-Claude Antonetti
Presiding Judge

Done this tenth day of April 2015
At The Hague
The Netherlands

[Seal of the Tribunal]

[5] Decision of 30 March 2015, paras 10 and 20.

Separate Opinion of Judge Mandiaye Niang

1. The Appeals Chamber deemed that the Trial Chamber Judges erred by not conducting an ongoing assessment of the initial conditions imposed on the provisional release of the Accused Vojislav Šešelj. Having found that one of these conditions was not met by the Accused, namely, to secure the voluntary return of the Accused to the Tribunal when he is required to do so, the Appeals Chamber decided that the provisional release granted by the Trial Chamber should be revoked.

2. The impact of the Decision of 30 March 2015 is unambiguous. The reasoning that underlies it is also clear. One does not have to agree with the *Aleksovski* case-law[6] to accept the need to respect legal hierarchy in which one of the consequences is the submission of the Trial Chamber Judges to the doctrine of the Appeal Judges, especially when examining a specific case, in line with the right to an appeal.

3. The difficulty the Trial Chamber faces in carrying out the Decision of 30 March 2015 immediately seems to me to be of a different order.

4. Having noted the error in the trial judges' assessment with regard to the conditions for granting provisional release under Rule 65 (B) of the Rules of Procedure and Evidence, the Appeals Judges could have referred the case to the Trial Chamber Judges for a new decision which, this time, would have had to apply the norm consistent with the interpretation offered by the Appeals Chamber, while taking into account other relevant factors. The reference made to the discretionary power would have found its proper place within this context.

5. Also, having noted the error of the Trial Chamber Judges and the Accused's failure to meet the conditions set out under Rule 65 (B) of the Rules of Procedure and Evidence, the Appeals Chamber could have acted on its own findings itself, by ordering the immediate return of the Accused to the United Nations Detention Unit.

[6] *The Prosecutor v. Aleksovski*, Case No. IT-95-14/1-1, Judgement on Appeal, 24 March 2000, para. 113.

6. It made a choice clear in wording but ambiguous in its follow-up, which involved voiding the substance of the dispute while finding, on the one hand, that the Trial Chamber Judges had erred in law and, on the other hand, re-evaluating itself the facts to find that the Accused had not met the prerequisites for release. And it was only after these findings that it decided to refer the case to the Trial Chamber Judges, ordering them to issue an order revoking the provisional release and to order the return of the Accused to the Detention Unit.[7] This novel approach[8] raises a problem.[9] It places the Trial Chamber Judges in the uncomfortable, even untenable - not to say unacceptable - position of having to rule, while having lost their *imperium*, since there is nothing left for them to rule on. All discretionary power taken away from them, they can only be a hollow echo of the already sufficiently loud voice of the Appeals Chamber. Is this artifice really necessary?

7. If it was the wish of the Appeals Chamber to muzzle the Trial Chamber Judges, its order should perhaps have been addressed to the Registry whose role is precisely that of implementing or ensuring the implementation of the decision of judges without hesitation or second-guessing their substance. To order a Judge to issue an order is to forget that his power to order has already been denied.

/signed/
Mandiaye Niang

Judge

[7] "**ORDERS** the Trial Chamber to immediately revoke Šešelj's provisional release and order his return to the UNDU." (*See*, Decision of 30 March 2015, para. 22, Disposition.)
[8] We only found one precedent, namely, *The Prosecutor v. Ante Gotovina, Ivan Čermak, Mladen Markač*, Case No. IT-06-90-AR73.5, "Decision on Gotovina Defence Appeal against 12 March 2010 Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia", 14 February 2011, public, para. 71, Disposition.
[9] Even a court such as the *Cour de Cassation* in France, whose very task it is not to rule itself on the case after cassation, makes an exception to this rule when there is nothing else to rule on after cassation. It therefore quashes without referral. Article 627 of the Code of Civil Procedure says: "The Court of Cassation may quash without referring the case in the cases and conditions envisaged under article L. 411-3 of the Code of Judicial Organisation". Article 411-3 of the Code of Judicial Organisation states: "The Court of Cassation may quash without referral where the cassation does not imply that there is need to rule again on the merits of the case. It may also, while quashing without referring, put an end to the dispute where the facts, as established and asserted supremely by the fact-trier judge, allow it to apply the appropriate rule of law."