IT-03-67-AR65.1
A51 - A34
30 MARCH 2015

51
A51

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-AR65.1

Date: 30 March 2015

Original: English

IN THE APPEALS CHAMBER

Before: **Judge William H. Sekule, Presiding**
Judge Arlette Ramaroson
Judge Khalida Rachid Khan
Judge Bakhtiyar Tuzmukhamedov
Judge Koffi Kumelio A. Afande

Registrar: **Mr. John Hocking**

Decision of: **30 March 2015**

PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC

DECISION ON PROSECUTION APPEAL AGAINST THE DECISION ON THE PROSECUTION MOTION TO REVOKE THE PROVISIONAL RELEASE OF THE ACCUSED

The Office of the Prosecutor:

Mr. Serge Brammertz
Mr. Mathias Marcussen

The Accused:

Mr. Vojislav Šešelj

1. The Appeals Chamber of the International Criminal 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 "Tribunal", respectively) is seised of the "Prosecution Appeal of the Decision on the Prosecution Motion to Revoke the Provisional Release of the Accused" filed on 20 January 2015 ("Appeal"), whereby the Prosecution submits that Trial Chamber III ("Trial Chamber") erred in its "Decision on Prosecution Motion to Revoke Provisional Release" of 13 January 2015[1] ("Impugned Decision") when it denied the Prosecution's request for the revocation of the provisional release of Vojislav Šešelj ("Šešelj"). Šešelj filed his response on 4 February 2015.[2] The Prosecution replied on 9 February 2015.[3]

I. BACKGROUND

2. On 6 November 2014, the Trial Chamber *proprio motu* ordered Šešelj's provisional release to the Republic of Serbia ("Serbia").[4] It considered by Majority[5] that, insofar as it would order Šešelj's release on strictly humanitarian grounds, it would not impose on him any condition other than not to influence witnesses and victims, and to appear before the Chamber as soon as it so ordered.[6] The Trial Chamber further considered that, in view of the situation prevailing at the time, it was satisfied that Šešelj would comply with the aforementioned requirements, and that, in these circumstances, there was no need to seek Šešelj's consent in this respect.[7]

3. On 1 December 2014, the Prosecution moved the Trial Chamber for the termination of Šešelj's provisional release and requested that a hearing be held at which the parties and Serbia could be further heard on the question of provisional release.[8] It argued that Šešelj's public statements made subsequent to his being provisionally released were such as to: (i) make it apparent

[1] *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, *Décision relative à la requête de l'Accusation en révocation de la mise en liberté provisoire de l'Accusé*, 13 January 2015. The English Translation of the Impugned Decision was filed on 16 January 2015. Unless otherwise indicated, all citations in the present Decision are to the English versions of the relevant documents.
[2] *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR65.1, Professor Vojislav Šešelj's Reply to the Prosecutor's Appeal to Revoke the Provisional Release of the Accused, 5 February 2015 ("Response"). The original Bosnian/Croatian/Serbian ("B/C/S") version of the Response was received on 4 February 2015. Pursuant to the instruction of the Appeals Chamber, the Response was filed as a public document.
[3] *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR65.1, Prosecution Reply to Response to Prosecution Appeal of the Decision on the Prosecution Motion to Revoke the Provisional Release of the Accused, 9 February 2015 ("Reply"). *See also Procès-Verbal* of 12 February 2015, indicating that the Reply was received by Šešelj in its B/C/S translation on 12 February 2015.
[4] *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Order on the Provisional Release of the Accused *Proprio Motu* ("Order on Provisional Release"), p. 4. *See also* confidential Annex to Order on Provisional Release rendered public by order of the Trial Chamber on 25 November 2014. *See Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Order Lifting the Confidentiality of the Annex to Order of 6 November 2014, 25 November 2014, p. 2.
[5] Judge Niang dissenting.
[6] Order on Provisional Release, p. 4.
[7] Order on Provisional Release, p. 4.
[8] Prosecution Motion to Revoke Provisional Release, 1 December 2014 ("Request for Revocation"), paras. 1, 7.

that the Trial Chamber's "trust in Šešelj's conduct was without foundation";[9] and (ii) call into question the Trial Chamber's assessment of the state of Šešelj's health.[10] Furthermore, the Prosecution submitted that: (i) Šešelj's public statements that he will not voluntarily return to the Tribunal undermined the Trial Chamber's conclusion that the pre-conditions for provisional release were satisfied;[11] and (ii) Šešelj's threats to persons who cooperated with the Prosecution breached the condition of his provisional release not to obstruct the course of justice.[12] The Prosecution requested that the Trial Chamber revoke his provisional release in these circumstances.[13] Finally, the Prosecution averred that, irrespective of Šešelj's health condition, any future provisional release should be governed by stringent conditions.[14]

4. On 13 January 2015, the Trial Chamber issued the Impugned Decision, dismissing the Request for Revocation.[15] The Trial Chamber stated that it deemed inadmissible the Prosecution's arguments it considered to be directly criticising the Order on Provisional Release.[16] It stated that the Prosecution had had the opportunity to appeal at the time, but chose not to do so.[17] The Trial Chamber further found that the Prosecution did not submit any convincing evidence that would warrant reconsideration of its Order on Provisional Release.[18] It determined that Šešelj had not violated its instructions regarding return to the Tribunal[19] or the conditions that it imposed in relation to victims and witnesses.[20]

II. SUBMISSIONS OF THE PARTIES

5. The Prosecution argues that the Trial Chamber erred in law by: (i) failing to consider whether the pre-conditions for provisional release remained satisfied, particularly in light of Šešelj's statements that he would not return to the Tribunal ("First Alleged Error");[21] and (ii) failing to consider whether, in light of the new facts presented by the Prosecution, the Trial Chamber's

[9] Request for Revocation, para. 3.
[10] Request for Revocation, paras. 2, 3.
[11] Request for Revocation, para. 4.
[12] Request for Revocation, para. 4.
[13] Request for Revocation, para. 4.
[14] Request for Revocation, para. 6. On 23 December 2014, Šešelj responded and requested that the Trial Chamber initiate disciplinary proceedings for misconduct against the Prosecutor. *See* Response to the Prosecutor's Motion to Revoke Provisional Release, 23 December 2014, paras. 5, 15. The original B/C/S version of Šešelj's response was received on 22 December 2014. On 24 December 2014, the Prosecution requested leave to reply and filed its reply submitting that Šešelj's request should be dismissed. *See* Prosecution Request for Leave to Reply and Reply Regarding Motion to Revoke Provisional Release, 24 December 2014.
[15] Impugned Decision, para. 15. The Trial Chamber further declared that it lacked the authority to initiate the disciplinary proceedings requested by Šešelj.
[16] Impugned Decision, paras. 9, 10.
[17] Impugned Decision, para. 10.
[18] Impugned Decision, para. 10.
[19] Impugned Decision, para. 12.
[20] Impugned Decision, para. 13.
[21] Appeal, paras. 3, 7.

assessment that minimal conditions were needed to govern Šešelj's provisional release remained valid ("Second Alleged Error").[22] It requests that the Appeals Chamber: (i) reverse the Impugned Decision; (ii) revoke Šešelj's provisional release; and (iii) order him to appear before the Trial Chamber so as to consider appropriate conditions for any further provisional release.[23]

6. With respect to the First Alleged Error, the Prosecution contends that Rule 65(B) of the Rules of Procedure and Evidence ("Rules") stipulates that provisional release may only be ordered if two essential pre-conditions are met, namely that the trial chamber is satisfied that an accused will appear for trial and that the accused will not pose a danger to any victim, witness or other person.[24] The Prosecution submits that, in light of Šešelj's unequivocal declaration that he would not return to the Tribunal, the Trial Chamber could no longer have been satisfied that the pre-conditions continued to be met and was therefore obliged to recall him.[25]

7. As regards the Second Alleged Error, the Prosecution submits that the Trial Chamber failed to address its argument that Šešelj's post-release conduct eroded the foundation for imposing only minimal conditions and not requiring an undertaking by Šešelj that he would comply with the conditions of his provisional release.[26]

8. Šešelj responds that the Prosecution fails to put forth any supporting legal argument.[27] He requests that the Appeals Chamber dismiss the Appeal as unfounded and politically motivated, and initiate disciplinary proceedings against the Prosecutor.[28]

9. The Prosecution replies that Šešelj failed to address any of the arguments in the Appeal.[29]

III. STANDARD OF REVIEW AND APPLICABLE LAW

10. The Appeals Chamber recalls that an interlocutory appeal is not a de *novo review* of a trial chamber's decision.[30] A decision by a trial chamber under Rule 65 of the Rules is a discretionary

[22] Appeal, para. 3, 9, 12.
[23] Appeal, paras. 1, 14.
[24] Appeal, para. 6.
[25] Appeal, paras. 7, 8.
[26] Appeal, paras. 9, 12.
[27] Response, p. 2.
[28] Response, p. 4. The Appeals Chamber observes that Šešelj's request for the initiation of disciplinary proceedings does not form part of the present appeal and thus dismisses it without further consideration.
[29] Reply, 9 February 2015, para. 2.
[30] *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.35, Decision on the Prosecution's Appeal of the Decision on Further Extension of Milivoj Petković's Provisional Release, 12 June 2012 ("*Prlić et al.* Decision of 12 June 2012"), para. 3; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.15, Decision on Prosecution's Appeal against the Trial Chamber's Decision on Slobodan Praljak's Motion for Provisional Release, 8 July 2009 ("*Prlić et al.* Decision of 8 July 2009"), para. 4.

one.[31] Accordingly, the relevant inquiry is not whether the Appeals Chamber agrees with that discretionary decision, but rather whether the trial chamber has correctly exercised its discretion in reaching that decision.[32]

11. In order to successfully challenge a discretionary decision, a party must demonstrate that the trial chamber has committed a discernible error.[33] The Appeals Chamber will only overturn a trial chamber's discretionary decision where it is found to be: (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the trial chamber's discretion.[34] 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.[35]

12. Rule 65(B) and Rule 65(C) of the Rules provide, respectively, as follows:

> (B) Release may be ordered at any stage of the trial proceedings prior to the rendering of the final judgement by a Trial Chamber only after giving the host country and the State to which the accused seeks to be released the opportunity to be heard and only if it is satisfied that the accused will appear for trial and, if released, will not pose a danger to any victim, witness or other person. The existence of sufficiently compelling humanitarian grounds may be considered in granting such release.
>
> (C) The Trial Chamber may impose such conditions upon the release of the accused as it may determine appropriate, including the execution of a bail bond and the observance of such conditions as are necessary to ensure the presence of the accused for trial and the protection of others.

13. Where a trial chamber finds that one of the two conditions of Rule 65(B) of the Rules has not been met, it need not consider the other and must deny provisional release.[36] In deciding

---

[31] *Prlić et al.* Decision of 12 June 2012, para. 3; *Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR65, Decision on Matthieu Ngirumpatse's Appeal against Decision on Remand on Provisional Release, 8 December 2009 ("Ngirumpatse Decision"), para. 5; *Prlić et al.* Decision of 8 July 2009, para. 4.

[32] *Prlić et al.* Decision of 12 June 2012, para. 3; *Ngirumpatse* Decision, para. 5; *Prlić et al.* Decision of 8 July 2009, para. 4; *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-AR65.1, Decision on Ramush Haradinaj's Modified Provisional Release, 10 March 2006 ("*Haradinaj et al.* Decision of 10 March 2006"), para. 21.

[33] *See e.g. Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR15*bis*, Decision on Appeal against Decision on Continuation of Proceedings, 6 June 2014, para. 34; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.11, Decision on Appeal against the Decision on the Accused's Motion to Subpoena Zdravko Tolimir, 13 November 2013 ("*Karadžić* Subpoena Decision"), para. 29; *Prosecutor v. Ratko Mladić*, Case No. IT-09-92-AR73.3, Decision on Mladić's Interlocutory Appeal Regarding Modification of Trial Sitting Schedule Due to Health Concerns, 22 October 2013 ("*Mladić* Modification of Trial Schedule Decision"), para. 11; *Lukić and Lukić* Appeal Judgement, para. 17.

[34] *Karadžić* Subpoena Decision, para. 29; *Mladić* Modification of Trial Schedule Decision, para. 11; *Lukić and Lukić* Appeal Judgement, para. 17.

[35] *Mladić* Modification of Trial Schedule Decision, para. 11; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.10, Decision on Appeal from Decision on Duration of Defence Case, 29 January 2013, para. 7; *Lukić and Lukić* Appeal Judgement, para. 17; *Krajišnik* Appeal Judgement, para. 81.

[36] *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-AR65.2, Decision on Lahi Brahimaj's Interlocutory Appeal against the Trial Chamber's Decision Denying his Provisional Release, 9 March 2006 ("*Haradinaj et al.*

whether the requirements of Rule 65(B) of the Rules have been met, a Trial Chamber must consider all relevant factors that a reasonable trial chamber would have been expected to take into account before coming to a decision.[37] It must then provide a reasoned opinion indicating its view on those relevant factors.[38] What these relevant factors are, as well as the weight to be accorded to them, depends upon the circumstances of each case.[39]

14. The Appeals Chamber further recalls that a chamber, when considering whether or not to grant the provisional release of an accused, is required to assess whether the conditions of Rule 65(B) of the Rules are fulfilled not only as they exist at the time it reaches its decision on provisional release, but also, as much as can be foreseen, at the time the accused is expected to return to the Tribunal.[40]

IV. DISCUSSION

A. First Alleged Error

15. Rule 65(B) of the Rules provides that one of the pre-conditions for provisional release is that the Trial Chamber "is satisfied that the accused will appear for trial". The Prosecution submitted evidence of express statements made by Šešelj after his release to the effect that he would not return to the Tribunal which were published *inter alia* on the website of his political party.[41] These statements have not been challenged. The Appeals Chamber finds that they are clearly relevant to the question whether the pre-condition for provisional release that Šešelj would appear

Decision of 9 March 2006"), para. 6. *See also Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Decision on Dario Kordić's Request for Provisional Release, 20 April 2004 ("*Kordić and Čerkez* Decision"), para. 10.

[37] *Prlić et al.* Decision of 15 December 2011, para. 6; *Ngirumpatse* Decision, para. 7; *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-AR65.3, Decision on Ivan Čermak's Appeal against Decision on his Motion for Provisional Release, 3 August 2009 ("*Gotovina et al.* Decision of 3 August 2009"), para. 6. This decision was rendered in its public redacted version by order of the Appeals Chamber of 4 August 2009. *See Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-AR65.3, Order Issuing Public Redacted Version of the "Decision on Ivan Čermak's Appeal against Decision on his Motion for Provisional Release" Issued 3 August 2009, 4 August 2009.

[38] *Prlić et al.* Decision of 12 June 2012, para. 6; *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR65.4, Decision on Consolidated Appeal Against Decision on Borovčanin's Motion for a Custodial Visit and Decisions on Gvero's and Miletić's Motions for Provisional Release during the Break in Proceedings, 15 May 2008 ("*Popović et al.* Consolidated Decision on Provisional Release"), para. 6; *Haradinaj et al.* Decision of 10 March 2006, para. 23.

[39] *Prlić et al.* Decision of 12 June 2012, para. 6 and references cited therein.

[40] *Prlić et al.* Decision of 15 December 2011, para. 6; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.24, Decision on Jadranko Prlić's Appeal against the Trial Chamber Decision on his Motion for Provisional Release, 8 June 2011 ("*Prlić et al.* Decision of 8 June 2011"), para. 6; *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84*bis*-AR65.1, Decision on Prosecution Appeal of the Trial Chamber's Decision on Ramush Haradinaj's Motion for Provisional Release, 16 December 2010 ("*Haradinaj et al.* Decision of 16 December 2010"), para. 7; *Popović et al.* Consolidated Decision on Provisional Release, para. 6; *Prosecutor v. Prlić et al.*, Case No. IT-04-74-AR65.14, Decision on Jadranko Prlić's Appeal against the *Décision relative à la demande de mise en liberté provisoire de l'accusé Prlić* of 9 April 2009, 5 June 2009 ("*Prlić et al.* Decision of 5 June 2009"), para. 8.

[41] Request for Revocation, para. 3, footnote 6 *referring to, inter alia*: Transcript of press conference of 27 November 2014 published on http://www.srpskaradikalnastranka.org.rs/srbija/3930, in which Šešelj is reported to have stated: "Concerning a possibility that The Hague Tribunal calls me back, I have told you already at the first press

for trial is still met.[42] The Appeals Chamber, Judge Tuzmukhamedov and Judge Afande dissenting, accepts the submission of the Prosecution that, in the Impugned Decision, the Trial Chamber did not address its argument that these statements eroded the essential pre-conditions for provisional release.[43] The Trial Chamber rather addressed the different question whether Šešelj had violated the condition it imposed upon his provisional release, namely that he should appear before the Trial Chamber when ordered to do so.[44]

16. The Appeals Chamber recalls that provisional release may *only* be granted if the chamber is satisfied that: (i) the accused will appear for trial, and (ii) if released, the accused will not pose a danger to any victim, witness or other person.[45] Additionally, a chamber is obliged to consider, at the time provisional release is granted, whether it is satisfied that, as much as can be foreseen, the accused will appear at the time he is expected to return to the Tribunal.[46] Placing a chamber under the obligation to anticipate the circumstances at the time of the accused's expected return would be rendered meaningless if it did not in turn oblige the chamber to remain satisfied that the accused fully complies with the two mandatory requirements that are at the very heart of justifying his provisional release in the first place. Moreover, if ongoing compliance with the two conditions of Rule 65(B) of the Rules were not required, there would be no need for the monitoring and reporting mechanism to ensure the presence of the accused and the protection of others, which is ordinarily imposed pursuant to Rule 65(C) in the practice before this Tribunal.[47] The Appeals Chamber thus considers that a chamber granting provisional release pursuant to Rule 65 of the Rules has to remain satisfied throughout the period of an accused's provisional release that the essential conditions of Rule 65(B) of the Rules justifying the release are still fulfilled.

---

conference that I certainly will not return voluntarily"; Vojislav Šešelj interview with *Bujica* TV, 26 November 2014 in which Šešelj is reported to have stated: "I certainly will not return voluntarily to The Hague ever".

[42] The Appeals Chamber recalls that it has previously found that a trial chamber was obliged to consider public statements to the effect that an accused would not surrender to the Tribunal as part of its assessment of whether the requirements of Rule 65 of the Rules were met. *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-AR65.1, Decision on Interlocutory Appeal from Trial Chamber Decision Granting Nebojša Pavković's Provisional Release, 1 November 2005, para. 7.

[43] *See* Appeal, para. 4.

[44] *See* Impugned Decision, para. 12.

[45] *See* Rule 65(B) of the Rules. *See also Gotovina et al.* Decision of 3 August 2009, para. 10.

[46] *See supra*, para. 14.

[47] *See e.g. Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-T, Public Redacted Version of Decision on Stanišić Defence Request for Provisional Release after Closing Arguments until Entry of Trial Judgement, 5 February 2013, para. 15.7 This decision was rendered in its public redacted version by order of the Trial Chamber of 19 April 2013. *See Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-T, Order Issuing a Public Redacted Version of the Confidential Decision on the Stanišić Defence Request for Provisional Release of 5 February 2013; *Prosecutor v. Jovica Stanišić and Franko Simatović*, Case No. IT-03-69-T, Decision on Simatović Request for Provisional Release, 16 July 2012, paras. 8.2, 8.3; *Gotovina et al.* Decision of 3 August 2009, para. 20; *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Defence Motions for Provisional Release of Radivoje Miletić and Milan Gvero, 7 December 2006, pp. 6-8.

17. It follows from the foregoing that a chamber has the duty to address any information brought to its attention that may constitute a change in circumstances[48] so as to call into question whether the pre-conditions set forth in Rule 65(B) of the Rules remain fulfilled.

18. The Appeals Chamber, Judge Tuzmukhamedov and Judge Afande dissenting, finds that, since the Trial Chamber failed to address the Prosecution's argument that Šešelj's statements that he would not appear before the Tribunal eroded the essential pre-conditions for his provisional release, the Trial Chamber failed to determine whether in light of the new information brought to its attention the requirement for provisional release set forth in Rule 65(B) of the Rules of being satisfied that Šešelj would appear for trial remained fulfilled. This failure constitutes an error of law.

19. Considering the nature of Šešelj's statements that he would not return to the Tribunal,[49] the Appeals Chamber, Judge Tuzmukhamedov and Judge Afande dissenting, finds that no reasonable trial chamber could have remained satisfied that the first of the two pre-conditions of Rule 65(B) of the Rules, which have to be cumulatively met, remained fulfilled. Recalling that provisional release must be denied in circumstances where a trial chamber finds that one of the two conditions of Rule 65(B) of the Rules has not been met,[50] it was, in these circumstances, incumbent upon the Trial Chamber to revoke Šešelj's provisional release at this stage and to give the parties as well as Serbia and The Kingdom of the Netherlands ("The Netherlands") an opportunity to be heard before proceeding to a *de novo* assessment of whether further provisional release was appropriate and, if so, under what conditions.

20. The Appeals Chamber, Judge Tuzmukhamedov and Judge Afande dissenting, therefore finds that the Trial Chamber erred in not revoking Šešelj's provisional release. Since the Appeals Chamber considers that the Trial Chamber is best placed to execute the order to revoke Šešelj's provisional release[51] and to give the parties, Serbia, and The Netherlands an opportunity to be heard on the matter of Šešelj's possible further provisional release, the Appeals Chamber, hereby orders the Trial Chamber to do so.

---

[48] The Appeals Chamber notes that it has previously held that a change in circumstances has warranted a renewed and explicit consideration of the risk of flight pursuant to Rule 65(B) of the Rules. *See Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.5, Decision on Prosecution's Consolidated Appeal against Decisions to Provisionally Release the Accused Prlić, Stojić, Praljak, Petković, and Ćorić, 11 March 2008, para. 20.

[49] *See supra*, para. 15.

[50] *Haradinaj et al.* Decision of 9 March 2006, para. 6.

[51] The Appeals Chamber notes that the revocation of Šešelj's provisional release entails procedural consequences, such as the possible issuance of a warrant of arrest pursuant to Rule 65(H) of the Rules as well as the oversight of his transfer to the United Nations Detention Unit ("UNDU"). The Appeals Chamber therefore considers that the Trial Chamber is best placed to carry out the revocation and to deal with the subsequent issues that may arise therefrom.

B. Second Alleged Error

21. In light of the foregoing, the Appeals Chamber, Judge Tuzmukhamedov and Judge Afande dissenting, observes that the Prosecution's submissions relating to the Second Alleged Error, namely that Šešelj's post-release conduct, either individually or collectively, called into question the Trial Chamber's assessment that only minimal conditions governing his release were necessary, are only relevant to considerations of the regime of conditions governing Šešelj's provisional release. The Appeals Chamber further observes that such Rule 65(C) conditions have the function of ensuring the presence of the accused for trial and the protection of others. Since the Appeals Chamber, Judge Tuzmukhamedov and Judge Afande dissenting, has found that the very basis for granting Šešelj's provisional release has been called into question by his post-release statements that he would not return to the Tribunal, and that the Trial Chamber should therefore revoke his provisional release at this stage to determine whether any further provisional release was justified, arguments pertaining to conditions governing provisional release become relevant, if at all, only at this later stage. The Appeals Chamber, Judge Tuzmukhamedov and Judge Afande dissenting, therefore dismisses the Prosecution's arguments in relation to the Second Alleged Error without further consideration.

V. DISPOSITION

22. For the foregoing reasons, the Appeals Chamber, Judge Tuzmukhamedov and Judge Afande dissenting,

GRANTS the Appeal in part, **QUASHES** the Impugned Decision, and

ORDERS the Trial Chamber to immediately revoke Šešelj's provisional release and order his return to the UNDU;

ORDERS the Trial Chamber, as soon as possible after Šešelj's return to the UNDU, to give the parties, Serbia, and The Netherlands an opportunity to be heard in accordance with Rule 65(B) of the Rules;

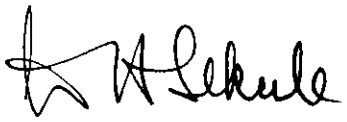
ORDERS the Trial Chamber, after giving the parties, Serbia and The Netherlands the opportunity to be heard, to conduct a *de novo* assessment of the merits of Šešelj's possible further provisional release in accordance with the present decision;

ORDERS that the terms of the Order on Provisional Release remain in force pending the order of the Trial Chamber revoking Šešelj's provisional release in accordance with the present decision;

DISMISSES the remainder of the Appeal.

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

Done this thirtieth day of March 2015,
At The Hague,
The Netherlands.



Judge William H. Sekule
Presiding Judge

Judge Bakhtiyar Tuzmukhamedov and Judge Koffi Kumelio A. Afande append a joint dissenting opinion to this decision.

Seal of the Tribunal

JOINT DISSENTING OPINION OF JUDGES TUZMUKHAMEDOV AND AFANDE

A. Introduction

1. In this Decision the Majority finds that the Trial Chamber erred in not addressing the Prosecution's argument that Šešelj's post-release statements, to the effect that he would not return to the Tribunal, eroded the essential preconditions for provisional release of Rule 65(B) of the Rules of Procedure and Evidence ("Rules").[1] Moreover, according to the Majority, no reasonable trial chamber could have remained satisfied, following Šešelj's post-release statements, that the preconditions of Rule 65(B) of the Rules remained fulfilled.[2] As a result, the Majority orders the Trial Chamber, *inter alia*, to immediately revoke Šešelj's provisional release and, once Šešelj is back in custody, to conduct a *de novo* assessment of the merits of Šešelj's possible further provisional release.[3]

2. For the reasons elaborated upon herein, we respectfully disagree with the Majority's legal reasoning and conclusion.

3. It should be noted at the outset, that this is the first case in which the Appeals Chamber is required to address legal issues concerning an alleged breach of conditions of provisional release and its revocation under Rule 65 of the Rules.

B. The Scope of the Appeal

4. In our view, it is important to emphasize that this appeal is dealing with the Trial Chamber's 13 January 2015 Decision not to revoke provisional release,[4] rather than the Trial Chamber's 6 November 2014 Decision to provisionally release Šešelj.[5] This appeal is not an opportunity for the Prosecution to appeal the initial decision to grant provisional release. We take the view that the Appeals Chamber can only properly make a finding on the Trial Chamber's decision not to revoke the provisional release. As elaborated on further below, the power to revoke the provisional release in this case and order Šešelj to attend a hearing is a matter solely within the remit of the Trial Chamber. Furthermore, the extent to which the Majority Decision is making a determination on factual issues may give the impression that the Appeals Chamber is not limiting itself to addressing the appeal of the

[1] *See* Decision on Prosecution Appeal Against the Decision on the Prosecution Motion to Revoke the Provisional Release of the Accused, 30 March 2015 ("Majority Decision"), para. 15.
[2] *See* Majority Decision, para. 19.
[3] *See* Majority Decision, para. 22.
[4] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Decision on Prosecution Motion to Revoke Provisional Release, 13 January 2015 ("13 January 2015 Decision").

13 January 2015 Decision, but is instead substituting itself for the Trial Chamber and is dealing with the matter under the general rules of reconsideration, even though the Prosecution invoked Rule 65(D) of the Rules.

5. The Majority should have provided cogent reasons that moved it to substitute its own factual analysis and findings for those of the Trial Chamber. Regrettably, no such reasons are to be found in the Decision. Due to that apparent omission, we deem it necessary to articulate our views on the factual elements in our joint dissenting opinion.

C. The Applicable Law

6. In our opinion, it is incumbent on the Appeals Chamber to clarify and to elaborate on the applicable law, so as to provide necessary guidance to trial chambers. We find it appropriate, at the very least, to pronounce our understanding of the applicable law regarding the admissibility of the appeal and the standard of proof that is required to trigger the reassessment of the provisional release or its revocation.

7. First, with regard to *admissibility,* as noted above, the Prosecution brings this appeal under Rule 65(D) of the Rules.[6] Rule 65(D) states that "[a]ny decision rendered under this Rule by the Trial Chamber shall be subject to appeal". An extensive interpretation of Rule 65(D), as urged by the Prosecution, may allow not only an appeal against the initial decision on provisional release of an accused but also against subsequent matters such as revocation of the order granting provisional release, as in the case at hand. While we are not opposed to such an extensive interpretation of Rule 65(D) of the Rules, as this is the first case dealing with such an appeal we find that the position of the Appeals Chamber should be clearly stated. Furthermore, as the Majority makes a determination on factual issues and substitutes the Trial Chamber's discretion with its own assessment of the facts, it is important to avoid any misinterpretation or the impression that the Appeals Chamber can deal with the matter under the general rules of reconsideration. Reconsideration can only be conducted by the chamber which first considered the matter – in this case the Trial Chamber. It should be reiterated that this appeal is not an opportunity for the Prosecution to appeal the 6 November 2014 Decision. Construed otherwise, the Appeals Chamber's orders in this Decision might be perceived as usurping the Trial Chamber's authority and function. Accordingly, this appeal can only be heard under Rule 65(D) of the Rules.

[5] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Order on the Provisional Release of the Accused *Proprio Motu*, 6 November 2014 ("6 November 2014 Decision").
[6] Prosecution Appeal Motion, para. 1.

8. Similarly, the Appeals Chamber has never before clarified the relevant *standard of proof* required to establish that the accused failed to satisfy or violated any of the conditions of his provisional release or to establish the existence of new facts calling into question the justification of the provisional release. It is opportune to set the evidentiary threshold that is necessary to prove that an accused breached the conditions attached to his order of provisional release. In our view, the standard of proof that is required for establishing the facts justifying provisional release – a balance of probabilities[7] – is also the same that is required to find that an accused breached the conditions of provisional release or that new information, which justify the reconsideration of the provisional release, has materialized.[8]

D. First Alleged Error

9. The Majority concludes that the Trial Chamber "failed to determine whether in light of the new information brought to its attention the requirement for provisional release set forth in Rule 65(B) of the Rules of being satisfied that Šešelj would appear for trial remained fulfilled."[9] However, even if – hypothetically – the Majority is correct that Trial Chamber erred in failing to apply Rule 65(B), the Appeals Chamber should have remanded the issue back to the Trial Chamber for its consideration. Nevertheless, since the Majority proceeds to examine Šešelj's statements, we provide below our views on the Majority's erroneous analysis.

10. The Majority fails to explain why it concludes that the Trial Chamber did not consider this factor in its 6 November 2014 Decision.

11. A careful review, on one hand, of the Trial Chamber's findings in its 13 January 2015 Decision that there is no breach of Šešelj's provisional release,[10] and, on the other hand, of the Prosecution's submissions on Šešelj refusing to voluntarily attend the Tribunal,[11] suggest that these are different perspectives on the same point. Based on Šešelj's claim that he will not voluntarily return to the Tribunal, the Prosecution is predicting that "force will be required" to bring him to the Tribunal.[12] We believe that whereas the Prosecution chooses on appeal to phrase its request *in abstracto*, the Trial Chamber took the approach to

[7] *See, e.g., Prosecutor v. Prlić et al.*, Case No. IT-04-74-A, Decision on Berislav Pušić's Application for an Extension of His Provisional Release, 27 January 2015, para. 3; *Prosecutor v. Šainović et al.*, IT-05-87-A, Decision on Vladimir Lazarević's Motion of Temporary Provisional Release on Compassionate Grounds, 23 March 2011, para. 4.
[8] *See, e.g., Prosecutor v. Rasim Delić*, IT-04-83-T, Decision on Prosecution Motion to Arrest the Accused Rasim Delić, 19 December 2007, page 5; *Prosecutor v. Gotovina et al.*, IT-06-90-PT, Order for the Arrest and Transfer of the Accused Mladen Markač from Provisional Release, 28 December 2007, page 3.
[9] Majority Decision, para. 18.
[10] 13 January 2015 Decision, para. 12.
[11] Prosecution Appeal Motion, para. 7.
[12] Prosecution Appeal Motion, para. 7.

address the issue *in concreto*. Indeed, Šešelj's reaction and behaviour is not a theoretical issue, but is rather a facts-based assessment to be made *in concreto* at the time Šešelj is ordered to return to the Tribunal. As we understand the Trial Chamber's reasoning in its 13 January 2015 Decision, it is based on the fact that a human being's reaction is evolutive and unpredictable, and as such it is not prudent to speculate on it *in abstracto*. Therefore, in spite of Šešelj's defying statements, no one can predict with certitude how he may react in the future when he is ordered to appear at the Tribunal, and whether he will refrain from voluntarily returning. Furthermore, the Prosecution's argument that "[i]t is clear from Šešelj's statements that force will be required to bring him back into the Tribunal's custody"[13] seems speculative. The Prosecution has failed to show that force will effectively be required, and it seems to suggest, moreover, that if Šešelj's provisional release be revoked at this stage then his attendance will be secured, whereas if an order requires him to appear at the Tribunal at a later stage it will necessitate more forceful measures.

12. Furthermore, a reading of the Trial Chamber's order of 6 November 2014 releasing Šešelj[14] and the 13 January 2015 Decision[15] together suggests that not only would Šešelj's public statements expressing defiance not have affected the Trial Chamber *proprio motu* decision to grant his provisional release but that the Trial Chamber even anticipated such behaviour. Even more, Šešelj declared in advance that should the Trial Chamber decide to release him he "will publicly criticize the Hague Tribunal as an illegal international court".[16]

13. Therefore, the Trial Chamber did not err in rejecting the Prosecution's argument, since Šešelj's statements did not constitute new information that had the potential to undermine the factors that favored ordering – according to the Trial Chamber – Šešelj's provisional release in the first place.

14. Put simply, the Appeals Chamber might disagree with the manner in which the Trial Chamber assessed the preconditions set in Rule 65(B) of the Rules and the weight that was given to the consistent challenging behaviour of Šešelj when it ordered his provisional

[13] Prosecution Appeal Motion, para. 7.
[14] 6 November 2014 Decision, page 2 ("CONSIDERING that the Chamber had recently explored the possibility of provisional release of the Accused *proprio motu* due to the deterioration of his health but had to suspend this initiative because the conditions imposed by the Chamber were not satisfied"). *See also*, *ibid*, Dissenting Opinion of Judge Mandiaye Niang to the Order on the Provisional Release of the Accused *Proprio Motu*, paras. 2, 4, 6, 10.
[15] 13 January 2015 Decision, para. 10. *See also*, *ibid*, Declaration of Judge Mandiaye Niang, para. 8 ("I see nothing new in these statements. The accused has resorted to them with some consistency. His refusal to comply with the conditions other than that of remaining in Serbia incidentally frustrated the provisional release *proprio motu* process in June 2014. The Prosecutor was well aware of this since he was part of this process. By releasing him a few months later without consulting him, the Majority knew what to expect. In fact, everyone knew. ")

release. However, as emphasized above, this appeal is not against the decision to provisionally release Šešelj and, consequently, the Appeals Chamber is in no position to review it. Whether the Trial Chamber erred when it ordered Šešelj's provisional release is not at issue in this appeal, and it would be inappropriate for the Appeals Chamber to pass judgment.

15. As we understand it, Šešelj's defying behaviour was taken into account when the Trial Chamber decided to grant his provisional release. The Prosecution, therefore, has failed on appeal to demonstrate an error in the Trial Chamber's approach in considering its application for revocation and there is consequently no justification for its revocation. Revocation of an order of provisional release should only be considered where, for example, the facts or circumstances that justified the provisional release pursuant to Rule 65(B) of the Rules changed or ceased to exist, the accused violated the conditions that were set pursuant to Rule 65(C) of the Rules or the order stated other conditions triggering its reassessment.

16. Arguing otherwise would put accused – who comply with the conditions of release – in a precarious situation of uncertainty regarding their provisional freedom and oblige them to legally evaluate the consequences of each and every utterance or action. A statement of an accused which, in and of itself, does not constitute criminal behaviour or violate the conditions of release ordered – as accepted by the Majority in this case – should not trigger the balancing mechanism that is set in Rule 65(B) of the Rules.

17. Notwithstanding the above, even if we were to accept that the Trial Chamber erred – since Šešelj's public statements expressing a refusal to voluntarily return to the Tribunal constitute new information that should have led the Trial Chamber to reexamine whether it is still satisfied that the accused will appear for trial – the usual course of action is to remand the matter to the Trial Chamber so that it can apply the correct legal standard and exercise its discretion accordingly.[17] Lacking exceptional circumstances, the Majority should have accorded the Trial Chamber the deference that it is owed and referred the case back to the Trial Chamber for reassessment. This holds true in particular where the Appeals Chamber is not privy to confidential information regarding Šešelj's health conditions that was at the

[16] *See Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Professor Vojislav Šešelj's Response to the Order of Trial Chamber III of 13 June 2014 Inviting the Parties to Make Submissions on Possible Release of the Accused Proprio Motu, 17 June 2014, para. 4(f).

[17] *Prosecutor v. Jovica Stanišić and Franco Simatović*, Case No. IT-03-69-AR65.4, Decision on Prosecution Appeal of Decision on Provisional Release and Motions to Present Additional Evidence Pursuant to Rule 115, para. 69. *See also*, *Édouard Karemera, et al. v. The Prosecutor*, Case No. ICTR-98-44-AR65, Decision on Mattieu Ngirumpatse's Appeal Against Trial Chamber Decision Denying Provisional Release, 7 April 2009, para. 16.

heart of the Trial Chamber's decision to order the provisional release.[18] The Decision of the Majority in this regard is, therefore, unwarranted.

18. Moreover, the fact that the Majority orders the Trial Chamber to revoke Šešelj's provisional release, rather than revoking the provisional release itself, demonstrates that the Majority does not consider it has the power to revoke the provisional release and suggests that indeed it is for the Trial Chamber to consider whether to revoke its original order of Šešelj's provisional release. In this case, the Appeals Chamber can only properly make a finding on the Trial Chamber's decision not to revoke the provisional release. The power to revoke the provisional release and to order Šešelj to attend a hearing is a matter solely within the remit of the Trial Chamber.

19. The logic of the Majority, which we do not support but is nevertheless relevant here, should have led the Appeals Chamber not only to recognize that it has the power to make findings on the evidence of Šešelj's post-release behaviour but also has the power to revoke his provisional release. The route chosen by the Majority of ordering the Trial Chamber to revoke the provisional release is a middle route which is not supported by law or logic.

E. Second Alleged Error

20. The Majority dismisses the Prosecution's remaining arguments relating to Šešelj's post-release conduct as they are only relevant to considerations of the regime of conditions governing Šešelj's provisional release, which might become relevant at a later stage.[19] This approach is unsupportive of the Majority's order to the Trial Chamber to "conduct a *de novo* assessment of the merits of Šešelj's possible further provisional release".[20]

21. The Trial Chamber is ordered to conduct a *de novo* assessment, which must include the two-prong test pursuant to Rule 65(B) of the Rules, and to decide whether to re-order the provisional release of the accused. Logically, one of the inherent components of such consideration will be whether the accused previously violated the conditions of his provisional release pursuant to Rule 65(C) of the Rules. Consequently, the reluctance of the Majority to decide whether the Trial Chamber erred in finding that Šešelj did not violate his release conditions is unsatisfactory in informing the parties, most importantly Šešelj, which conditions pursuant to Rule 65(C), if any, he has breached, and puts the Prosecution in an unnecessary situation of uncertainty that in all probabilities will lead to another appeal that

[18] *Cf. Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-AR65.1, Decision on Johan Tarčulovski's Interlocutory Appeal on Provisional Release, 4 October 2005, para. 9.
[19] *See* Majority Decision, para. 21.

could have been easily avoided. Accordingly, we briefly set out our view on the Prosecution's submissions.

22. The Prosecution argues that the Trial Chamber erred by failing to impose stricter conditions on Šešelj in spite of the "new facts arising from Šešelj's post-provisional release conduct that have now eroded the Trial Chamber's foundation for imposing only minimal conditions and not requiring an undertaking by Šešelj that he will comply with the conditions of his provisional release".[21] The Prosecution points to four issues, namely: (i) public statements issued by Šešelj that threaten persons who have cooperated with the Prosecution; (ii) conduct that is inflammatory and insulting to victims; (iii) Šešelj's statements to the effect that his health condition was not particularly grave, which allegedly directly undermined the Trial Chamber's findings in its 6 November 2014 Decision; and (iv) Šešelj's statements that he would not voluntarily return to the Tribunal.[22] As to the latter, as it was addressed above, there is no need to address it again here.

23. With regards to elements (i) and (ii), these refer to the precondition that an accused should not pose a danger to victims and witnesses, which is rather a requirement of Rule 65(B) of the Rules. As such, these elements should properly be considered as non-negotiable Rule 65(B) pre-release conditions and not post-release conditions to be reviewed under Rule 65(C) of the Rules.

24. To this end, we note that in its 13 January 2015 Decision the Trial Chamber clearly considered the precondition of not obstructing witnesses, and found the new evidence unfortunate but that it did not constitute an attempt to influence or threaten witnesses, and therefore did not violate conditions imposed on Šešelj.[23] The Trial Chamber therefore did not fail to consider this new evidence, but rather considered the new evidence and made its decision that it did not require a post-release change in Šešelj's conditions. Mindful of the standard of review on appeal, the Prosecution simply puts the same information before the Appeals Chamber and fails to demonstrate on appeal how the Trial Chamber erred in making such finding.

25. Finally, with regards to element (iii), it does appear that the Trial Chamber failed to address the impact of Šešelj's post-release statements regarding his health in its 13 January 2015 Decision. Recalling that Šešelj's provisional release was based on his health this is clearly

[20] Majority Decision, para. 22.
[21] Prosecution Appeal Motion, para. 12.
[22] Prosecution Appeal Motion, para. 12.
[23] 13 January 2015 Decision, para. 13.

an important issue, and given that the Trial Chamber's assessment of Šešelj's health was based on confidential material, we find it was incumbent upon the Trial Chamber to provide a reasoned opinion in its 13 January 2015 Decision. By failing to address this issue, the Trial Chamber has erred, and this would have justified that the issue be remitted back to the Trial Chamber to provide a reasoned opinion.

26. In conclusion, we are of the view that the applicable law should have been properly explained at the outset of the Majority Decision, especially given the number of new issues raised in this appeal. Furthermore, we find that Majority Decision is lacking the necessary explanation for finding that the Trial Chamber erred with regard to the first alleged error, a shortcoming exacerbated by the lack of deference due to the Trial Chamber's discretion. We are of the view that the matter should have been remanded to the Trial Chamber in order to provide a reasoned opinion on the Prosecution's contention regarding Šešelj's health.

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

Judge Bakhtiyar Tuzmukhamedov

Judge Koffi Kumelio A. Afande

Dated this thirtieth day of March 2015
At The Hague,
The Netherlands.

[Seal of the Tribunal]