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: 23 March 2012

Original: ENGLISH
French

IN TRIAL CHAMBER III

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

Registrar: **Mr John Hocking**

Decision of: **23 March 2012**

THE PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC DOCUMENT

DECISION ON THE ACCUSED VOJISLAV ŠEŠELJ'S REQUEST FOR PROVISIONAL RELEASE

The Office of the Prosecutor

Mr Mathias Marcussen

The Accused

Mr Vojislav Šešelj

I. INTRODUCTION

1. Trial Chamber III 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 ("Chamber" and "Tribunal", respectively) is seized of the oral request made by Vojislav Šešelj ("Accused") on 20 March 2012, in the course of his closing argument, seeking his provisional release[1] ("Request").

2. The Chamber recalls that, on 20 March 2012, in accordance with Rule 87 (A) of the Tribunal's Rules of Procedure and Evidence ("Rules"), the Presiding Judge declared the hearings in this case closed.[2] Since then, the trial has been in the phase of deliberations.

II. ARGUMENTS OF THE PARTIES

3. The Accused contends that reasons no longer exist to keep him in detention insofar as, according to him: i) there is no risk, or reason, for him to flee; ii) he could not influence witnesses because witnesses listed by the Tribunal's Office of the Prosecutor ("Prosecution") have already been heard and iii) there is no risk of him recommitting crimes likely to bring about proceedings before the Tribunal because "the war is no longer in effect in the Balkans"[3].

4. At the same hearing, the Prosecution responded that the Accused's request should be rejected because he had presented no supporting evidence,[4] including state guarantees.[5]

III. APPLICABLE LAW

5. Pursuant to Rule 65 (B) of the Rules,[6]

[1] Closing arguments, T(E) of 20 March 2012, pp 17550 and 17551 (provisional version).
[2] Closing arguments, T(E) of 20 March 2012, p. 17554 (provisional version).
[3] Closing arguments, T(E) of 20 March 2012, p. 17551 (provisional version).
[4] Closing arguments, T(E) of 20 March 2012, p. 17552 (provisional version).
[5] Defence Closing Statement, 20 March 2012, T. 17539 (provisional version).
[6] Rule 65(B) of the Rules, amended on 20 October 2011.

> 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.

A. Absence of state guarantees

6. As regards the requirement making it incumbent upon the Chamber to give the host country and the State to which the accused seeks to be released the opportunity to be heard, the Chamber notes, *in limine*, that the Accused has neither provided state guarantees in support of his Request, nor indicated the country to which he seeks to be released.[7]

7. However, the Chamber recalls that "Rule 65(B) requires an applicant for provisional release to satisfy the Chamber to which he has applied of only two matters: 1) that he will appear for trial, and (2) that, if released, he will not pose a danger to any victim, witness or other person" and that, in these provisions "there is no reference /…/ to an obligation upon the accused, as a prerequisite to obtaining provisional release, to provide guarantees from [a] State, or from anyone else, that he will appear for trial."[8] As a result, the Chamber cannot dismiss the Request on the sole

[7] The Chamber recalls that, in its Decision of 23 July 2004, Trial Chamber II of the Tribunal ("Trial Chamber II") rejected the Accused's request to be released while awaiting trial, holding that the conditions required for provisional release pursuant to Rule 65 (B) of the Rules had not been met and that, in particular, no state guarantees ensuring that the Accused would appear for trial and not pose a danger to any victim, witness or other person were provided in support of the Request (*Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, "Decision on Defence Motion for Provisional Release", 23 July 2004 (public) ("Decision of 23 July 2004"), paras 7 and 8). Furthermore, in its decision of 13 December 2005, the same Chamber rejected another request by the Accused in which, among other things, he requested that he be released by the Chamber. In this connection, Trial Chamber II particularly noted that the Accused had not proven a change in the circumstances which had prevented the Chamber from concluding in its previous Decision of 23 July 2004 that the criteria under Rule 65 (B) of the Rules were satisfied (*Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, "Decision on Request of the Accused for Trial Chamber II to Issue an Order for the Trial to Commence by 24 February 2006 or an Order to Abolish Detention, Dismiss the Indictment and Release Dr Vojislav Šešelj" ("Document no. 116"), 13 December 2005 (public), pp 2 and 3).

[8] *Prosecutor v. Vidoje Blagojević et al*, Case No. IT-02-53-AR65, "Decision on Application by Dragan Jokić for Leave to Appeal", 18 April 2002 (public) ("*Blagojević et al.* Decision of 18 April 2002"), para. 7. *See* also *Prosecutor v. Édouard Karemera et al.*, Case No. ICTR-98-44-AR65, "Decision on Matthieu Ngirumpatse's Appeal Against Trial Chamber's Decision Denying Provisional Release", 7 April 2009 (public) ("*Karemera et al.* Decision of 7 April 2009"), para. 13; *Prosecutor v. Jovica Stanišić and Franko 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", 26 June 2008 (public), para. 48.

grounds that the Accused failed to present the guarantees of a State and, consequently, must take into consideration all relevant evidence that a reasonable Trial Chamber would have to take into account when deciding whether it is satisfied that the requirements of Rule 65 (B) of the Rules have been fulfilled.[9]

B. If released, the Accused will appear in court for the rendering of the judgement or, if need arises, will return upon expiry of the release period

8. The Chamber recalls that "while the submission of State guarantees is not a pre-requisite for provisional release, it is generally advisable for an applicant […] to submit guarantees in order to satisfy the International Tribunal that he will appear when required".[10] In view of that, the Appeals Chamber has on several occasions held that "the Tribunal has no power to execute its own arrest warrant upon an applicant who is in the territory [of a country] in the event that he does not appear for trial, and it needs to rely upon local authorities within that territory or upon international bodies to effect arrests on its behalf".[11]

9. A State's guarantees may carry considerable weight where a Trial Chamber has concerns about the applicant's personal guarantees.[12] In this connection, the Chamber considers that, even though the Accused surrendered to the Tribunal of his own free will soon after having been informed that an Indictment had been raised against him,[13]

[9] *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-AR65.2, "Decision on Ramush Haradinaj's Interlocutory Appeal Against the Trial Chamber's Decision Denying his Provisional Release", 9 March 2006 (public) ("*Ramush Haradinaj et al.* Decision of 9 March 2006"), para. 10; *Karemera et al*. Decision of 7 April 2009, para. 13.

[10] *Prosecutor v. Astrit Haraqija and Bajrush Morina*, Case No. IT-04-84-R77.4-A, "Decision on Motion of Astrit Haraqija for Provisional Release", 8 April 2009 (public), para. 8. *See* also the *Karemera et al.* Decision of 7 April 2009, para. 13; *Blagojević et al.* Decision of 18 April 2002, paras 7 and 8.

[11] *Blagojević et al.* Decision of 18 April 2002, para. 8. *See* also *Prosecutor v. Radoslav Brđanin and Momir Talić*, Case No. IT-99-36-AR65, "Decision on Application for Leave to Appeal", 7 September 2000 (public), p. 3.

[12] *Karemera et al.* Decision of 7 April 2009, para. 13.

[13] *See* in particular the Initial Appearance, T(E) of 26 February 2003, p. 2; *see* also "Decision on Accused's Claim for Damages on Account of Alleged Violations of his Fundamental Rights During Provisional Detention", 21 March 2012 (public with a public annex and concurring separate opinion by Presiding Judge Jean-Claude Antonetti) ("Decision of 21 March 2012"), paras 6 and 24. The Chamber notes, however, that – contrary to what the Accused has been arguing so far (*see* in particular "Claim for Damages on Account of Violation of Elementary Human Rights of Professor Vojislav Šešelj During Nine Years of Detention", 27 January 2012 (public), para. 2) – during the closing argument and in the context of discussing the mitigating circumstances affecting his sentence, the Accused indicated that he had come to The Hague "for different reasons" and not to surrender: "At several rallies I promised the Serbian people that I would implement a project together with the Dutch queen. That's

his behaviour throughout his trial was such that the Chamber can do no other than note the absence of any cooperation with the Tribunal.[14] The Chamber also notes that the Accused not only failed to present personal guarantees, e.g. bail or an undertaking that he would appear before the Tribunal at the Chamber's request, but on the contrary, made provocative remarks by declaring that he had formulated his request "to bring more pain" to the Chamber and to place it "in a position in which [it would] have to decide and reject [his] Request".[15]

C. If released, the Accused will not pose a danger to any victim, witness or other person

10. The Chamber notes that, according to the established case-law,

> Before granting provisional release, a Trial Chamber should take into consideration the position of victims and witnesses living in the same region where the accused, when released, will return. The perception that persons accused of international crimes are released, for a prolonged period of time, after a decision that a reasonable trier of fact could make a finding beyond any reasonable doubt that the accused is guilty (this being the meaning of a decision dismissing a Rule 98 *bis* motion), could have a prejudicial effect on victims and witnesses.[16]

11. In this case, although the Accused has indicated neither the country nor region to which he intends to go in case of his provisional release, the Chamber considers the

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why I travelled to The Hague. I had no intention whatsoever to surrender myself. When the airplane landed in Amsterdam, the capital of The Netherlands, and when the funnel was erected, all of a sudden the crew told us that the airport police insisted that I should be the first to step out of the airplane. […] And when I looked at the door that leads directly from the /?finger/ into the airport, I opened it up and I ran out. However, I was surrounded by a hundred policemen and I didn't have a chance. They just dragged me, put me inside a police vehicle, and took me to the DU. Therefore, there was no extenuating circumstances." (Closing argument, T(E) of 20 March 2012, pp 17548 and 17549 (provisional version).

[14] In this connection, the Chamber recalls that, even though an Accused is not required to co-operate with the Prosecution and will be not disadvantaged due to his refusal to cooperate, "when an accused person decides to cooperate with the Prosecution, this matter may weigh in his favour when he seeks to be provisionally released, insofar as it shows his general attitude of cooperation towards the International Tribunal which is relevant to the issue that he will appear." (*Ramush Haradinaj et al.* Decision of 9 March 2006, para. 16, referring to *Prosecutor v. Milan Milutinović et al.*, Case No. IT-99-37-AR65.3, "Decision Refusing Milutinović Leave to Appeal", 3 July 2003 (public), para. 12.

[15] Closing arguments, T(E) of 20 March 2012, p. 17551 (provisional version).

[16] *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR.65.7, "Decision on 'Prosecution's Appeal from *Décision relative à la demande de mise en liberté provisoire de l'accusé Petković*' dated 31 March 2008'", 21 April 2008, para. 17. *See* also *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR.65.26, "Decision on Prosecution Appeal of Decision on Provisional Release of Jadranko Prlić", 15 December 2011, para. 10: "recalls that, at the advanced stage of the proceedings, provisional release could have a prejudicial effect on victims and witnesses."

potential impact of his provisional release on the victims and witnesses to be a factor militating against a decision granting the Request.

12. Moreover, the Chamber notes that a number of contempt proceedings are currently under way against the Accused. More specifically, in its Judgement of 31 October 2011, Trial Chamber II declared the Accused guilty of contempt of court and sentenced him to a prison sentence of 18 months, for having deliberately and knowingly obstructed the course of justice by violating the protective measures ordered by the Chamber and divulging confidential information about ten protected witnesses in a book authored by him.[17] The *Amicus Curiae* Prosecutor has appealed the Judgement and the trial is currently pending before the Appeals Chamber.[18] Secondly, by an order in lieu of indictment, on 9 May 2011 Trial Chamber II initiated further contempt proceedings against the Accused at the Tribunal for failing to remove confidential information from his private website in violation of orders issued by a Chamber.[19] Although these contempt proceedings do not fall within the remit of the Chamber, the latter is not at all certain – due, in particular, to a duly reasoned request from the Accused – that, if released, he would not attempt to come into contact with the witnesses concerned, or that his release would not have an intimidating effect for these witnesses.

D. Other issues under consideration

[17] *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.3, "Public Redacted Version of 'Judgement' Issued on 31 October 2011, 31 October 2011 (public redacted version) ("Judgement of 31 October 2011")

[18] *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.3, "Amicus Curiae Prosecutor Notice of Appeal Against Sentence", 14 November 2011 (public). The Chamber notes that, on 17 November 2011, the Accused sent a letter to the Appeals Chamber, indicating that he intended to appeal the Judgement of 31 October 2011 (*Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.3-A, "Submission No. 482 [Preliminary Reply to Prosecutor's Appeal]", 21 November 2011 (public): […] I myself intend to file an appeal against the second judgement for contempt of court, dated 31 October 2011 […]"). The Chamber notes, however, that the Appeals Chamber's Scheduling Order dated 7 February 2012 mentions solely the appeal filed by the *Amicus Curiae* (*Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.3-A, "Scheduling Order", 7 February 2012, (public)).

[19] *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.4, "Public Edited Version of 'Decision on Failure to Remove Confidential Information from Public Website and Order in Lieu of Indictment' issued on 9 May 2011", 24 May 2011 (public redacted version), modified by "Public Edited Version of 'Second Decision on Failure to Remove Confidential Information from Public Website and Amended Order in Lieu of Indictment' issued on 21 October 2011", 28 October 2011 (public redacted version).

13. In the light of the Accused's arguments regarding the allegedly excessive character of his pre-trial detention,[20] the Chamber notes that, in ruling on a request for provisional release, the actual or likely length of an accused's pre-trial detention is only "an additional discretionary consideration which has no bearing upon the assessment as to whether an accused will appear for trial if released".[21] In this case, the Chamber considers, on the one hand, that, in view of the complexity of his trial and the exceptional circumstances of the case, the length of the Accused's pre-trial detention is not excessive[22] and, on the other, that it has no impact on the Chamber's considerations regarding the conditions required under Rule 65 (B) of the Rules.

14. Finally, the Chamber notes that the 18-month prison sentence passed by the Judgement of 31 October 2011 against the Accused must be served concurrently with the 15-month prison sentence passed by the Judgement of 24 July 2009[23] and confirmed by the Judgement of 19 May 2010.[24] Although it does not fall within the Chamber's remit to address the issue of the modalities of the execution of these sentences, it notes that neither of the judgements specified at which moment they are to be served.

E. Conclusion

15. In view of the above, the Chamber considers that the Accused failed to present convincing arguments that he would appear in court for the rendering of the judgement or would otherwise return to the UN Detention Unit in The Hague ("Detention Unit") upon expiry of the release period, and that, if released, he would not pose a danger to any victim, witness or other person.

16. The conditions under Rule 65 (B) of the Rules being cumulative, the Chamber does not deem it necessary to give the host country and the State to which the

[20] *See* in this connection the Decision of 21 March 2012, paras 87 to 92.
[21] *Ramush Haradinaj et al.* Decision of 9 March 2006, para. 23 and cited references.
[22] *See* also the Decision of 21 March 2012, para 92.
[23] *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.2-A, "Judgement on Allegations of Contempt", 24 July 2009 (confidential, public redacted version filed on the same date).
[24] *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.2-A, "Judgement", 19 May 2010 (public redacted version).

Accused seeks to be released the opportunity to be heard, especially since – as noted above[25] – the Accused failed to indicate the country to which he seeks to be released.

17. Nevertheless, the Chamber notes that, on 12 March 2012, it ordered the Registrar *proprio motu* to appoint a commission of three medical experts and provide, as soon as possible, but no later than 30 days from the date of the issuance of the order, their report on the compatibility of the Accused's detention in the Detention Unit with the state of his health.[26] The Chamber notes in particular that this decision is without prejudice to any future reasoned request[27] for provisional release the Accused might wish to file following the conclusions of the expert report.

IV. DISPOSITION

18. For the foregoing reasons and pursuant to Rule 65 of the Rules, the Chamber **REJECTS** the Request of the Accused.

19. The Presiding Judge of the Chamber Jean-Claude Antonetti attaches a concurring separate opinion.

[25] *See supra*, para. 6.
[26] "Order to Proceed With a New Medical Examination", 12 March 2012 (public), p. 2. The Chamber simultaneously encouraged the Accused to prove his cooperation and goodwill by allowing the three medical experts appointed by the Order to examine him and/or allow them access to his medical file (*ibid.*).
[27] It is up to the Accused to present arguments relative to the criteria of Rule 65 (B) of the Rules (*see supra*, paras 6, 7 and 17).

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

/signed/
Jean-Claude Antonetti
Presiding Judge

Done this twenty-third day of March 2012
At The Hague
The Netherlands

[Seal of the Tribunal]