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

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IN TRIAL CHAMBER III

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

Registrar : **Mr John Hocking**

Order of: 10 April 2015

THE PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC DOCUMENT

SEPARATE CONCURRING OPINION OF PRESIDING JUDGE JEAN-CLAUDE ANTONETTI ATTACHED TO INTERLOCUTORY DECISION BEFORE RULING ON THE MERIT OF THE REVOCATION OF THE PROVISIONAL RELEASE OF THE ACCUSED

Office of the Prosecutor:

Mr Serge Brammertz

The Accused:

Mr Vojislav Šešelj

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I. PRELIMINARY OBSERVATIONS

Bound by the **secrecy of deliberations**, I was careful until now not to attach **any opinions** to the numerous decisions entered so far with regard to the provisional release of **Vojislav Šešelj ("the Accused")**. It seems to me that I now must elaborate and make my position clear so that we can understand why that decision was taken.

Before going to the crux of the matter, it is curious, to say the least, to note that the Appeals Chamber did not ask itself any questions on the **admissibility** of the Prosecution's motion. In fact, when the decision to grant provisional release was issued on 6 November 2014,[1] the Prosecution did not invoke Rule 65 (D) of the Rules of Procedure and Evidence **("Rules")** in the time allowed them. It was only later that it decided to submit to the Trial Chamber their Motion to Revoke dated 1 December 2014.[2] It is noteworthy that the Accused himself objected to this motion, demanding that legal action be taken against the Prosecutor whose actions, in his view, were evidently politically motivated.[3]

Insofar as the Appeals Chamber deemed itself competent to decide on the Prosecution's motion, it was required, pursuant to Article 25 of the ICTY Statute, to affirm, reverse or revise the decision of the Trial Chamber.[4] In the case of a contested request for provisional release, it could only affirm or reverse the decision, that is to say, it could terminate the previously ordered release and demand the return of the Accused to detention. I cannot understand why the Appeals Chamber shifted its responsibility on to the Trial Chamber unless it was acting as a Cassation Chamber.

To my mind, this motion by the Prosecution was, in legal terms, a **request to reconsider** our previous decision. This request for reconsideration – which was dismissed[5] – should have been filed pursuant to Rule 73 (B) of the Rules of Procedure and Evidence, subject to authorisation by

[1] *The Prosecutor v. Vojislav Šešelj*, Case no. IT-03-67-T, "Order on the Provisional Release of the Accused *Proprio Motu*", 6 November 2014.
[2] *The Prosecutor v. Vojislav Šešelj*, Case no. IT-03-67-T, "Prosecution Motion to Revoke Provisional Release", 1 December 2014.
[3] *The Prosecutor v. Vojislav Šešelj*, Case no. IT-03-67-T, "Response to the Prosecution Motion to Revoke Provisional Release", 22 December 2014, para. 15.
[4] It should be noted that the Report of the Secretary General pursuant to Paragraph 2 of Security Council Resolution (1993), indicates with regard to procedure for appeal and revision, that "[T]he judgement of the Appeals Chamber affirming, reversing or revising the judgement of the Trial Chamber would be final." UN Document S/25704, par. 118.
[5] *The Prosecutor v. Vojislav Šešelj*, Case no. IT-03-67-T, "Decision on Prosecution Motion to Revoke Provisional Release", 22 December 2014

the Trial Chamber by means of **certification of appeal**.[6] However, this motion of the Prosecution is based on Rule 65 (D), which is not applicable at this stage in the present case.[7] It is undeniable that, had the Prosecutor made his submission for certification of appeal in writing, I would have been **against granting** it. As this procedural aspect has been disposed of definitively by the ruling of the Appeals Chamber, I must present here some important elements that all support the release of the Accused.

II. PROCEDURAL BACKGROUND

1. The concept of release

In keeping with Rule 65 (B) of the Rules amended on 20 October 2011, an Accused may be granted provisional release **at any stage of the proceedings prior to the rendering of the final judgment**, as long as the Chamber is satisfied that the Accused will appear before the Court and will not pose a danger to any victim or witness. It is, moreover, stipulated that the Chamber may take into account the existence of sufficiently compelling humanitarian grounds. As far as the Appeals Chamber is concerned, paragraph (I) of this Rule is even more explicit, since it stipulates expressly that a convicted person awaiting judgment on appeal may be granted provisional release on the same conditions detailed in items (i) and (ii). In addition, item (iii) stipulates that such a release may be justified by **"special circumstances"**.

Thus, the legal framework of provisional release is particularly broad and carries two principal conditions (the assurance of appearing for a hearing and the protection of victims and witnesses). The Trial Chamber's decision to grant release dated 6 November 2014 took these two imperatives into account.

2. Implementation of the process for release *propio motu*

The fact to bear in mind is that an **Accused** is presumed **innocent** until the delivery of the judgment, all the more so if he declared, in accordance with procedure, that he would plead not guilty. If these words are to have a meaning, they should also be applied to extreme situations. The presumption of innocence is not a theoretical category at the ICTY because a number of accused

[6] Rule 73 (B) entitled "Other Motions" stipulates that: "Decisions on all motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings."

have been definitively acquitted.[8] In the present case, the question arose immediately in my mind whether there was any purpose whatsoever in keeping this Accused **in the hands of the law** after the completion of his trial. It was quite clear that this would serve no purpose because, if released, he could in no way interfere with the course of our deliberations or exert any pressure on or intimidate witnesses and victims who have already testified. As far as witnesses and victims are concerned, I could not see what interest he could possibly have in approaching them, considering that most of the witnesses called by the Prosecution declared themselves later as defence witnesses.

I believe that the **presumption of innocence** should apply even more in this case in view of the fact that the Accused is ill and his condition requires treatment. The credibility of international justice depends on its ability to adjust its judicial treatment in cases involving ill persons who are presumed innocent. Of course, the situation may be slightly different when a judgment finds the accused guilty, and before the phase of the appeal judgment, as was the case of **Rasim Delić,** who died during that phase of the appeal.[9] It is, however, noteworthy that this Accused could have benefited from being released between the end of his trial and the delivery of the judgment, in the period from 11 December 2007 to 11 January 2008.[10] It is also interesting that, in this case, the Prosecution filed a motion to arrest the Accused, who had had a meeting with a member of the Presidency of the Federation of Bosnia-Herzegovina, expressly prohibited by the Trial Chamber.[11] Therefore, presumption of innocence requires a careful consideration of individual situations on a case-by-case basis.

In the present case, the **deteriorating health** of the Accused has impacted the positions taken by the judges on this Chamber. In fact, in the face of the Accused's declining health, the Trial Chamber initiated in July 2014 a process for his provisional release on its own initiative, subject to conditions of home confinement and surveillance of the Accused. Nevertheless, this procedure had to be stopped following the remarks made by the Accused.[12] The remarks of the accused in the course of

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[7] *The Prosecutor v. Vojislav Šešelj*, Case no. IT-03-67-T, "Prosecution Appeal of the Decision on the Prosecution Motion to Revoke the Provisional Release of the Accused", 20 January 2015, para. 1.

[8] To give only two examples, in its Judgement of 16 November 2012, the Appeals Chamber acquitted Ante Gotovina of the charges against him. Equally, the Appeals Chamber acquitted the Accused Momčilo Perišić in its Judgement of 28 February 2013.

[9] A decision was rendered during the appeals phase granting him provisional release until the appeals hearing. *The Prosecutor v. Rasim Delić*, Case no. IT-04-83-A, "Decision on Motion of Rasim Delić for Provisional Release", public, 11 May 2009. It should be noted that the Accused died at his home on 16 April 2010. On 29 June 2010, the Appeals Chamber concluded the appeals phase by announcing that the Judgement rendered by the Trial Chamber should be considered as final.

[10] The first decision on provisional release was rendered by the Trial Chamber following a motion filed by the Defence. The Trial Chamber granted this motion while waiting to render its Judgement. *The Prosecutor v. Rasim Delić*, Case no. IT-04-83-T, "Decision on Defence Motion for Provisional Release", public, 23 November 2007.

[11] *The Prosecutor v. Rasim Delić*, Case no. IT-04-83-T, "Prosecution Motion to Arrest the Accused Rasim Delić", public, 14 December 2007.

[12] In its Decision of 23 March 2012, the Trial Chamber, in a different composition, had already indicated this in paragraph 9 of its Decision: "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

this process for his provisional release *proprio motu* could appear surprising in view of the usual guarantees offered by the accused in their own requests for provisional release. As a rule, an accused tries to show in advance that he is acting in the **spirit of cooperation** and supplies the judges of the Trial or the Appeals Chamber with all the useful indications of his future conduct during detention, so that the judges would have no hesitation in granting their provisional release. Here, however, the **intransigent position** of the Accused, who insisted on being released with no other restriction than his undertaking to remain in Serbia, disrupted this procedure and it had to be stopped.[13]

In the November 2014, the process for provisional release restarted when the Trial Chamber learned that the Accused's health had deteriorated due to a possible metastasis to the liver. It was, therefore, this **new element** (metastasis of the liver) that triggered the resumption of the provisional release process. Once the process was under way, the question arose whether it was necessary to elicit again the opinions of the Prosecution, the receiving State and the Accused. The position of the Prosecution in this type of situation before the judgment is standard: as a general rule, the Prosecution is opposed. The receiving State, for its part, has to provide its observations, considering the practical consequences of the responsibility it assumes. In view of the fact that the Accused was supposed to go to Serbia to receive treatment, the Trial Chamber asked this State to formulate its position once again. The Republic of Serbia reiterated its position as previously stated in July 2014, namely: **"The position of the Government of the Republic of Serbia with regard to the possible release of the accused Vojislav Šešelj remains the same as it was with regard to previous decisions of the ICTY Trial Chamber that sought guarantees from the Government of the Republic of Serbia, as we informed you on 1 July 2014."**[14]

So, the Government of the Republic of Serbia stood by its earlier position: it required the Accused's consent to the conditions stipulated on 1 July 2014. With this stance taken by Serbia, it was clear that the process would be blocked again, since the Accused would refuse once again the surveillance and the home confinement. In that situation, it was evident that the observations of the Accused would make for **a new provocation**, tending, *a priori*, **to reject** the motion. Knowing that, under the provisions of Rule 65(B), this disposition can be made only on the basis of the **observations made by States**, and having examined the opinions of the Serbian doctors who had had access to the medical records of the Accused and had talked to him, I decided to go ahead or

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." *The Prosecutor v. Vojislav Šešelj*, Case no. IT-03-67, Closing Arguments, public hearing of 20 March 2012, T(F), p. 17551.

[13] *The Prosecutor v. Vojislav Šešelj*, Case no. IT-03-67-T, "Order Terminating the Process for Provisional Release of the Accused *Proprio Motu*", 10 July 2014.

risk having the Accused's death on our conscience.[15] In those circumstance, as a responsible international judge, could I "sit idly by" and wait for a fatal turn?

For my part, I did not wish to get involved in the personal game the Accused is playing with our Institution because, apart from his posturing, there were **major issues** more important than his concept of **international justice.** In fact, these issues should lead a **responsible** international judge to take into account a whole series of parameters which must not be compromised by the attempts to destabilise the Court on the part of this Accused who, from the beginning of his trial, pursued his personal crusade against the ICTY. These major issues concern the **presumption of innocence** of an accused, the question of necessity of **provisional detention** awaiting judgment (although the presence of the Accused in detention is not even necessary at that stage), the **duration of detention** which is getting longer as time goes by, and the **central issue of the health** of the Accused who, as we have been informed, for a reason connected to an administrative decision, has been refusing medical treatment for several weeks. In such circumstances, it is my opinion that, the accused benefiting as he does from the **presumption of innocence,** and taking into account the **case-law in the matter**, his further provisional detention is no longer justified.

3. Case-law in the matter of provisional release

The process of **provisional release** of the Accused initiated *ex officio* by the Trial Chamber is an important event in the history of this **Tribunal** because, until now, there have been **no cases** of provisional release *ex officio*. We would therefore do well to take a closer look at cases which have more or less in common.

The case-law of regional human rights courts and international judicial bodies contains some relevant decisions. The Inter-American Court of Human Rights and the UN Human Rights Commission have, in the decisions ***Acosta-Calderón v. Ecuador***,[16] ***Vladimir Kulomin v. Hungary***[17] and ***Michael and Brian Hill v. Spain***[18] clearly stated that provisional detention should

[14] Response from the State, confidential, 5 November 2014.
[15] *See* the press conference of 2 November 2014 at which Serbian doctors described a "dramatic situation", "a weight loss of 25 kg" with potential "tragic consequences". Available on the site of the Accused: www.vseselj.com.
[16] Inter-American Court of Human Rights, *Acosta-Calderon v. Ecuador*, Judgement of 24 June 2005, paras 74 and ff.
[17] United Nations Human Rights Committee, *Vladimir Kulomin v. Hungary*, Communication no. 521/1992, 1 August 1996, UN Doc. CCPR/C/56/D/521/1992.
[18] United Nations Human Rights Committee, *Michael and Brian Hill v. Spain,* Communication no. 526/1993, 2 April 1997, UN Doc. CCPR/C/59/D/526/1993. Judge Fausto Pocar appears in the case as a member of the Committee, and he was in the composition of the Appeals Chamber in the Krajišnik Case which denied the request for the provisional release of Krajišnik. *See*, *The Prosecutor v. Momčilo Krajišnik and Biljana Plavšić*, IT-00-39 and 40-AR65, "Decision on Application for Leave to Appeal", 14 December 2001.

be the **exception**. The European Court of Human Rights has also recalled this principle.[19] It is also noteworthy that at the ICC, in the trial of **William Samoei Ruto,** the Deputy Prime Minister of Kenya was not placed in provisional detention, which allowed him to pursue his ministerial and political activities at the same time as participating in his trial in a workable and appreciable way.[20]

In ICTY case-law, **Ramush Haradinaj** is an **emblematic case** that allows us to gauge the full scope of the problem in question and the definition of the **field of political expression**. We must recall in this case that on 12 October 2005, after the Accused was granted provisional release on 6 June 2005,[21] the Trial Chamber, by a majority, relaxed the conditions imposed on the Accused and found that « *particularly in light of the presumption of innocence, that the seriousness of the crimes an accused is charged with is not a reason on its own for granting provisional release, but merely one of the factors to be taken into account in evaluating whether the Accused will appear for trail […]*"[22]

The Trial Chamber estimated in that case that it was warranted to *"empower UNMIK, without having to seek prior approval by the Trial Chamber, to authorise or deny, as the case may be, any request by the Accused to appear in public or to engage in a certain public political activity.*"[23] Thus, overseen by UNMIK, the party in question was free to engage in political activity and attend rallies.

This approach taken by the Trial Chamber was upheld by the **Appeals Chamber, rejecting the Prosecution's appeal** which maintained that the Trial Chamber's approach would have an adverse effect, as the victims and witnesses would be perturbed to see the Accused appear in the media.[24] The Prosecution submitted that the victims and witnesses could gain the impression that their interests were not taken into account and, furthermore, that the supporters of the Accused,

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[19] *See* for example, the European Court of Human Rights, *Ilijkov v. Bulgaria*, no. 33977/96, Judgement of 26 July 2001, para. 85.

[20] *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, ICC-01/09-01/11, "Reasons for the Decision on Excusal from Presence at Trial under Rule 134 *quarter*", public, 18 February 2014 . In its decision, the Appeals Chamber relies, in particular, on the new provision **Rule 134 *quarter*** adopted by the Assembly of the State Parties on 27 November 2013 allowing the Accused to be excused from presence at the trial, and to be represented by Counsel, due to extraordinary public duties.

[21] *The Prosecutor v. Ramush Haradinaj et al.*, Case no. IT-04-84-PT, "Decision on Ramush Haradinaj's Motion for Provisional Release", public, 6 June 2005.

[22] *The Prosecutor v. Ramush Haradinaj et al.*, Case no. IT-04-84-PT, "Decision on Defence Motion on Behalf of Ramush Haradinaj to Request Re-assessment of Conditions of Provisional Release Granted 6 June 2005", 12 October 2005, p. 6.

[23] *The Prosecutor v. Ramush Haradinaj et al.*, Case no. IT-04-84-PT, "Decision on Defence Motion on Behalf of Ramush Haradinaj to Request Re-assessment of Conditions of Provisional Release Granted 6 June 2005", 12 October 2005, p. 6.

[24] *The Prosecutor v. Ramush Haradinaj et al.*, Case no. IT-04-84-PT, "Prosecution's Appeal against 'Decision on Defence Motion on Behalf of Ramush Haradinaj to Request Re-assessment of Conditions of Provisional Release Granted 6 June 2005'", public, 19 October 2005, pp. 7-8.

emboldened by the pronouncements of their leader, could intimidate victims and witnesses.[25] The Prosecution also advanced the idea that this decision would discourage witnesses from coming to testify and that the Accused would be given a carte blanche to engage in politics and undermine the authority of the Tribunal along with its function of restoring and keeping peace in the region.[26] It is noteworthy that the Prosecution's motion voiced the same concerns. The Prosecution also added that **war crime** charges ruled out all political activity and public meetings.

These arguments are irrelevant in the present case because **this trial is finished**. That being so, I do not see what interest the Accused could have in pressuring witnesses or victims while the Trial Chamber is in the process of deliberating. I also fail to see in what way the authority of the Tribunal could be undermined by the fact that this decision recognises the legitimate right of the party in question to political expression. Contrary to the submissions in paragraph 32 of the Prosecution's filings in the case of **Ramush Haradinaj**, I find that reintegrating a politician into social and political circles contributes to the **restoration** and the **keeping of peace** in the region, as well as to respect for democratic debate, even if this may seem difficult to accept.

In different proceedings, the Appeals Chamber's public decision of 14 March 2014 rejected the request for provisional release of **Vinko Pandurević** who, having been convicted and sentenced to 13 years' imprisonment, had made a request for provisional release pending delivery of the appeals judgment.[27] Basing its decision on the notion of **special circumstances** referred to in Rule 65 (I) (ii) of the Rules for the accused **awaiting** an appeal judgment, the Appeals Chamber rejected the request on the grounds that the sentence could be increased, that the accused had not promptly surrendered to the Tribunal and that a hearing was scheduled.[28] Let us recall that this decision was taken by a majority.[29] But there is an enormous difference between that and the present case, because the accused there was found guilty by the Trial Chamber, which is not the case with **Vojislav Šešelj** since the deliberations have not yet begun.

4. The motion to revoke the provisional release of the Accused

Regardless of the decison that has been issued, it is necessary to keep in mind a number of factors.

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[25] *The Prosecutor v. Ramush Haradinaj et al.*, Case no. IT-04-84-PT, "Prosecution's Appeal against 'Decision on Defence Motion on Behalf of Ramush Haradinaj to Request Re-assessment of Conditions of Provisional Release granted 6 June 2005'", public, 19 October 2005, pp. 7-8.
[26] *The Prosecutor v. Ramush Haradinaj et al.*, Case no. IT-04-84-PT, "Prosecution's Appeal against 'Decision on Defence Motion on Behalf of Ramush Haradinaj to Request Re-assessment of Conditions of Provisional Release Granted 6 June 2005'", public, 19 October 2005, p. 10.
[27] *The Prosecutor v. Popović et al.*, Case no. IT-05-88-A, "Decision on Vinko Pandurević's Motion for Provisional Release", public 14 March 2014, para. 19.
[28] *The Prosecutor v. Popović et al.*, Case no. IT-05-88-A, "Decision on Vinko Pandurević's Motion for Provisional Release", public 14 March 2014, para. 19.
[29] *See* Dissenting Opinion attached to the Decision, paras 1-11.

On 28 November 2014, the Chief Prosecutor, **Serge Brammertz**, requested the revocation of the provisional release of the Accused. His request was based, on the one hand, on the fact that the Accused had demonstrated his intention not to return to **The Hague** of his own will, and on the other, his public statements concerning **Vukovar** and the Tribunal.[30] This request also referred, in the footnotes, to the health condition of the Accused.[31]

As far as the Accused's return **for the judgment** is concerned, the Prosecution cited in the footnotes a number of press articles. It must be said here that the given references are piecemeal. Despite this handicap, I find it important to make a distinction between two types of documents: the first concerns statements about his return, and the second relates to statements about **Vukovar** and **Greater Serbia**.

On the first type of documents, it appears that the Accused has repeatedly stated that he has no intention of returning to The Hague voluntarily. It must be noted that these claims are of a **hypothetical nature**, because I note that he has said that, if the government had to arrest and extradite him, the supporters of the Serbian Radical Party would not put up armed resistance, but would only go out into the streets and protest. He added that, if the Tribunal asked for his return, the Serbian President **Tomislav Nikolić** and his Prime Minister **Alexandar Vučić** would have to initiate extradition proceedings, and he would not flee. Under these circumstances, I do not see any reason that would make me lend credence to provocative or hypothetical statements because, when the time comes, the Chamber shall order the return of the Accused or not, and at that moment the government of Serbia, within the framework of its cooperation with the ICTY, will do the necessary to enable the dispatch of the Accused to The Hague. For the time being, we are not in that situation and, moreover, the Accused has indicated he would not flee, thus offering passive resistance.

On the second type of document, concerning the *Serbian Chetniks* and the liberation of **Vukovar**, it appears that the texts cited in footnote 8 are in fact a communiqué of the Serbian Radical Party, whose President is Vojislav Šešelj, but since its content concerns events of which the Chamber is aware, I shall not say anything about the event. In this matter, the Serbian authorities may still, under their domestic laws, decide to prosecute the Serbian Radical Party or even its President, but this is not within the purview of our Chamber.

[30] *The Prosecutor v. Vojislav Šešelj*, Case no. IT-03-67-T, "Prosecution Motion to Revoke Provisional Release", public, 28 November 2014. para. 3, footnotes 6 and 8.
[31] *The Prosecutor v. Vojislav Šešelj*, Case no. IT-03-67-T, "Prosecution Motion to Revoke Provisional Release", public, 28 November 2014. para. 3, footnote 9.

With regard to the issue of victims and witnesses, the excerpts from the articles cited by the Prosecution in their submissions did not allow me to have any certainty that the statements in question concern victims or witnesses. I also wish to emphasise that we need to be extremely prudent with press articles because the statements may have been twisted or taken out of context and because, thus far, I have not seen any sign whatsoever of danger to any of the victims. I feel bound to recall that the competence of this Chamber relates exclusively to the acts covered in the **Indictment** that were committed from 1991 to 1993 and with which the Accused is charged. As for the commission of other, subsequent acts, I have always withdrawn from dealing with them, since I estimated that I would not be able to judge the Accused impartially if I had to sanction the deeds he **committed subsequently**. For this reason, in order to be able to judge if a victim or a witness is concerned by some statement made by the Accused, I would have to be in possession of that statement, to know the name and the circumstances of the victim or witness, and have that person file a specified complaint.

And yet, the submissions of the Prosecution refer to the principal subject of this procedure - the Accused's health - only in a **peripheral fashion**. In reality, when the Trial Chamber took this decision, it did so because of serious concerns for the current and prospective state of health of this Accused. Even though the Accused did not wish to make the details of his health condition known through official channels, his **condition** is unquestionably very serious. Suffice it to mention only the elements in the possession of the Trial Chamber, specifically those concerning his heart condition[32] that led to a medical expert examination, as reported amply in the articles on the ICTY website.[33] Unfortunately, I cannot cite in attachment to my opinion the content of Request no. 516 addressed **publicly** to the President of the Tribunal on 10 February 2014, but filed as **confidential and *ex parte*** on 13 February 2014 by a decision of the President of the Tribunal. In truth, the elements mentioned in these various documents testify to a state of health that is **very alarming**, and under these circumstances, regardless of the quality of the medical care provided in the Netherlands by the DU doctor and the hospital, it was more advisable for him to go and receive treatment in **Belgrade** or **elsewhere**, surrounded by family, in a psychologically more favourable environment.

It is on these grounds that it was decided *propio motu* to free this accused whose **provisional detention**, it must be stressed, **was excessive**. In my capacity as judge, I do not have to act in favour

[32] *The Prosecutor v. Vojislav Šešelj*, Case no. IT-03-67, "Order to Obtain Reports from United Nations Detention Unit and to Proceed with a New Medical Examination", public, 12 January 2011; "Order to Proceed with a New Medical Examination", public, 12 March 2012.

of one or another State nor arbitrate their disputes; my only duty is to say whether, on the evidence presented by the Prosecution, the Accused is guilty as charged or not.

In view of the unending flow of criticism from the Accused of our international court, it was foreseeable that, in the matter of his possible provisional release, he would not make any written submissions, which he made clear,[34] and that he would not wish to be indebted to his government **in any way**. I was always aware that his release was going to pose a problem of a different order, namely, that of the **field of his political expression**. Certainly, the Accused made it perfectly plain that he wished to travel around, hold rallies and give interviews, which demonstrated his interest in continuing to exercise his civil and political rights as guaranteed by international legal instruments.[35] For my part, I consider that, being presumed innocent and with no punitive measure having been pronounced to limit his civil or political rights, I could not see on which legal authority I could restrict this political expression. On the other hand, like any other political expression, this one must observe certain parameters, first and foremost the one related to the existence of an international legal order, and the respect of the conditions determined by the Tribunal.

As far as I am concerned, I believe the Trial Chamber did everything in its power to find a **solution** that would both enable the Accused to receive treatment, because his life was in danger, and honour the provisions of Rule 65 of the Rules.

III. PROCEDURAL ASPECTS INHERENT IN THE DECISION OF THE APPEALS CHAMBER

1. Warrant of arrest

As the Accused has been released, it must be considered that at the present time there is no longer any **valid basis for his detention**. In fact, in keeping with the Statute, once the Indictment was confirmed, an order for an arrest warrant was issued to bring him to The Hague. It is by virtue of this arrest warrant that he was detained here until 6 November 2014, the date of the decision granting his provisional release.

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[33] *See*, in particular, articles entitled: "SRS: Šešelj Life at Risk", the press, 8 November 2010; "Šešelj Life in the Hands of Prison Guards!", the press, 31 October 2010; "Heart Beats for Doctors", *Večernje Novosti*, 26 October 2010.
[34] *The Prosecutor v. Vojislav Šešelj*, Case no. IT-03-67, Closing Argument, public hearing, 20 March 2012, T(F), pp. 17550-17551.
[35] *See* in particular Article 19 of the International Covenant on Civil and Political Rights and Article 10 of the European Convention on Human Rights.

It should be noted here that he departed **alone**, by plane, without any police escort, which means that the arrest warrant issued earlier was annulled by the decision to release him. In this regard, paragraph (H) of Rule 65 of the Rules of Procedure and Evidence mentions that the Trial Chamber may issue warrant of arrest to secure the presence of an accused who has been released or is for any other reason at liberty.

From my point of view, it is now necessary to issue a new arrest warrant, and that is also the thinking of the Appeals Chamber should this person be required to return to The Hague.

2. The Appeal

Paragraph (D) of Rule 65 of the Rules stipulates that **any decision** rendered under this rule by a Trial Chamber shall be subject to appeal. The time allowed is seven days. In the present case, it should be noted that the Prosecution did not lodge an appeal within the time allowed and is therefore time-barred …

3. Certification of appeal

As there has been no appeal, the submissions of the Prosecution that lean toward modifying a measure of liberty fall into the category of motions mentioned in Rule 73 of the Rules of Procedure and Evidence. In this situation, with the motion already decided on, the Prosecution should have requested a certification of appeal under aforementioned Rule 73.

It appears that the Appeals Chamber has skirted around this issue in its decision. The issue will arise again with our decision today. Will the parties be able to appeal this decision implementing the decision of the Appeals Chamber? If so, should they seek certification of appeal? For me, the answer is obvious: the Prosecution, like the Accused, should request certification of appeal, showing that its prompt settlement by the Appeals Chamber could tangibly advance the case.

4. Ratio decidendi

In *common law*, the term *ratio decidendi* signifies reasoning behind the decision. It is understood as the essential reasoning underlying the grounds for the ruling in a legal decision, which is to say that it necessarily carries an imperative or binding authority and is subsequently regarded as a legal rule such as it is applied, in a decision that constitutes an authority, to a particular case.[36] *Ratio*

[36] *See*, in particular, *The Prosecutor v.. Aleksovski,* Appeal Judgement, 24 March 2000, para. 113. On should bear in mind that a court decision (in common law) mentions the facts ("facts of the case"). The stages of the proceedings are

decidendi is associated with the principle of *stare decisis*, called the rule of the precedent, which obligates inferior jurisdictions to adhere on a point of law to the decisions informed by the same *ratio decidendi*. In this context, *ratio decidendi* is the principal and necessary quantity for a decision that will become a rule embedded in case-law. The rest of the judgment will be qualified as *obiter dictum,* consisting of digressions or reasoning based on hypothetical elements.

In *common law* jurisdictions, the rule of precedent favours equality[37] before the law, allowing thus similar cases to be treated in the same way. I should recall here that we have no precedent of an accused being released *proprio motu* by the judges in the course of deliberations following the disqualification of a judge which entailed the appointment of another judge. In my opinion, it is a unique case in the history of international justice. Having to respect precedents compels a judge to weigh the reasons for a decision with utmost care.

The ICTY Appeals Chamber concluded that "*the proper construction of the Statute, taking due account of its text and purpose, yields the conclusion that in the interests of certainty and predictability, the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interest of justice.*"[38]

To buttress its reasoning, the Appeals Chamber first took as a basis national and international practices. In national courts, the general practice tends to temper the notion of *stare decisis* so as to render judgments that are fair and adjusted to the specific situation. The international practice shows a tendency to recognise the precedent as an **auxiliary source of international law**[39] but it is by no means a practice that a judge is obliged to follow. It is fair to say that the rule of precedent is rather a source of inspiration and interpretation.

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also mentioned. The parties intentions are presented in an overall but complete way. If there have been any precedents, the Judge will of course mention them. It is the disposition (holding) part of the judgement that contains the solution to the case.

[37] *See*, in particular, G. DWORKIN, "*Stare Decisis* in the House Of Lords", *The Modern Law Review*, 1962, vol. 25, issue 2, pp. 163-178; "*Un adoucissement de la théorie du* Stare Decisis *à la Chambre des Lords*", *Revue internationale de droit comparé*, 1967, vol. 19, no. 1, pp. 185-198.

[38] *The Prosecutor v. Aleksovski,* Appeal Judgement, 24 March 2000, para. 107. *See* also, E. ZOLLER, "*Les revirements de jurisprudence de la Cour Suprême des États-Unis*", *Cahiers du Conseil constitutionnel*, no. 20, June 2006; Lord RADCLIFFE, "The Law and Its Compass", 1960, p. 39. *See*, in particular, the *Rookes v. Barnard* Case, (1964), A. C. and the opinion of Lord Evershed, pp. 1184-1185. *See* also Philippe WECKEL's very critical commentary in "*Jurisprudence internationale*", *Revue Générale de Droit International Public* (2000), pp. 802-804, in which the author deems that the reasoning of the Appeals Chamber in the *Aleksovski* Case with regard to *Stare Decisis* "ignores Article 38 of the World Court, which has nevertheless been drafted to prevent any transposition into international law of the common law tradition of the legal authority of jurisdictional precedent", p. 803.

[39] *See*, in particular PCIJ, *Chorzów Factory* case, Appeal Judgement of 26 July 1927, Collection series A, no. 1, p. 20; ICJ, *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, Judgement of 24 February 1982, para. 42.

It must be noted at this point that the Appeals Chamber recognises that it can diverge from its prior decision in the interests of justice. I can only subscribe wholeheartedly to this approach which is the path of wisdom.

5. The Appeals Chamber: Cassation or Appeals Chamber?

Article 25, paragraph 1 of the Statute stipulates that "The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:

(a) an error on a question of law invalidating the decision; or
(b) an error of fact which has occasioned a miscarriage of justice."

Paragraph 2 states that "The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers."

The principle of two-level jurisdiction is internationally recognised. It is guaranteed in Articles 14-15 of the International Covenant on Civil and Political Rights (ICCPR), stipulating that "*Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.*"

In the present case, the ambiguity[40] surrounding the decision of the Appeals Chamber poses the tantalising problem of deciding whether this is a cassation decision or a decision of a different nature. As far as I am concerned, this decision must be considered as a cassation decision because, in the second-instance jurisdiction, the Appeals Chamber, by virtue of the **devolutionary effect of the appeal,** should have made the decision itself – either to uphold or to reverse. In case of reversal, it should have issued a new **arrest warrant**, which it has not done. That being so, it would be normal to refer the entire case back to the judges of the Trial Chamber without any further order or injunction.

[40] This ambiguity to my mind results from the fact that the Appeals Chamber always refused to be considered as part of two-tier proceedings by the judicial notion of refusing to examine the case "*de novo*". *See*, for example *The Prosecutor v. Haradinaj, Balaj and Brahimaj,* 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, para. 5; *The Prosecutor v. Stanišić*, Case no. IT-04-79-AR65.1, "Decision on Prosecution's Interlocutory Appeal of Mićo Stanišić's Provisional Release", 17 October 2005, para. 6; *The Prosecutor v. Boškoski and Tarčulovski*, Case no. IT-04-82-AR65.2, "Decision on Ljube Ljube Boškoski's Interlocutory Appeal on Provisional Release", 28 September 2005, para. 5.

All these things considered, I believe that in this case the Appeals Chamber acted as a Cassation Chamber and that, therefore, the Trial Chamber has some room for manoeuvre in its discretionary power to decide on provisional release.

IV. ELEMENTS IN FAVOUR OF RELEASE

The Trial Chamber took the initiative to release the Accused. Why?

This decision of the Trial Chamber had been slowly taking shape and had been mulled over by the Judges for several months before its delivery on 6 November 2014.

One must keep in mind three factors that have played to my mind an important role:

1. **The inordinate length of the detention**
2. **The delay in the deliberations**
3. **The critical state of health of the Accused as the deciding factor**

1. The inordinate length of the detention

The Accused, who was detained as of 24 February 2003, has been awaiting his judgement for **12 years**. This is an **excessive** length of time which greatly militates in favour of his provisional release while he awaits the reading of his judgement. In other words, this situation falls under the notion of "special circumstances" set out in Rule 65 (I) (iii).

2. The delay in of the deliberations

The delay in the deliberations that were initially scheduled for 30 October 2013 was due to successful motion of the Accused for the disqualification of a judge during the deliberations phase of the proceedings. The consequence was the appointment of a new judge and the need for extra time for the new judge to become familiar with the proceedings; it should be noted that this was the best procedural solution in order to save time. The other solution - to end the proceedings - would have meant a miscarriage of justice for the victims.

3. The critical state of health of the Accused: the deciding factor

The deciding factor was the health of the Accused. We should recall that when the proceedings concluded, the Accused was already in poor health suffering from a heart condition. It was only

after the endless twists and turns involving the disqualification procedure that the judges of the Chamber leaned that the Accused was suffering from colorectal cancer. The Trial Chamber then initiated the process of provisional release, having taken care to consult the States and the parties. While a consensus was being reached by both the States and the Prosecution to release the Accused, the Accused nevertheless expressed specific requirements with regard to his release by not wanting to submit to any restrictions. In these circumstances, the Trial Chamber had to terminate the process by its Decision of 10 July 2014.

I have no doubts that the Accused should have been released for the three aforementioned factors, but also because of the refusal of treatment could only have led to his death in prison, a UN institution where another death had already occurred previously, leading to a flood of criticism and even abuse of our institution with regard to the case of Slobodan Milošević. Who would have wanted the death of someone who is presumed innocent due to the refusal of treatment because of being placed in "isolation" in circumstances that are still unclear to this day? Certainly not me!

It is undeniable that it could have been foreseen that the Accuse would continue his political activities and indulge in provocations. Should I have appointed myself the moral guardian who "gags" freedom of expression? I do not think so, and despite his provocations, such as publicly burning the Croatian flag, I believe that it is not up to me to control the actions of the Accused, because if this is a violation of Serbian law, it is up to the Serbian authorities to take action. My only obligation is to be certain that he will appear and that he will not pose a danger to any victim or witness. So far, the Trial Chamber has not received any complaint from victims or witnesses. With respect to him being present at the judgement hearing, it is not on the agenda as a scheduling order has not yet been made. On this matter, I note that the appearance of the Accused will only be brought into question for one of the following reasons:

a. in the event of acquittal, his presence will not be required
b. if he is found guilty and if the sentence has already been served out in detention, his presence will not be required
c. the hypothesis will only become real if the Accused is found guilty and **sentenced to a term longer** than his time in detention.

As the Trial Chamber has still not conducted its deliberations, it is premature to focus at this moment on hypotheses a, b or c.

V. THE PATH OF WISDOM: IMPLEMENING THE DECISION OF THE APPEALS CHAMBER

The Decision of the Appeals Chamber requesting the Trial Chamber to act (it deemed that we are best placed to do so) is a very wise one because, while indicating the urgency of the matter, it requests that we issue an arrest warrant in order to reincarcerate the Accused. On the matter of urgency, it is relative, as having been released on 6 November 2014, the Accused has been free for several months.

In order to issue an arrest warrant for the Accused, the Judges must, however, assess the situation in all its aspects and must, above all, have a precise picture of the Accused's health condition because what use would it be to bring him back alive, only to have his body sent back to Belgrade should he die?

This wisdom therefore invites us to act in a **measured** and **composed** manner and, therefore, a medical certificate providing comprehensive information about the current health of the Accused by an attending doctor would allow us to act calmly and not in haste. This seemed evident to me, and in the words of William Shakespeare in Romeo and Juliet in 1594, "Wisely and slow, they stumble that run fast." This proves all the more necessary as **Doctor Bojić** indicated that because of the decision of the Tribunal, the Accused refused to start his chemotherapy to have it interrupted and, in this scenario, the doctor envisaged a dramatic deterioration in his health.[41] Does this very alarming statement not indicate that the Accused is in the terminal stages? If this is the case, should I, as a judge, be participating in this "legal rodeo" by bringing him back to detention even though his health had deteriorated in detention? These are the questions that deserve our consideration and definitely call for medical opinion.

As a judge of a UN organisation, I am unwilling to subject the organisation to significant financial consequences should an action for damages be brought because of serious oversights on the part of the prison medical service which placed him in isolation, an event that resulted in him refusing chemotherapy. I am reminded of the case of **General Đukić,** mentioned in the work of **John Laughland**[42] entitled *Le Tribunal pénal international gardien du nouvel ordre mondial*, which said that "a Serbian doctor maintained that the diet at The Hague had exacerbated the cancer: in any case, it is quite likely that the tribulations he had been through accelerated his death. The judges

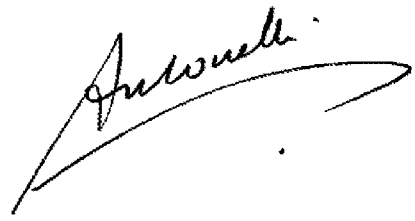
[41] Newspaper article, "Šešelj Refused Chemotherapy", *Politika*, 4 April 2015.
[42] J. LAUGHLAND, *Le Tribunal pénal international gardien du nouvel ordre mondial*, François-Xavier de Guibert (ed.), Paris, 2003, p. 98.

and the Prosecutor bear a heavy responsibility in this wretched story." This case encouraged me to be cautious.

VI. CONCLUSION

It is only with a report of the doctors that the Trial Chamber can decide either to uphold its previous decision or to revise it completely or partially. I felt obliged to mention this because, as an independent judge, I have the power to assess individually within the collective body of the Chamber.

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



Jean-Claude Antonetti
Presiding Judge

Done this tenth day of April 2015

The Hague (Netherlands)

[Seal of the Tribunal]