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: 13 January 2015

Original: ENGLISH
French

IN TRIAL CHAMBER III

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

Registrar: **Mr John Hocking**

Order of: **13 January 2015**

THE PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC

DECISION ON PROSECUTION MOTION TO REVOKE PROVISIONAL RELEASE

The Office of the Prosecutor

Mr Serge Brammertz
Mr Mathias Marcussen

The Accused

Mr Vojislav Šešelj

TRIAL CHAMBER III ("Chamber") is seized of a motion by the Prosecutor ("Prosecution") dated 1 December 2014 wherein he requests the Chamber to revoke the provisional release of the Accused Vojislav Šešelj ("Motion").

Procedural Background

1. On 6 November 2014, the Chamber ordered *proprio motu* the provisional release of the Accused. Attached to the decision was an annex that was first confidential and then public, with the Chamber's instructions on the conduct expected of the Accused during his provisional release.

2. On 23 December 2014 the Accused filed his Response.[1]

3. On 30 December 2014, the Prosecution filed a Request for Leave to Reply that was joined to the provisional reply ("Reply").

Arguments of the Parties

4. The Prosecutor requests that the measure of provisional release be revoked based on several grounds. He first points to the fact that he was unaware of the confidential information regarding the health of the Accused, on which the Chamber based its decision, and could do little else but to defer to the Chamber's assessment. However, the Accused's conduct subsequent to his provisional release substantiates the idea that the Chamber overestimated the gravity of his health. Moreover, as the Accused stated that he would not appear before the Chamber unless forced to do so, and insulted and threatened victims and witnesses, he has violated the conditions set out by the Chamber and the measure he has been granted must be revoked.

[1] Response to the Prosecutor's Motion to Revoke Provisional Release", public, 23 December 2014 ("Response").

5. Taking up some of the arguments Judge Niang developed in his dissenting opinion on the decision of 6 November 2014, the Prosecutor regrets that the Chamber did not consult the Accused to make sure that he agreed to abide by the restrictions imposed on him. Consequently, he requests that a hearing be scheduled once the Accused's provisional release is revoked to discuss the conditions of a new provisional release in the presence of all interested parties, including Serbia, which has been put in a difficult position by this decision.

6. In his Response, the Accused states that the Prosecutor merely repeats the arguments, accusations and insults of his political opponents. By doing so, he is compromising his independence in violation of Article 16 of the Statute of the Tribunal. Consequently, the Accused requests that the Chamber initiates disciplinary proceedings against the Prosecutor in light of his conduct, which he describes as unacceptable.

7. The Prosecution first seeks from the Chamber leave to reply to the Accused's written submissions and then promptly addresses the merits to show that the arguments set out in the Motion are based on public statements made by the Accused and not on any political opinions. The Prosecution also states that the Accused fails to substantiate his claims against the Prosecutor. Lastly, the Prosecution claims that the Accused's unsupported allegations of misconduct against the Prosecution are a very serious matter that the Chamber should not tolerate and asks the Chamber to dismiss the Accused's allegations.

Reasons for the Decision

8. As a preliminary matter, the Chamber authorised the Reply since it responds to new allegations raised in the Response.

9. On the merits, the Chamber notes that in its Motion, the Prosecutor developed two sets of arguments. The first set directly criticises the Decision of 6 November 2014 which purportedly failed to take into account relevant

elements. The second set relates to factual elements which, according to the Prosecutor, establish that the Accused has violated the conditions imposed by the Chamber on his provisional release and designed to coincide with other requirements.

10. With respect to the first set of arguments, the Chamber deems them inadmissible. The only avenue open to the Prosecutor to criticise a decision's reasoning he finds defective is an appeal. Since the Prosecutor did not appeal the decision, he is now attempting to challenge it under the guise of a request for reconsideration, which will also not bear fruit. Reconsideration requires on the part of the requesting party presentation of new evidence[2] that emerged after the decision or at least proof of a clear error of judgement.[3] The Prosecutor provided no convincing evidence that would warrant a reconsideration.

11. With regard to the alleged violations by the Accused of his conditions of provisional release, it should be recalled that the Order of 6 November 2014 imposed the following conditions on the Accused: to have no contact of any kind with the victims or to try and influence them in any way; not to obstruct, in any way, the procedure or the course of justice, and to appear before the Chamber when ordered to do so.[4]

12. The Prosecution alleges, firstly, that the Accused violated the conditions imposed by the Chamber when he stated that he would never again return to The Hague. However, the Chamber has not yet ordered the Accused to return to the Tribunal. Accordingly, the Accused has not violated any of the Chamber's instructions in that respect. Mere declarations of intent cannot constitute a violation of an obligation that has not yet, in fact, been imposed.

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[2] *The Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A. "Decision on Defence's Request for Reconsideration", 16 July 2004, pp. 3-4, citing *The Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Trial Chamber III, "Decision on Defence Motion to Reconsider Decision Denying Leave to Call Rejoinder Witnesses", 9 May 2002, para. 8.

[3] *The Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, "Decision on Defence's Request for Reconsideration", 16 July 2004, pp. 3-4, citing notably *The Prosecutor v. Zdravko Mucić* et al., Case No. IT-96-21A*bis*, "Judgment on Sentence Appeal", 8 April 2003, para. 49; *The Prosecutor v. Popović et al.*, Case No. IT-05-88-T, "Decision on Defence Motion for Certification to Appeal Decision Admitting Written Evidence Pursuant to Rule 92 *bis*", 19 October 2006, p. 4.

[4] Order of 6 November 2014, p. 3 and Annex.

13. The Prosecution also mentions the statements that the Accused gave to the press calling people who cooperated with the Prosecution traitors. As unfortunate as these vague statements may be, they do not constitute an attempt to influence or threaten victims or witnesses and, accordingly, do not violate the conditions imposed by the Chamber.

14. In light of the foregoing, the Chamber finds that the Prosecution's Motion is a tangle of inadmissible or unfounded arguments that are unlikely to challenge the Order of 6 November 2014.

15. In respect of the allegations of the Accused regarding possible misconduct on the part of the Prosecutor, the Chamber deems it does not have the authority to deal with the matter. The contested conduct does not directly concern a violation of the integrity of the proceedings, but rather alleges dishonourable behaviour by the Prosecutor with regard to the mandate entrusted to him by the United Nations Security Council.

FOR THE FOREGOING REASONS, the Trial Chamber

PURSUANT TO Rules 46, 54, 65 (B) and 65 (C) of the Rules,

DISMISSES the Motion AND

DECLARES IT LACKS THE AUTHORITY to initiate the disciplinary proceedings requested by the Accused.

Presiding Judge Jean-Claude Antonetti attaches a declaration.

Judge Niang attaches a declaration.

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

/signed/
Jean-Claude Antonetti
Presiding Judge

Done this thirteenth day of January 2015
At The Hague
The Netherlands

[Seal of the Tribunal]

Declaration of Judge Jean-Claude Antonetti, Presiding Judge

In the conclusion of his written submission of 22 December 2014, the Law Professor Vojislav Šešelj ("Accused") requests the Trial Chamber to apply disciplinary sanctions against the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") because of his alleged unacceptable conduct.

Without going into the reason alleged by the Accused for challenging the Prosecutor, I feel it is my duty to make a declaration on the question of the authority of the Judges when it comes to applying any form of sanction against the Prosecutor. As stated clearly in Article 16, section 1 of the Statute of the ICTY: "The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991." This places a heavy burden of responsibility on the Prosecutor since this means that he will be issuing an Indictment against an individual who, in the end, because he is being prosecuted, will be taken into custody.

In the second stage, the Prosecutor will try to prove the guilt of the Accused beyond reasonable doubt by presenting evidence in court. To perform this task entrusted to him by the Security Council, he must have complete independence, which implies absolute immunity. Therefore, he must be completely independent from everyone else, and, as a consequence, no one can call his conduct into question, other than in the form of a continued re-assessment of the work he is entrusted with by the International Community and which must meet the victims' expectations.

Aware of the Prosecutor's position within the structure of the international justice system, the Security Council carefully stated in Article 16, section 2 of the Statute that the Prosecutor shall act independently as a separate organ of the International Tribunal. He or she shall not seek or receive instructions from any Government or from any other source. As we can see, there is no provision in the Statute that would allow for the way in which he carries out his task to be called into question. Moreover, if we allow for the possibility that he can be held accountable, what

authority would be competent to do so? In my view this can certainly not be the Judges, who have no authority over this independent organ. In some countries, disciplinary proceedings fall within the competence of the appointing authorities. In this particular case, the appointing authority is the Security Council.

It should, nonetheless, be noted that the Prosecutor of the ICTY is not appointed permanently, but is given a four-year mandate and that his mandate has just been extended for a year as part of Security Council Resolution 2193 (2014). Clearly, if the Security Council deems that the Prosecutor it appointed does not perform his task in complete independence, it can still decide not to renew his mandate when the current one expires.

I wish to specify that this declaration concerns solely the Prosecutor, since the members of the Office of the Prosecutor, who are civil servants of the United Nations, find themselves in a different situation.

/signed/
Jean-Claude Antonetti
Presiding Judge

Declaration of Judge Mandiaye Niang

1. I have no difficulty in joining in with my colleagues to dismiss the Prosecutor's Motion to revoke the provisional release of the Accused Vojislav Šešelj. This position calls for some clarification. It may, in fact, seem to be at odds with my initial disagreement, which I expressed in my dissenting opinion of 12 November 2014. In this opinion, I criticised the conditions of the Accused's provisional release.

2. Why do I now agree with my colleagues to dismiss this Motion which, for a part, takes up in substance my own arguments against the Decision of 6 November 2014?

3. My assessment of the Decision of 6 November has not changed. In my opinion, the conditions attached to the provisional release of the Accused required a greater scrutiny of the conditions that needed to be set in place to guarantee, inter alia, the appearance of the Accused before the court and the protection of witnesses.

4. However, despite these shortcomings, despite my profound disagreement with its underlying reasoning, the Decision of 6 November 2014 now has the force of *res judicata*; a force that is attached to any decision that has not been challenged within the deadline for appeal.

5. The Chamber's Decision of 6 December 2014 comes under that rare category of decisions that can be the subject of an interlocutory appeal *ipso jure*. The Prosecutor had seven days to lodge one.[5] In addition to his right to appeal, the Prosecutor could have availed himself of the possibility of asking the Trial Chamber to stay the execution of the provisional release until the appeal is settled.

6. The Prosecutor allowed this deadline to pass without lodging an appeal, thus depriving himself of the possibility of seeking a stay of the provisional release. In

[5] This deadline did only begin to run, in my opinion, from the date of the filing of my dissenting opinion of 12 November 2014. It should, in fact, form an integral part of the majority decision.

other words, the Prosecutor was in agreement with the Decision of 6 November 2014.[6]

7. By seeking to revoke the provisional release only a few days after the deadline to lodge an appeal had expired, the Prosecutor knew – or, in any case, must have been aware of the fact – that he could not criticise the Judges' reasoning through this procedural mechanism. All that was left to him was to try and convince the Chamber that new evidence had emerged after the decision which undermined its foundation.

8. As new evidence, the Prosecutor seeks to establish that the Accused has violated the conditions of his provisional release. He relies in particular on the statements made by the Accused after his release, which were reported by the press. These statements are, in essence, Šešelj's acts of bravado against the Tribunal whose legitimacy he claims not to recognise, against the current Serbian authorities and those who cooperate with the Tribunal, whom Šešelj describes as traitors to the cause that he defends, as well as a repetition of his political doctrine. 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.

9. By voluntarily depriving himself of the possibility of opposing the decision with which he did not agree, I believe that the Prosecutor is ill advised to return before the same Judges to ask them to revoke their decision. His rather late discovery of the relevance of my dissenting opinion will not sway me.

/signed/

Mandiaye Niang

Judge

[6] To justify his inertia, the Prosecutor seems to turn into an argument the confidential nature of the medical information on which the Chamber relied to justify the provisional release. However, his reference to the Chamber is incomplete. While the Chamber did mention the confidential information, it immediately added that this information was also in the public domain.