



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 2011
Original: ENGLISH
French

IN TRIAL CHAMBER III

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

Registrar: Mr John Hocking

Observations of: 23 March 2011

THE PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC

**OBSERVATIONS BY PRESIDING JUDGE JEAN-CLAUDE ANTONETTI,
REGARDING REGISTRY SUBMISSIONS PURSUANT TO RULE 33(B)
WITH RESPECT TO APPOINTING EXPERTS**

The Office of the Prosecutor

Mr Serge Brammertz
Mr Mathias Marcussen
Ms Lisa Biersay

The Accused

Mr Vojislav Šešelj

The President of the Tribunal

Judge Patrick Robinson

The Registrar, pursuant to Rule 33(B) of the Rules, seized the Chamber of public submissions on 16 March 2011 to signal that the Accused Šešelj was visited by an endocrinologist on 17 and 18 February 2011 and that he refused to meet the second expert, the cardiologist, on 14 March 2011, due to the latter's nationality. In addition, the Registrar informed the Chamber that the third expert (a pulmonologist) was supposed to meet the Accused on 23, 24 and 25 March 2011.

Taking into account the Accused's state of health, the Chamber decided on 19 October 2010¹ to commission a panel of experts in order to examine the Accused and to respond to the following questions:

1. What is the present state of health of the Accused? From what specific condition does he suffer and what course of treatment he is following or ought he to follow?
2. To what extent is the Accused's medical condition compatible in the short and medium term with his participation in the hearings?
3. In what sense would the pathology(-ies) from which the Accused suffers require specific arrangements for the hearings?
4. What is the probable future course of the Accused's medical condition in the 6 months to come, counting forward from his examination by the expert panel?

Contrary to *civil law* jurisdictions, where Judges designate experts of their own accord, the Rules and practice of this the Tribunal have arranged for it to be the Registrar himself who selects the experts, or otherwise informally solicits the advice of the Chamber. This procedure is a **high-risk procedure**, as it is partially outside of the purview of the Judges, for they cannot select the said experts themselves.

It is appropriate to note that the Chamber rendered its decision on **19 October 2010** and that, as of this date, more than five months have elapsed in expectation of the expert's findings at a time when the Accused's medical situation is a source of

¹ *The Prosecutor v. Vojislav Šešelj*, Case IT-03-67-7 "Order to Conduct a Fresh Expert Medical Evaluation of Vojislav Šešelj", PUBLIC, 19 October 2010.

ongoing concern. In my view, it was nearly certain that the Accused would move to disqualify the cardiologist of British nationality, taking into account the statements he had made previously concerning NATO member countries which bombed Serbia.² It would have, in my opinion, been more prudent for the Registry to assign a cardiologist of Russian nationality³ because the primary objective was for the Chamber to have a **comprehensive review of the health of the Accused in light of his heart problems.**

Some time ago, the Accused underwent surgery in a Dutch hospital, which seems to have been helpful. I think nonetheless that, having been burned in a previous case with respect to the situation of the Accused Slobodan Milošević, the Judges of this Tribunal must avoid running any risk in this matter. The Judge carrying out his or her assignment at the ICTY is typically an experienced Judge who is primarily attentive to the expeditiousness of the trial and has an accused in good health. The Judge is obliged to take every measure pursuant to Rule 54 of the Rules to ensure a fair trial for the Accused, while furnishing the Accused with conditions conducive to his defence. One of those conditions is quite evidently his health. International Justice would thereby undermine its own credibility by playing host to the trial of an invalid, of a physically disabled or even mentally ill person.⁴

The Statute confers upon the Accused abundant guarantees in this regard, allowing him to appear before an impartial, professional Judge and to be in financial circumstances that will allow him to defend himself as well as he might. The Registrar has deemed it necessary to render these submissions publicly, which I approve entirely, and has even made a formal request of the Chamber in paragraph 4, indicating that on his level he did not wish to create discriminatory treatment by formally requesting fresh instructions from the Chamber in this regard.

² Status Conference of 1 December 2010, Transcript, p. 16544: “I am prepared to accept these three world-renowned doctors. So if the Registry makes it possible for me to be visited by them and – so they could examine me and look at the report – I also need to have a translator from Russian – I am prepared to receive doctors from other countries, except for the ones that I have mentioned, and I explained the reasons. If I cannot meet up with these three world-renowned Russian doctors, in the future I’m going to refuse to see any other medical experts [...]”

³ On 8 March 2006, the Accused Slobodan Milošević wrote a letter to the Ministry of Foreign Affairs of the Russian Federation, stating: “it is known to you that Russian physicians, who rank among the most respected physicians in the world [...]”

⁴ After the death of Slobodan Milošević, a British daily wrote: “[International Justice is] incompetent, ineffective and impotent.”

The position of the Registry is thus quite clear and commendable: the Registry wishes to have a specific guideline. That is perfectly understandable, especially so since the Accused has close ties to the media and an obvious ability to cause harm via his website.

Quite clearly, International Justice ought not to become hostage to an accused manipulating the judges according to whim. The issue must be raised and in this specific case dismissed. From my point of view, this is not a spontaneous idea from the Accused but continuous conduct on his part from the time he arrived at the Tribunal. Likewise, the Accused has declared himself the principal adversary of this Tribunal and that, in his own words, he would use any and every means to destroy this Tribunal.

Statements such as these must not lead us to a response in kind: a Judge must maintain distance and calmly consider the situation while evaluating the advantages and disadvantages of his decision. The main problem in this case is obvious: not having an indisputable scientific evaluation might, through the lack of due care, lead to the death of the Accused; the Tribunal would then be discredited, just as it was when the Accused Slobodan Milošević died, with some going so far as to speak of “a judicial assassination”.⁵ That risk is one which I personally do not wish to incur and I am compelled, as a reasonable trier of fact, do all in power to ensure that the Accused is present in the dock in the best possible shape and that my attention is focused solely upon the merits of the case and not upon slag preventing the smooth flow of International Justice.

I am all the more sensitive to this issue as recently this Accused publicly stated in court that he had made contact with an American lawyer in order to bring suits of every variety imaginable against the Judges of this Tribunal. Although the chances of someone prevailing in any proceedings against a Tribunal Judge shielded by immunity are practically nil, nevertheless having a Judge be accused publicly of liability for **professional negligence** is a very unpleasant thing when one feels that one has done everything to prevent this type of reproach.

⁵ Open Letter from Attorney Jacques Vergès to Ms Carla Del Ponte, ICTY Prosecutor. Available at <http://www.b-i-infos.com> (Last accessed on: 23 March 2011).

Liability for professional negligence is an inherent aspect of judging when the Judge is not a professional, does not perform their official duties to the best of their ability or has no experience in the matter. The present case may be representative in this regard. If the Judges deemed it necessary to appoint an expert panel, it is because there was an obvious need for it. For this reason, the challenge raised to one of the three experts coming is not a challenge which necessarily has to be understood as a conflict between the Accused and the Judges.

Consequently, in the interest of International Justice, in the interest of this trial, in the interest of the Accused himself, **the Chamber**, in my view, ought to have amended its previous decision by asking the Registry to appoint a cardiologist whose nationality was not American or British. The Judges were particularly sensitive to this issue, pointing out to the Registry that the experts appointed ought not to be of French, Italian or Danish nationality.

That being said, it seems to me that you now have, in connection with the Decision of 19 October 2010, in the absence of specific instructions from all of the Judges in the Chamber, the opportunity to appoint another expert of a different nationality, given the objection voiced by the Accused. The most productive method, in my opinion, would be to submit to him several experts of your choosing and to ask him which he would prefer in order to avoid any future problems.

Precious time has been wasted (more than five months) and even if the Accused does not currently seem to have visible cardiac problems (as I observed at the last hearing), there is nevertheless a risk, for all concerned, that he may die suddenly and that if an **autopsy** were performed the forensic pathologist would conclude that his heart and arteries had been in a serious condition requiring appropriate care.

To prevent us from facing such an extreme turn of events, I see it as **urgent** that you and you alone, in the absence of action from the Chamber, do what is required to have him examined by an expert cardiologist.

I felt compelled to make this opinion public **so that in the event of a tragic outcome**, everyone will in turn be able to discern their own responsibility.

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

/signed/
Jean-Claude Antonetti
Presiding Judge

Dated this twenty-third day of March 2011
At The Hague
The Netherlands

[Seal of the Tribunal]