# 8 ICTY and Provisional Release: The Case of Vojislav Šešelj

*Snežana Trifunovska*[*]

## 8.1 Introduction

In February 2003 the ICTY indicted Vojislav Šešelj for recruiting paramilitary forces during the war in the former Yugoslavia. He was charged with 15 counts for crimes against humanity and war crimes committed against non-Serbs in parts of Croatia, Bosnia and Herzegovina and Vojvodina (province in the Republic of Serbia) in the period from August 1991-September 1993.[1] In February 2003, only few days after issuing of the initial indictment against him, Šešelj voluntarily surrendered to the Tribunal where he was kept until November 2014. On 6 November 2014 the Trial Chamber III ordered his provisional release on humanitarian grounds i.e. his grave illness caused by colon and liver cancer and on 12 November he was released from the ICTY Detention Unit and returned to Serbia.

The *Šešelj* case is in several respects unique in the practice of ICTY. Throughout the whole procedure Šešelj showed great disrespect for the Tribunal and has not accepted its legitimacy. His goal of voluntarily surrendering to the Tribunal was to 'win the battle' against it. Being holder of PhD in law, Šešelj used all his legal knowledge to hinder the procedure against him. Šešelj's saga has been disaster for the ICTY: during the period of his long detention

> he has been found in contempt of the court three times for disclosing identities of protected witnesses, refused court-appointed council by going on hunger strike and used his resulting right to self-representation to delay, obfuscate and insult those he faced during the drawn out proceedings.[2]

* Associate Professor, *Radboud University, Law Faculty.*

1 Šešelj was initially indicted on 14 February 2003 with violations of the laws or customs of war under Art. 3 ICTY Statute (murder, torture and cruel treatment and wanton destruction, destruction or wilful damage done to institutions dedicated to religion or education and plunder of public or private property) and with crimes against humanity under Art. 5 of the ICTY Statute (prosecution on political, racial or religious grounds, deportation and inhumane acts (forcible transfer)).

2 Alex Fiedling, 'The Šešelj Mess Just Got Messier Following his Provisional Release to Serbia', posted on 24 November 2014, online: http://beyondthehague.com/2014/11/24/the-Šešelj-mess-just-got-messier-following-his-provisional-release-to-serbia/.

In his Closing Statement of 20 March 2012 he said:

> I managed to prove that the ICTY is illegal, that it is anti-Serbian, that it is using lies and the filthiest manipulations, and that it did not contribute in any way whatsoever of the administration of justice, but rather injustice […] So, from here, I will go straight to glory […].[3]

While his behaviour in The Hague and his statements frustrated the procedure to a great extent, the biggest upset was caused not by Šešelj, but by The Hague Tribunal itself.[4] As pointed out elsewhere, the trial of Šešelj'is essentially a series of unfolding disasters.' It started at the beginning of November 2007 and was concluded on 20 March 2012. The judgment of the Trial Chamber is expected to be rendered in the last quarter of 2015.[5] The delay in rendering of the judgment is caused, *inter alia*, by the replacement of one of the judges of the Trial Chamber. Judge FrederikHarhoff was disqualified on 28 August 2013 because of a letter circulated in June 2013 in which it was found that he demonstrated a bias in favor of conviction of Šešelj. Judge MandiayeNianga who replaced him needed a period of time, at least until June 2015, to familiarize with the case.

The decision on provisional release (bail) of Vojislav Šešelj of 6 November 2014 is only one in the line of mismanaged decisions which reveals the Tribunal's weaknesses and limitations. The timeline of the most recent events begins on 6 November 2014 when the Trial Chamber decided to release Šešelj without any conditions and guarantees as provided in Rule 65(B) and as usually required and considered in cases of provisional release. Already on 1 December 2014 the ICTY Prosecutor, Serge Brammertz, filed a motion to revoke the provisional release of Vojislav Šešelj.[6] In his view the Accused's conduct subsequent to his provisional release substantiates the idea that the Chamber overestimated the gravity of his health. He claimed that Šešelj violated the conditions of provisional release by stating that he would not return to The Hague and would not appear before the Chamber unless he would be forced to do so; he also insulted and threatened victims and witnesses and for these reasons provisional release must be revoked.[7] However, in dismissing the motion on 13 January 2015, the Trial Chamber found that it was 'a tangle of inadmissible or unfounded arguments that are unlikely to challenge the Order of 6 November 2014.'[8] The Chamber

3 www.icty.org/x/cases/Šešelj/trans/en/120320IT.htm.

4 Daisy Sindelar, 'In Releasing Šešelj, ICTY Solves One Problem – But Creates Many Others', 20 November 2014, www.globalsecurity.org/military/library/news/2014/11/mil-141120-rferl02.htm.

5 ICTY Digest, No. 151, June 2015, http://icty.org/x/file/About/Reports%20and%20Publications/ICTYDigest/2015/icty_digest_151_en.pdf.

6 See, *Prosecutor v. Vojislav Šešelj*, Decision on Prosecution Motion to Revoke Provisional Release, T.Ch. III, Case No. IT-03-67-T, 13 January 2015.

7 Id., Para. 4.

8 Id., Para. 14.

also stated that it could not address the points of the Prosecutor's criticism as they were not formulated as an appeal. This led to a formal Prosecutor's appeal against the Chamber's decision not to revoke its decision on provisional release, filled by the Prosecutor on 20 January 2015. The appeals procedure which followed will be remembered as the first case in which the ICTY Appeals Chamber was requested to address legal aspects of an alleged breach of conditions of provisional release.

In its decision of 30 March 2015 the Appeals Chamber granted the Prosecutor's motion and the impugned Trial Chamber's decision was in part quashed.[9] It ordered the Trial Chamber to immediately revoke Šešelj's provisional release and to return him back to the Detention Unit in The Hague in order to conduct a *de novo* assessment of the merits of Šešelj's possible provisional release.[10] However, instead of ordering the return to The Hague, the Trial Chamber requested the Registry to contact the medical team treating Vojislav Šešelj in order to provide the Chamber with the updated report on medical condition of the accused.[11] As could have been expected, Šešelj strongly disagreed and prohibited his medical team to release any information concerning his health.

On 25 May 2015 the Serbian Ministry of Justice received a request from the ICTY Appeals Chamber to deliver Šešelj to The Hague within one day, i.e. until May 26th. In his talk with the Prosecutor Brammertz who happened to be for a visit in Belgrade when the request was received, the Serbian Prime Minister, Aleksandar Vucic, said that Serbia was faced with an immoral decision of the Tribunal and that every citizen of Serbia including Šešelj, must be treated in accordance with the national laws.

At the end of July 2015 both the Tribunal and Belgrade kept quiet and without taking further steps in the case. It seems that it is a deadlock situation without any prospect of being solved in favour of the Tribunal.

Obviously the decision of the Trial Chamber III of 6 November 2014 – unique of that kind in the practice of the Tribunal – divided not only the judges in the Trial Chamber which ordered the release, but also brought about tension between the Trial and the Appeals Chambers. In the discussion below an attempt will be made to explain the rules and the practice of ICTY with regard to provisional release; the reasons why Šešelj had not been allowed provisional release in more than eleven years of his detention; why the Tribunal released him in November 2014 without posing any conditions as provided in Rule 65(B); and, what legal and practical consequences of the latest decisions of the Trial and Appeals Chambers can be expected future. These questions aim at uncovering the reasoning of the Tribunal and the factors playing role in the practice of the Tribunal on provisional release.

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9 Decision on Prosecution Appeal against the Decision on the Prosecution Motion to Revoke the Provisional Release of the Accused, 30 March 2015 (IT – 3-67-AR65.1), Para. 22.

10 Id., Para. 22.

11 *Prosecutor v. Vojislav Šešelj*, Interlocutory Decision before Ruling on the Merit of the Revocation of Provisional Release of the Accused, T.Ch. III, Case No. IT-03-67-T, 10 April 2015.

### 8.2 Provisional Release Is Part of Human Rights of Accused

When arrested an accused may be held in custody (on remand) or be set provisionally free (or on bail). Provisional release is based on particular reasons and is of a temporary character. The accused is obliged to return to the court when called to do so. In national legal systems provisional release is common, but it is subject to certain conditions and guarantees and under some circumstances it will not be granted. International criminal procedures regulate provisional release in a similar manner.

The main reasons for imposing conditions and guarantees on provisional release are to ensure that the defendant will appear before the court when requested and that he or she will not abscond. In the national systems guarantees include, *inter alia*, submission of passport by the accused, restriction of movement by imposing curfew, reporting daily to the police station or prohibiting any contact with victims or witnesses. Sometimes special conditions and guarantees, such as prohibition to approach certain area or deposit of monetary values, are added. In The Netherlands provisional release can take place if the accused provides guarantees that he or she will meet the conditions for release and will not hide in case of conviction detention or imprisonment sentence. In international criminal trials these guarantees are usually requested not only from the defendant, but also from the receiving or home State of the accused where he or she intends to spend the time of provisional release, while the State of detention provides a statement that it agrees with provisional release.

A court can deny provisional release for various reasons. As most important and frequent reasons for denial are a fear that if released the defendant will fail to return to custody, will commit an offence, will interfere with victims and witnesses, or will otherwise obstruct the course of justice.[12] Apart from these, other factors play role as well. For example, the nature of the offence, the severity of the penalty for the crime(s) the person is accused of and sometimes the character of the accused can also be taken into consideration. Basically, in common law there are two separate and distinct grounds for denying bail: the concern of ensuring the accused's attendance in court and the protection of public.[13]

All major human rights treaties contain rules on provisional release. While it can be a matter of discussion whether provisional release exists in international human rights law on its own, it is clearly closely linked and related to some other important and well-estab-

12 The European Court of Human Rights held that 'the danger of an accused absconding does not result just because it is possible or easy for him to cross the frontier [but] there must be a whole set of circumstances like the heavy sentence to be expected or the accused's particular distaste of detention, or the lack of well-established ties in the country, which give reason to suppose that the consequences and hazards of flight will seem him to be a lesser evil than continued imprisonment.'See, Stögmüller*v.* Austria, ECtHR Judgment, Appl. No. 1602/620, 10 November 1969, Para. 15.

13 *R. v. Hall* case, Judgment, Supreme Court of Canada, Case No. 28223 (2002 SCC 64), 10 October 2002, Para. 56, http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2006/index.do.

lished rights of the accused. The core of the norm is that an accused or detained on a criminal charge is presumed innocent and has the right to liberty and therefore he or she should be brought promptly before a judge and shall be entitled to trial within a reasonable time or released under certain conditions. Provisional release is a guarantee that individuals arrested for committing a criminal offence will be kept in detention no longer than strictly necessary. One of the rights that are affected by denial of provisional release is the presumption of innocence which is one of the most sacred principles of criminal law. In one of its leading cases on the right to provisional release, the Supreme Court of Canada held that '[w]hen bail is denied to an individual who is merely *accused* of a criminal offence, the presumption of innocence is necessarily infringed.'[14] According to the first President of ICTY, Antonio Cassese '[t]he presumption of innocence [generally implies] that an accused should remain at liberty unless and until he is convicted, i.e. it [implies] a "right to bail".'[15]

In addition to the right to be presumed innocent and the right to liberty, keeping an accused in detention prior to conviction involves also the right to a speedy and fair trial. From the point of view of these rights it is very important that a detention of an accused prior to conviction is as short as possible. This can be achieved through the mechanisms of provisional release that can be enforced in a special judicial procedure. Accordingly, human rights treaties such as the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR) do not recognize a right to bail or release pending trial, but rather, they recognize the right to have a court decide the lawfulness of a defendant's detention promptly after arrest.[16] So, for example, Article 9(4) of ICCPR stipulates that a person deprived of liberty by arrest or detention 'shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.' Similar provision is contained in Article 5(4) of ECHR and Article 7(6) of the American Convention on Human Rights (ACHR).

'Detention prior to conviction is a serious infringement on the rights of defendants and has many real-life repercussions.'[17] The practice of international tribunals reveals that those accused of international crimes spend long time in detention while awaiting trials. As will be discussed elsewhere in this paper, this can be explained by the gravity of the charges, the complexity of the cases international criminal courts are dealing with and by the time consuming procedures for collecting evidence and proving guilt. However, statistics, especially of ICTY, raise concerns among human rights lawyers and commenta-

14 Id., Para. 64.

15 Antonio Cassese, "The International Criminal Tribunal for the Former Yugoslavia and Human Rights", European Human Rights Law Review, (1997), p. 334.

16 Caroline L. Davidson, 'No Shortcuts on Human Rights: Bail and the International Criminal Trial', *American University Law Review*, Vol. 60, Issue 1, 2010, Art. 1, p. 13, http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1601&context=aulr.

17 Id., p. 5.

tors. In ICTY an average detention of top political leaders is longer than three years. For example, until his death in March 2006, Slobodan Miloševic had spent almost five years in detention, Radovan Karadzic was arrested in July 2008 and is still in detention and the same is with RatkoMladić who has been in continuous detention since May 2012.[18] However, Šešelj had been in a far longest detention compared to all other ICTY detainees – longer than eleven years.

In addition to the consideration of the above human rights of accused, there are also other reasons which favour provisional release. Detention in any case disrupts the life of the accused, deprives them from liberty, disturbs their family life and brings their employment in jeopardy. Typical for international criminal trials is that the accused are far from their families and support networks, they are considerably older and in worse health than detainees in domestic jurisdictions and, unlike in domestic jurisdictions, many international defendants are not direct perpetrators of crimes i.e. trigger-pullers and are arguably unlikely to be dangerous if released.[19]

## 8.3 ICTY Rule(s) on Provisional Release

In ICTY, like in most other international criminal courts, there are no trials *in absentia*. It means that, according to Article 19 of the ICTY Statute (Art. 20 of ICTR Statute) at the moment when the Trial Chamber is satisfied that a *prima facie* case has been established by the Prosecutor and the indictment is confirmed, the suspect may be arrested and brought to the Detention Unit in The Hague where he or she should stand a trial. Like in above-mentioned common law countries, in international criminal courts, including ICTY, the purpose of the detention is twofold: to ensure that the accused will appear for trial and to prevent him or her of posing a danger to anyone. The ICTY Statute does not contain any article explicitly regulating provisional release. It seems that one of the main reasons for that is the fact that the Statute was drafted by the UN Secretary General in a rather short period of time in 1993 and because of the urgency of the situation in the former Yugoslavia no attention was paid to provisional release. Besides, the fact that the ICTY is the first international criminal tribunal established in the post-Nuremberg period, probably also played certain role. During the drafting of the ICTY Statute the provisions of the Nuremberg Military Charter and the experience of the Nuremberg Tribunal were taken into consideration, however not in respect of the rights of the accused that were almost absent in the Nuremberg Charter. 'The lack of suspect's rights at the Nuremberg Tribunalis due to the fact that those trials stood at the very beginning of the conception of international criminal

18 Id., p. 4.
19 Caroline L. Davidson, *above* n. 16, p. 4.

justice and could not draw on the core human rights treaties adopted in the meantime.'[20] Accordingly, Article 16 of the Nuremberg Charter that included only minimum rights of fair trial was of no particular use to the Statute of ICTY. However, the omission of an article on provisional release was soon after the acceptance of the ICTY Statute remedied by the adoption of Rule 65 of the Rules of Procedure and Evidence.

Strictly speaking, like any other international tribunal, ICTY is not formally bound by human rights treaties.[21] It means that the rules on provisional release that are included in the relevant human rights treaties have only support function in ICTY jurisprudence and can serve 'as a *litmus test* within international criminal proceedings.'[22] The situation is unlike in the ICC Statute in which Article 21(3) stipulates a general obligation of the Court to interpret the applicable law in consistence with internationally recognized human rights. This obligation has frequently been recalled in the jurisprudence of the ICC. Such an explicit provision is not included in the ICTY Statute, though in his early report of 1993, the former UN Secretary General, Boutros Boutros-Ghali, asserted that the Tribunal:

> … must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings … such internationally recognized standards are, in particular, contained in Article 14 of the International Covenant on Civil and Political Rights[23]

However, with respect to provisional release Article 21 the ICTY Statute is certainly of importance. This provision on the rights of accused 'was adopted almost verbatim from Article 14 of the International Covenant on Civil and Political Rights; the international *grundnorm* for a fair trial.'[24] The rights included in Article 21 comprise of two basic categories: (i) the right to a fair trial and the principles inherent to that right and (ii) the human rights guarantees of the accused which are to be respected during the course of the trial.[25] It provides for equality of persons before the Tribunal and minimum guarantees, *inter alia*, to a fair and public hearing, presumption of innocence until proved guilty and the right to be tried without undue delay. Providing for these rights is a *de jure* obligation of

20 Clemens A. Muller, 'The Law of Interim Release in the Law of International Criminal Tribunals', *International Criminal Law Review*, Vol. 8, 2008, pp. 589-626, p. 590.

21 Rules on provisional release are stipulated in Arts. 14 and 9(3) of ICCPR, Arts. 6 and 5(3) of the European Convention on Human Rights (ECHR), Art. 7(5) of the American Convention on Human Rights (ACHR) and in Art. 11 of the Universal Declaration of Human Rights.

22 Clemens A. Muller, *above* n. 20, p. 589.

23 Report of the UN Secretary General Pursuant to Para. 2 of Security Council Res. 808, UN Doc. S/25704, 3 May 1993, Para. 106.

24 Antonio Cassese, "The International Criminal Tribunal for the Former Yugoslavia and Human Rights", European Human Rights Law Review, (1997), p. 333.

25 Id.

the Tribunal that applies also to provisional release.[26] There are three arguments supporting such a view: (a) according to Article 21 the defendant must be treated as innocent until proven guilty, in which case any detention necessitates strong justifications; (b) the burden of proof for any continued detention rests on the prosecutor rather than the defendant, i.e. the prosecutor should prove that the accused should not be provisionally released; and (c) an accused must be proven guilty through a clear and discrete standard of proof which should be used to justify continued detention when not otherwise required.[27] For provisional release are of relevance paragraphs 3 and 4(c) of Article 21 – the right to be presumed innocent until proved guilty and to be tried without undue delay.

Apart from the relevance of Article 21 of the Statute, provisional release is in more detail regulated by Rule 65 of the ICTY Rules of Procedure and Evidence. From its inception in 1994 until the last amendment in 2011, Rule 65 had been changed several times.[28] One of the main problems by which the Tribunal struggled was setting of a suitable standard and conditions of provisional release in Rule 65 (B) which, on the one hand, would comply with the human rights standards and, on the other hand, would be compatible with the requirements and specific character of international criminal proceedings. Until now Rule 65(B) has been amended four times (in January 1995, November 1999, December 2001 and October 2011). Though it is not of relevance for Šešelj's provisional release since he surrendered to ICTY in 2003, it is interesting to note that in the period prior to the 1999 amendment one of the main characteristics of Rule 65(B) was its stringency. It included four criteria that had to be taken into consideration: (i) the existence of exceptional circumstances; (ii) the guarantee that the accused would return for his trial; (iii) the accused posed no danger to victims, witnesses or other persons, and (iv) the host country raised no objections. These 'criteria were conjunctive and even if they were in fact satisfied, there was no guarantee that the accused would be granted provisional release.'[29] Especially difficult was the requirement of 'exceptional circumstances' which led to denial of provisional release in many cases. Release was ordered very rarely and mostly because of health reasons of the accused or in order to enable them to attend funerals of their close relatives. In the *Blaškić* case the Trial Chamber explained that as follows:

> […] both the letter [of Rule 65(B)] and the spirit of the Statute of the International Tribunal require that the legal principle is detention of the accused and that release is the exception; that, in fact, the gravity of the crimes being prose-

26 Raphael Sznajder, 'Provisional Release at the ICTY: Rights of the Accused and the Debate that Amended a Rule', *Northwestern Journal of International Human Rights*, Vol. 11, Issue 3, 2013, pp. 109-145, p. 113.

27 Id., p. 113.

28 Rule 65 was adopted on 11 Feb 1994. It was revised or amended in 1995, 1997, 1998, 1999, 2000, 2001, 2005 and 2011.

29 Kate Doran, 'Provisional Release in International Human Rights Law and International Criminal Law', *International Criminal Law Review*, Vol. 11, 2011, pp. 707-743, at p. 719.

> cuted by the International Tribunal leaves no place for any other interpretation even if it is based on the general principles of law governing the applicable provisions in respect of national laws which in principle may not be transposed to international criminal law.[30]

Obviously, such a position of the Tribunal deviated from international human rights norms according to which 'it shall not be the general rule that persons awaiting trial shall be detained in custody'[31] and with the view of the Human Rights Committee which in its General Comment No. 8 claimed that a '[p]re-trial detention should be an exception and as short as possible.'[32]

Not only the requirement of the existence of 'exceptional circumstances' but also a rigid application of other criteria involved in some cases miscarriage of justice.[33] One example of that dates back to the early practice of the Tribunal and concerns brothers Zoran and Mirjan Kupreškić in the *Kupreškićet al.* case. They voluntarily surrendered to ICTY in October 1997 and have spent over four years in custody, during which period their requests for provisional release were consistently rejected. Ironically enough, in the appeals procedure the conviction was reversed and they were acquitted.[34] According to Kate Doran, this was

> a remarkable decision which clearly depicted the severity of the pre[-1999] amendment position on provisional release. The accused who voluntarily surrendered […] were detained for four years as they did not meet the 'exceptional circumstances' proviso Rule 65.[35]

She goes further by pointing out at some of the damage the two brothers suffered by so long detention. They

> were removed from their homes and transferred to The Hague and consequently denied any chance of employment. Moreover the brothers could not be compensated for the extreme hardship they had endured as there was, and still is,

30 *Prosecutorv. Blaškić*, Order Denying a Motion for Provisional Release, Case No. IT-95-14, T.Ch, 20 December 1996.
31 ICCPR, Art. 9(3).
32 Human Rights Committee, General Comment No. 8, 'Article 9 Right to Liberty and Security of Persons', 16th Session, 30 June 1982.
33 Kate Doran, *above* n. 29, p. 722.
34 Prosecutor *v.* Zoran Kupreškić *et al.*, Appeal Judgment, Case No. IT-95-16-A, App. Ch., 23 October 2001, Para. 245.
35 Kate Doran, *above* n. 29, p. 722.

> no provision for such an application in the ICTY Statute. This is noteworthy as many international and domestic instruments provide for this eventuality.[36]

In ICTR practice even a more drastic is the case is of Gratien Kabiligi who was acquitted of all charges after spending 10 years and 10 months in custody.[37]

By the 1999 amendment the requirement of 'exceptional circumstances' was removed. This was done because of both the criticism that the rule was not in conformity with international human rights standards of accused and because of the difficulty in setting the standard of 'exceptional circumstances'. However, using its discretion almost ten years later (in 2008) 'in what seemed to be a swing in the opposite direction, the Appeals Chamber added a requirement through precedent: that accused demonstrate 'compelling humanitarian grounds' in their applications for provisional release to justify release made at late stages of proceedings.'[38] As pointed out by Raphael Sznajder, 'For accused in late stages of proceedings, the standard created by precedent in 2008 was even more stringent than had existed before the 1999 amendment.'[39]

When in 2004 Šešelj for the first time requested provisional release, the 2001 Rule 65(B) was applicable. It provided that a Trial Chamber could order provisional release only after giving the host country and the State to which the accused sought to be released the opportunity to be heard and only if satisfied that the accused would appear for trial and, if released, would not pose a danger to any victim, witness or other person.[40]

According to the most recent amendment of Rule 65 (B) of 2011

> Release may be ordered at any stage of the trial proceedings prior to the rendering of the final judgment 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.

As Sznajder points out

36 Id.
37 Id.
38 Raphael Sznajder, *above* n. 26, p. 111.
39 Id., p. 109.
40 The 2001 Rule 65(B) reads as follows: 'Release may be ordered 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.'

> [t]he apparent purpose of the October 2011 amendment was to mitigate the effect of a highly subjective requirement brought about by judicial interpretation, through creation of questionable precedent. The precedent set forth by the Appeals Chamber in 2008 interjected a requirement obligating accused in late stages of proceedings to demonstrate that they had sufficiently 'compelling humanitarian grounds' in order to be provisionally released – in addition to fulfilling the objective requirements of Rule 65(B).[41]

The newest Rule has two main characteristics: (a) it allows provisional release 'at all stages of the trial proceedings prior to the rendering of the final judgment' which means that the accused is presumed innocent also at a late stage of the trial, and (b) the Trial Chamber is given explicit discretionary power in applying 'compelling humanitarian grounds' as a basis of provisional release.[42] Accordingly, it is up to the Chamber whether and to which extent these criteria will be taken into consideration. '[C]ompelling humanitarian grounds' are now wholly within the trial chamber's purview to assign importance, or not, in deciding applications for provisional release.'[43]

The current Rule 65(B) contains three cumulative conditions which should be met for a decision on provisional release: (a) the Trial Chamber should hear the opinions of the host State and the State to which the accused seeks to be released; (b) the Tribunal should be satisfied that the accused will appear for trial; and (c) if released, the accused will not pose a danger to any victim, witness or other person. In addition to these, according to Rule 65(C) the Chamber may impose such conditions upon the release of the accused as it may determine appropriate. These may include the execution of a bail and the observance of such conditions as are necessary to ensure the presence of the accused for trial and the protection of others. However, if the conditions under paragraph (B) are not met, the Chamber will not consider conditions under paragraph (C), but must deny provisional release.[44]

In establishing whether conditions of Rule 65(B) have been met all relevant factors which 'a reasonable Chamber would be expected to consider in coming to a decision', should be considered.[45] That depends upon circumstances of each case, but the assessment must take place at the time when the Chamber takes decision on provisional measures and the Chamber is also obliged 'to the extent foreseeable, to envisage how those circumstances

41 Raphael Sznajder, *above* n. 26, p. 109.

42 Id., p. 134.

43 Id., p. 135.

44 *Prosecutor v. Vojislav Šešelj*, Decision on Prosecution Appeal Against the Decision on the Prosecution Motion to Revoke the Provisional Release of the Accused, App. Ch., Case No. IT-03-67-AR65.1, 30 March 2015, Para. 13.

45 The *Prosecutorv. Jadranko Prlić et al.*, Decision on Jadranko Prlić's Motion for Provisional Release, Case No. IT-04-74-T, T.Ch. III, 24 November 2011, Para. 10.

may evolve once the accused returns to the Tribunal."[46] According to Rule 65(B) it is for the defendant to demonstrate that in case of provisional release he will comply with the conditions of appearing for trial and not posing danger to others. The Tribunal considers various factors such as whether the accused voluntarily surrendered, how serious is the charge and potential sentence, has the accused cooperated with prosecution, does the accused know witnesses, etc. The accused remains throughout the duration of his or her release, under the authority of the Tribunal and therefore he or she is requested to endure that his conduct would be respectful and discreet.[47]

One of the aspects that a Trial Chamber considers as part of its discretionary power is the length of the time which the accused has spent in detention. As pointed out elsewhere Article 9(3) of the ICCPR and Article 5(3) of ECHR establish that the accused has the right to a trial within reasonable time. This assessment is not done merely on the duration of the pre-trial detention but other factors are also taken into consideration such as the complexity of the case, speed of handling, conduct of the accused, conduct of the authorities. Personal interests of the accused play role, however 'interest of justice' and integrity of proceedings may prevail.

### 8.4 History of Šešelj's Provisional Release

A. At his initial appearance before the Trial Chamber, on 26 February 2003, Šešelj stated that he would not be filling a motion for provisional release as he came to the Tribunal of his own will and did not believe that any government could provide guarantees on his behalf. However, already in June 2004 he requested the Chamber to order his provisional release until the start of the trial against him.[48] In his request Šešelj raised the following arguments: (a) he offered to cooperate with the Prosecution even before he was formally indicted and before his voluntary surrender to the Tribunal shortly after the indictment against him was issued; (b) he self-represented himself in the proceedings and his procedural right to defend himself in person had been violated by his continuing detention; (c) scheduling the trial to commence only in early 2007 his right to fair and expeditious trial had been violated; and (d) family reasons.[49]

The Trial Chamber II rejected the motion on all grounds. With regard to the length of the pre-trial detention the Chamber noted that – given the legal and factual complexity of the case and the number of witness statements and evidence – 15 months which by then

46 Id.

47 Id., Para. 45.

48 *Prosecutor v. Vojislav Šešelj*, Decision on Defence Motion for Provisional Release, T. Ch. II, Case No. IT-03-67-PT, 23 July 2004, Paras. 1 and 2.

49 Id., Para. 3 (IT-03-67-PT).

the Accused had spent in detention, was not unreasonable and did not *per se* constitute a ground for allowing Šešelj's request.[50] Similarly, it concluded that the conditions as established in Rule 65 (B) were not met. In difference from national States, the Tribunal has no its own law enforcement mechanisms and is dependent on the effective cooperation of States and State agencies. During the time of provisional release an accused is under the jurisdiction of the State to which he or she is released. For this reason the State should be willing to ensure not only the return of the accused to the Tribunal but also that during his release the accused will have no contact with victims and Prosecution witnesses.[51] Since such guarantees were not provided the Trial Chamber II concluded that the conditions for provisional release were not satisfied and denied the motion.[52]

B. In November 2005 the Trial Chamber II also denied a motion of Šešelj requesting the Chamber either to order the trial to commence by 24 February 2006 at latest, or to abolish detention, dismiss the indictment and release him. At the status conference of 24 January 2006 he insisted that a reasonable time limit for the beginning of the trial must be set and said the following:

> The point is that every reasonable deadline for the start of trial is long over. [The] Trial Chamber has evaded stating anything about this. […] But even had I been on provisional release, this time period would have been too long leading up to the start of the trial, let alone having to wait for it in detention.[53]

The Trial Chamber denied the motion again. It basically raised two arguments: (a) there was no legal logic in the argument of the accused that if the case would not start on that particular day the remedy would be to abolish the detention, to dismiss the indictment and to release him; and (b) it was not shown that there was a change in circumstances and that Šešelj would appear for trial and, if released, he would not pose a danger to any victim, witness or other person as required by Rule 65.[54]

C. Six years later, in March 2012 Šešelj submitted again a motion for provisional release. By that time he had spent nine years in detention. His request followed after the closing of the hearings on 20 March 2012 and the trial entered the phase of deliberations. During the Defence Closing Statement of 20 March 2012, Šešelj wondered: 'What are the reasons

50 Id., Para. 10.
51 *Above* n. 49, Para. 3.
52 Id., Paras. 12 and 13.
53 Transcript, 24 January 2006, www.icty.org/x/cases/Šešelj/trans/en/060124SC.htm.
54 *Prosecutor v. Vojislav Šešelj*, 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 (Submission No. 116), T. Ch. II, Case No. IT-03-67-PT, 12 December 2005.

for further detention? There is no possibility for me to flee. Where would I escape? There is no possibility for me to influence any witnesses because all the witnesses have been examined long time ago. And there is no danger of me re-offending. Why? Because the state of war is no longer in effect in the Balkans. Of course I am not expecting you to grant my motion. I know that you're going to reject it, but I am putting you in a position in which you have to decide and which you have to reject my motion.'[55] And again the motion was rejected. The Trial Chamber found yet again that the conditions of Rule 65(B) as amended in 2011, were not fulfilled: there were no convincing arguments that Šešelj would appear in court for rendering of the judgment, that he would return to The Hague when requested, nor that there were convincing arguments that he would not pose a danger to any victim, witness or other person.[56] The request was dismissed not only on the basis of the Prosecutor's argument that no State guarantees were provided, but all other evidence of importance for conditions established in Rule 65(B) RPE was taken into consideration as well.

D. In difference from previous times, on 13 June 2014 the Trial Chamber III invited *proprio motu* the parties to make submissions on possible provisional release of Vojislav Šešelj.[57] By that time Šešelj had been in detention longer than eleven years and diagnosed with colon cancer. The Government of Serbia was asked to confirm whether it was able to provide guarantees that it will, *inter alia*, arrest Šešelj immediately in case of violation of home confinement, take away his passport and would not issue a new travel document while the provisional measures were in place. Serbia was also asked to guarantee that Šešelj would not have any contact with victims or witnesses or would try to influence them and that it would inform immediately the Chamber in case he would breach or obstruct any of the measures put in place.[58] The Government of Serbia stated that it was prepared to give guarantees that the measures imposed by the Chamber would be respected but these guarantees were 'subject to the formal and unequivocal commitment of the Accused to respect the imposed conditions.'[59] In addition, the Government of The Netherlands was called to provide its observations on a possible provisional release of Šešelj. Finally, the Trial Chamber III requested Šešelj to state in writing his commitment that he would respect the conditions of his provisional release. So he would be obliged, among other things, to place himself under the supervision of the Serbian authorities, to surrender his passport to the Serbian authorities, not to contact any victims or witnesses or seek to influence them

55 Transcript, 20 March 2012, www.icty.org/x/cases/Šešelj/trans/en/120320IT.htm.

56 *Above* n. 49, Para. 15.

57 The *Prosecutor v. Vojislav Šešelj*, Order Inviting the Parties to Make Submissions on Possible Provisional Release of the Accused *Proprio Motu*, T. Ch. III, Case No. IT-03-67-T, 13 June 2014.

58 Id., Para. 10.

59 The *Prosecutor v. Vojislav Šešelj*, Order Terminating Process for Provisional Release of the Accused *Proprio Motu*, T. Ch. III, Case No. IT-03-67-T, 10 July 2014.

in any manner, to return to the Tribunal on the date indicated by the Chamber and to comply strictly with any order of the Chamber varying the conditions of or terminating the provisional release.[60]

In his Separate Opinion, the Chamber's Presiding Judge, Jean-Claude Antonetti, went further in setting conditions of Šešelj's provisional release. He held that the order should include also a provision that 'should [Šešelj] fail to state formally his commitment to comply with the conditions, the Chamber will be forced to withdraw the provisional release *proprio motu*.'[61] In his view there was no other way of allowing the provisional release as it was 'absolutely necessary' to implement the guarantees by the Chamber.[62] Since the ICTY Rules do not regulate the question of *proprio motu* decision on provisional release the Chamber was obliged to follow a general provision on guarantees as included in Rule 65. So, it would not be possible to depart from Rule 65 without the risk of abusing the discretionary power of the Chamber.[63] At the end Judge Antonetti said:

> The situation is relatively simple one: if the Accused gives his consent in writing that he will respect the conditions that were set out, he will return to Begrade; should he maintain the position he expressed in his submission, regretfully I will have no other choice but to find that he should remain in detention awaiting a judgment for which no one knows the date of delivery.[64]

However, as it could have been expected, Šešelj rejected to commit himself with respect to any conditions except that he would not leave the territory of Serbia. Since no guarantees were provided on 10 July 2014 the Trial Chamber III decided to terminate the process of provisional release.[65]

E. Notwithstanding the above, because of the worsening of Šešelj's health, already at the beginning of November 2014, the Trial Chamber III decided, again *proprio motu*, to examine the possibility of his provisional release. The Dutch and the Serbian Governments

60 The *Prosecutor v. Vojislav Šešelj*, Order Inviting the Accused to State his Commitment to Respect Guarantees of his Possible Provisional Release *Proprio Motu*, T. Ch. III, IT-03-67-T, 3 July 2014.

61 The *Prosecutor v. Vojislav Šešelj*, Separate Opinion of Presiding Judge Jean-Claude Antonetti to the Order Inviting the Accused to State his Commitment to Respect Guarantees of his Possible Provisional Release *Proprio Motu*, T. Ch. III, Case No. IT-03-67-T, 3 July 2014.

62 Id.

63 Id.

64 The *Prosecutor v. Vojislav Šešelj*, Separate Opinion of Presiding Judge Jean-Claude Antonetti to the Order Inviting the Accused to State his Commitment to Respect Guarantees of his Possible Provisional Release *Proprio Motu*, T. Ch. III, Case No. IT-03-67-T, 3 July 2014.

65 Id.

were invited again to file their observations regarding the possible release and, in addition, the Serbian Government was requested to confirm that

> it will be able to guarantee that the Accused will have no contact with witnesses or victims and that he will return to the Tribunal when ordered to do so by the Chamber.[66]

While The Netherlands did not oppose a possible provisional release of the Accused, the Serbian Government agreed (like in June 2014) with the release of Šešelj to its territory on the condition that 'he adheres to the conditions set by the Chamber.' In other words, the Serbian Government was prepared to give guarantees only if the Accused confirmed that he would accept and respect the conditions of provisional release as imposed by the Chamber.[67] Strangely enough, in the follow up procedure the Trial Chamber III – with Judge Antonetti presiding – did not take into consideration the consent, i.e. observations of the two Governments, especially that one of Serbia which was made conditional, but decided on 4 November 2014 to order the release of the Accused strictly on humanitarian grounds and not to impose on him any other condition than not to influence witnesses and victims, and to appear before the Chamber as soon as he is so ordered.[68]

In his dissenting opinion, Judge MandiayeNiang strongly disagreed with the decision of the Trial Chamber. His main arguments were the following:

Firstly, unlike for the order of July 2014, this time the Trial Chamber did not follow the request of Serbia to ask the accused formally to confirm that he would respect the conditions of provisional release. In his view

> The majority, no doubt fearing a deadlock in view of the earlier attitude of the Accused, did not deem that it had to consult the Accused again. It was satisfied to declare its trust that 'the Accused will comply with the aforementioned requirements', that is, that he will 'not … influence witnesses and victims and [will] appear before the Chamber as soon as it so orders'.[69]

According to Judge Niang, the Chamber also missed to hold a status conference as provided in Rule 65 *bis* which would be an appropriate framework to enter into dialogue with the

66 The *Prosecutor v. Vojislav Šešelj*, Order Inviting the Host State and Receiving State to Submit Observations on Possible Provisional Release of the Accused *Proprio Motu*, T. Ch.III, Case No. IT-03-67-T, 4 November 2014.

67 Id.

68 Id.

69 The *Prosecutor v. Vojislav Šešelj*, Dissention Opinion of Judge Mandiaye Niang to the Order of Provisional Release of the Accused *Proprio Motu*, T.Ch. III, Case No. IT-03-67-T, 4 November 2014.

Accused about his health and conditions accompanying his provisional release.[70] He reminded that when in June 2014 Šešelj was consulted on a possible provisional release, he expressed his criticism of the current Serbian authorities whose guarantees he did not recognize and remained quiet with regard to his possible attitude towards witnesses or his return before the Chamber when he would be required to do so.[71] This time, in November 2014, the Chamber did not insist on getting any assurances from Šešelj, but relied only on trust. This was in the view of Judge Niang wrong. He rightly asked:

> [w]hy be content with a statement of trust, as was done by the majority, when we have the possibility of checking whether the Accused will adhere or not to our conditions and we can then apply, if needed be, alternative measures?[72]

Secondly, since the Trial Chamber missed the opportunity to consult Šešelj on the conditions of provisional release and to ask for his consent as requested by the Government of Serbia, the Chamber did not order any monitoring mechanism and did not impose any obligations on Serbia in that respect. This made Serbia's cooperation infeasible. If the Trial Chamber had no consultation with Šešelj, Judge Niang claimed that at least it could impose obligations on Serbia to monitor Šešelj and thereby to ensure protection of witnesses.[73]

As from the beginning of November 2014 when the Trial Chamber III ordered provisional release, very unique developments took place. These developments were set off primarily by Šešelj's use of hostile and hatred speech immediately after his return to Belgrade and by his calls for a Greater Serbia. His defamatory statements met with a strong reaction elsewhere and especially in Croatia which started mobilizing international efforts to revoke the Tribunal's decision on provisional release and to return him to prison. On 25 November 2014 the European Parliament passed a non-binding resolution in which it noted that the hatred speech used by Šešelj publicly and his ideology disturbed many people in the countries of former Yugoslavia and was not contributing to the regional conciliation. It called on the ICTY to withdraw the provisional release and to prevent his hate speech.[74] That, among other things, encouraged the Office of the Prosecutor 'to redouble efforts to ensure accountability for serious violations of international humanitarian law and to firmly stand against all forms of revisionism.'[75]

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70 Id., Paras. 7-8.
71 Id., Para. 6.
72 Id., Para. 9.
73 Id., Para. 11.
74 'Resolution on Serbia: the case of accused war criminal Vojislav Šešelj', adopted by the European Parliament on 25 November 2014 (B8-0294/2014).
75 Completion Strategy Report: Prosecutor Brammertz's address before the United Nations Security Council, Press Release, 10 December 2014, www.icty.org/sid/11599.

As result of that and as discussed above, on 1 December 2014, Prosecutor Bremmerz started a procedure for termination of Šešelj's provisional release. In the procedure that followed the refusal of the Trial Camber to deal with the Prosecutor's request, the Appeals Chamber considered whether the Trial Chamber has correctly exercised its discretion in reaching that decision.[76] The Appeals Chamber firstly dealt with the standard of review and applicable law. It pointed out that there are certain circumstances under which the Appeals Chamber may overturn a discretionary decision of the Trial Chamber. It can be the case: if the Trial Chamber based its decision on incorrect interpretation of governing law or on patently incorrect conclusion of fact or if it is so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.[77] Apart from that, the Appeals Chamber might also consider whether the Trial Chamber has given sufficient weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations in reaching its decision.[78]

In its Order of 30 March 2015 majority of the Appeals Chamber (two judges dissenting) found that there was an error of law because the Trial Chamber failed to address the Prosecution's argument that Šešelj's statements that he would not return to the Tribunal eroded the essential preconditions for his provisional release and that 'no reasonable trial chamber could have remained satisfied that the first of the two pre-conditions of Rule 65(B) of the Rules, which have to be cumulatively met, remained fulfilled.'[79] Consequently, it ordered the Trial Chamber: to revoke its decision on provisional release; as soon as possible after Šešelj's return to The Hague to give Serbia and The Netherlands an opportunity to be heard in accordance with Rule 65(B); and, to conduct a *de novo* assessment of the merits of Šešelj's possible further provisional release.

## 8.5 Possible Legal and Practical Responses to the Current Situation

At this moment (July 2015) no further steps to resolve the impasse are being taken by any of the actors involved. In the Tribunal itself the Trial Chamber is obviously not eager to comply with the decision of the Appeals Chamber. One could think that the reason for that might be because it shares the opinion of the two dissenting Judges of the Appeals Chamber, Tuzmukhamedov and Afanđe. They held that the extent to which the Appeals Chamber

76 The *Prosecutor v. Vojislav Šešelj*, Decision on Prosecution Appeal Against the Decision on the Prosecution Motion to Revoke the Provisional Release of the Accused, App. Ch., Case No. IT-03-67-AR65.1, 30 March 2015, Para. 10.

77 Id., Para. 11.

78 Id.

79 Id., Paras. 18 and 19.

> [made] determination on factual issues may give the impression that the Appeals Chamber [was] not limiting itself to addressing the appeal of the 13 January 2015 Decision, but [was] instead substituting itself for the Trial Chamber and [was] dealing with the matter under the general rules of reconsideration, even though the Prosecution invoked Rule 65(D) of the Rules.[80]

The manner in which the relevant rules were interpreted in the Decision of the Appeals Chamber 'might be perceived as usurping the Trial Chamber's authority and function.'[81] As further pointed out in the Dissenting Opinion, the power to revoke the provisional release and to order Šešelj to attend a hearing is a matter solely within the remit of the Trial Chamber.[82] In addition, as one of the problematic aspects, the dissenting Judges stressed that there is no adopted standard of proof that the Appeals Chamber could apply in order to establish that the accused violated any of the conditions of provisional release.[83]

The unwillingness on the part of the Trial Chamber to comply with the Decision of the Appeals Chamber and the latter's issuing of the request to the Serbian Government on 25 May 2015, reveal that the differences in the views between the Trial and Appeals Chambers are serious. They show a lack of appropriate rules and standards, as well as limitations of the Tribunal to deal with a situation such as this one what certainly brings the reputation of the Tribunal into question. In the period February-March 2015, the Trial Chamber (meeting in a different composition) considered also urgent requests for provisional release of Goran Hadzić. In this case it decided on three occasions to deny the requests by Hadzić (in detention since July 2011), who suffers from brain cancer in a terminal stage. The motions were denied notwithstanding the fact that the conditions as set in Rule 65(B) were fulfilled: the Host State and the Government of Serbia provided appropriate guarantees and there was no risk that he would flee or pose danger to any victim or witness.[84] Despite the medical reports which stated a low life-expectancy of Hadzić and seriousness of his condition, the Chamber held that the Defence failed 'to provide sufficiently compelling humanitarian reasons justifying provisional release' or 'to demonstrate an urgency which necessitates a decision on interim provisional release.'[85] It was only by a decision of the Appeals Chamber of 13 April 2015 that provisional release of Hadzić was granted (under strict conditions imposed on him and on the Serbian Gov-

80 *Above* n. 74. Joint Dissenting Opinion of Judges Tuzmukhamedov and Afanđe, Para. 4.
81 Id., Para. 7.
82 Id., Para. 18.
83 Id., Para. 8.
84 *Prosecutor v. Goran Hadzić*, Decision on Urgent Interlocutory Appeal from Decision Denying Provisional Release, Case No.IT-04-57-AR65.1, App. Ch., 13 April 2015, Para. 4.
85 See, the Decision on Defence Urgent Request for Provisional Release of 11 February 2015, the Decision on Second Urgent Request for Interim Provisional Release of 25 February 2015 and the Decision on Defence Urgent Request for Provisional Release of 13 March 2015.

ernment) and the impugned decision was quashed.[86] Later on, in May 2015, the Trial Chamber decided to approve a new Defence motion and to order a new provisional release.[87] On the first glance it might seem that, frightened by the experience in the *Šešelj* case, the Trial Chamber in the *Hadzć* case was extra cautious in (not) allowing provisional release, despite the fact that he is in terminal stage of his illness. However, an overview of the decisions on provisional release does not support such a view. It has always been so that the Trial Chamber(s) were very restrictive in allowing provisional release, including provisional release of seriously ill accused. Allowing to Šešelj a release on purely humanitarian basis and without any conditions, is one exception in which the Trial Chamber III acted inconsistently with its own practice and Rule 65 that has certainly not set a precedent in the practice of the Tribunal. The questions why it happened and whether there were some other than humanitarian reasons for the Trial Chamber to decide so, would lead only to speculations that would go outside legal considerations.

With regard to enforcement of the Appeals Chamber's Decision, one can note that, even if the Trial Chamber was prepared to comply, under the existing conditions it would be very difficult, if not impossible, to do that. Šešelj publicly and on various occasions rejected the possibility to return to The Hague. It means that it would be on the Serbian authorities to arrest and surrender him to ICTY. However, in the absence of the guarantees of the Serbian Government, the possibility of ICTY to request its cooperation is undermined. The Tribunal could rely on the general provision included in Article 29 of ICTY Statute which imposes on States an obligation to cooperate. It could also report the non-compliance to the UN Security Council, though it is not clear if it would be sufficient to enforce the decision and return Šešelj to prison. Apart from that, political pressure by some important international actors could be considered. Serbia is candidate for EU membership and in the given situation its political and economic interests might prevail.

For the Tribunal it is in a way fortunate that the trial procedure against Šešelj was completed in 2012 and as of July 2015 the Trial Chamber judgment was pending. If it were not the case, in the situation like this one it would be difficult to continue the trial in the absence of the accused. The concept of trials *in absentia* is not new in international proceedings(in 1945 the Nuremberg Tribunal tried Martin Bormann *in absentia* and sentenced him to death) and since recently there is an increasing tendency of the tribunals to allow the absence of an accused from some sittings i.e. parts of the procedure. However, as pointed out above, in ICTY Statute there is no article explicitly providing for such trials. It is because there was a widespread perception that trials *in absentia* should not be provided for in the Statute, as this would not be consistent with Article 14 of ICCPR according to

86 *Above* n. 82.

87 See, *Prosecutor v. GoranHadzić*, Decision on Urgent Motion for Provisional Release Filled on 28 April 2015, Case No. IT-04-75-T, T. Ch., 21 May 2015.

which the accused shall be entitled to be tried in his presence.[88] Hence, the Statute in Article 21(4)(d) stipulates that the accused shall be entitled to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing. This provision imposes a legal obligation on the Tribunal to have the accused in its custody. Theoretically, it could hold hearings in absence of an accused if the accused waives his right and chooses not to be present at the trial; because of his poor health; or, when he willingly disrupts the court proceedings. So, for example, in November 2006 Šešelj was removed from the status conference because of the persistent obstruction of the proceedings and the defence was temporarily taken over by his lead stand-by counsel and his co-counsel.[89] However, currently, this consideration is of no relevance since the trial of Šešelj is finished and the Trial Chamber is in deliberation. One of the possibilities that now might be considered is delivering of a judgment in the absence of the accused. In some views, the Trial Chamber can make use of Rule 98(C) *ter* which provides that the judgment shall be rendered by a majority of judges and shall be followed by a written judgment as soon as possible afterwards.[90] This might be a desirable alternative solution in providing justice. But even if that would be possible and Šešelj would be convicted, under current circumstances the significance of such a judgment would be only symbolic as long as Šešelj remains released.

Having in mind the fact that Šešelj's illness is life threatening, from the ethical point of view it would be wrong to bring him back to The Hague while he is in this situation and to prevent him from receiving – in his view – the most appropriate medical treatment. That would deprive Šešelj from his right to health which is a fundamental part of human rights which he enjoys, notwithstanding his status of an accused for international crimes.[91] In the past, the Tribunal has prevented Slobodan Milošević from getting the requested medical treatment[92] and currently Ratko Mladić is also not allowed to get a medical treat-

88 *Above* n. 23, Para. 101.

89 www.sense-agency.com/icty/Šešelj-removed-from-courtroom.29.html?cat_id=1&news_id=9915.

90 Rule 98 (C) *ter* stipulates: 'The judgment shall be rendered by majority of the Judges. It shall be accompanied or followed as soon as possible by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.' See, blog of Luka Misetic, 'How the ICTY can still Salvage the Šešelj Trial', *Misetic Law*, 13 November 2014, online: http://miseticlaw.blogspot.nl/2014/11/how-icty-can-still-salvage-Šešelj-trial.html.

91 In *Cabal and Pasini v. Australia* case, the Human Rights Committee held that though in the ICCPR there is no specific provision on health of detainees, that issue could be raised under Art. 6(1) – the right to life and Art. 10(1) the right to dignity and human treatment. See, Cabal and Pasini*v.* Australia, View of the Human Rights Committee, CCPR/C/78/D/1020/2001, Communication No. 1020/2001, 7 August 2003, Para. 7.7.

92 The former President of Serbia, Slobodan Miloševic, who was arrested by Serbian authorities on 1 April 2001 and transferred to The Hague on 29 June 2001, asked for provisional release in order to get medical treatment in a medical center in the Russian Federation. However, on 23 February 2006 the request was denied because his trial was 'in the latter stages of a very lengthy trial, in which he is charged with many serious crimes, and at the end of which, if convicted, he may face the possibility of life imprisonment. In these circumstances, and notwithstanding the guarantees of the Russian Federation and the personal undertaking of the Accused, the Trial Chamber was not satisfied that the first prong of the test has been met – that is, that it is more likely than not that the Accused, if released, would return for the continuation of

ment outside The Netherlands, despite the fact that he is seriously ill and not fit to stand the trial. Understandably, the primary task of the Tribunal is to prosecute and bring to justice those responsible for international crimes, but, as it has been frequently pointed out, that can properly be done only with full respect of the rights of accused.

Not allowing timely provisional release to a seriously ill accused is especially aggravated if the person has already been in detention for a long period of time. During the eleven years spent in the prison in The Hague Šešelj's health significantly deteriorated. Though lengthy detentions occur regularly in international criminal procedures, such a long detention without any provisional release during that time and without a conviction, like it happened with Šešelj, is unprecedented not only in ICTY but in international criminal practice as well. According to some data ICTY detainees spend almost 17 months in detention before their trials even began.[93] Only to mention, Dario Kordic had spent seven years and Momčilo Krajišnik almost nine years in ICTY detention before receiving their final sentences.[94] In ICTR there is a similar situation.[95] There are some indications that in the ICC will be the same problem: in the case of Germain Katanga it took a period of seven years of detention until the Trial Chamber judgment (from 2007-2014) and eight years in case of Thomas Lubanga Dyilo until the final sentence in the appeals procedure was rendered in December 2014.

Excessively long periods of time that the procedures take are considered as one of the 'unfortunate shortcomings' of international tribunals.[96] They are explained by the inherent difficulties of international proceedings.[97] Antonio Cassese lists four types of such intrinsic difficulties: (a) the complexity of international crimes such as genocide, war crimes and crimes against humanity which normally are a manifestation of organized criminality and involve more than one person; (b) the difficulty of collecting evidence that may be scattered over large territories or more than one state; (c) the need to prove some special ingredients of the crimes, for example, in the crimes against humanity the existence of a widespread or systematic practice; and, (d) language problems and conduct of proceedings in at least two and possibly in three or more languages, with the consequence that documents and

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his trial (*The Prosecutor v. Slobodan Milošević*, Decision on Assigned Counsel Request for Provisional Release, T. Ch, Case No. IT-02-54-T, 23 February 2006. Para. 18). Only two weeks later, on 11 March, Miloševic died in his cell without receiving the necessary medical treatment.

93 Milena Sterio, 'Pirates' Right to a Speedy Trial', in: Michael P. Scharf et al. (Eds), *Prosecuting Maritime Piracy: Domestic Solutions to International Crimes*, Cambridge University Press 2015, pp. 172-204, at p. 194.

94 Id.

95 So, for example, *Bagosora et al.* four detainees spent more than 13 years in ICTR detention before the final sentence was delivered, while in *Nyiramasuhuko et al.* case the six detainees spent even 15 years before the judgment by the ICTR trial chamber was delivered and as of June 2015 the appeals procedure was still pending. See, Milena Sterio, *above* n. 93.

96 *Above* n. 90.

97 Antonio Cassese, *International Criminal Law*, Oxford University Press, 2nd ed., 2008, p. 443.

exhibits need to be translated into all these languages.[98] According to Cassese the adversarial model further protracts international criminal proceedings as it requires that all evidence be scrutinized orally through examination and cross-examination.[99] The need to keep the accused in custody of an international criminal court is also warranted by their scant reliance on the cooperation of the relevant states to ensure that the accused will appear in court once summoned to resume their participation in trial or appellate proceedings.[100] This problem is more serious in international courts, however national courts also have difficulties in getting the accused back to prison. In such cases national courts usually issue arrest warrants, although such warrants are not a guarantee that the justice will be served. According to some data of 118,500 arrest warrants issued in England and Wales in 2002, only 45 per cent were served on the absconder by the police within three months after issue. The consequences of this are broader than it may seem on the first glance: '[p]ublic confidence in the criminal justice system is weakened if defendants skip their court hearings, leading to failed trials.'[101] The same goes for international criminal justice system which are by their nature and constitution weaker than national criminal systems as they do not have any enforcement bodies on their own.

However, while the above mentioned arguments explain why international criminal procedures take so long, from the point of view of the rights of accused they cannot serve as justification. In the *Lubanga* case the Defence rightly noted that:

> [i]t is axiomatic to state that in an international criminal law case the majority of evidence will be located abroad or that there will be a significant amount of evidence. In fact one of the rationales for international criminal tribunals is that they will be able to cope with the extra demands of large and complex cases because they will have the infrastructure to sort, store and use evidence in large and complex cases. […] therefore to then use this argument as a justification for having an inordinately long […] detention is fundamentally unfair.[102]

But with regard to Šešelj it is not only that the above reasons played role in his long detention. Practical arrangements and the (mis)management of the Tribunal contributed to delays in the procedure as well. That has been admitted by the ICTY President, Judge Theodor Meron, who recently noted that '[t]he *Šešelj* case has suffered from the departure of many Chambers staff members, including three team leaders and three senior legal

98 Id.
99 Id.
100 Id.
101 Malcolm Davies et al., *Criminal Justice*, Pearson Education Limited, 4thed., 2010, p. 288.
102 The *Prosecutor v. Thomas Lubanga Dyilo*, Defence Appeal against the 'Décision sur la demande de mise en liberté proviosire de Thomas Lubanga Dyilo', PT. Ch.I, Case No.ICC-01/04-01/06, 26 October 2006, Para. 44.

officers' and that '[e]very effort is being made to secure appropriate resources to ensure that final judgement drafting is not further delayed owing to these departures.'[103] On the other hand, one should also not forget that by obstructing the procedure, Šešelj certainly contributed to the prolongation of his detention. He has been portrayed as hardliner, a man whose defence strategy at The Hague has been one of attack, vowing to 'blast the court to pieces'.[104] By his behaviour during his detention, Šešelj made difficult for the Trial Chamber to focus on the main aspects of the case and on the evidence presented to it.

Overall it can be concluded that despite its efforts, ICTY missed the chance to set exemplary standards regarding provisional release and that the principle of presumption of innocence and fair trial has not been given sufficient consideration. It should be subject of a separate study to determine more broadly whether and to which extent ICTY has complied with human rights standards of accused. In that study the competing interests which international criminal prosecutions should satisfy, should certainly be taken into consideration. But, as the late Antonio Cassese said, the rights of the accused are central to the concept of justice[105] and as it was held in the *Lubaga* case

> [w]here fair trial becomes impossible because of breaches of the fundamental rights of the suspect or the accused by his/her accusers, it would be a contradiction in terms to put the person on trial. Justice could not be done. A fair trial is the only means to do justice. If no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped.[106]

As regards Šešelj's provisional release the story is not yet finished and further developments should be awaited with due patience.

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103 Assessment and Report of Judge Theodor Meron, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to Para. 6 of Security Council Res. 1534 (2004) and covering period from 16 November 2014 to 15 May 2015, UN Doc. S/2015/342 of 15 May 2015, Para. 23.

104 Colin Freeman, 'Serbian indicted war criminal released by The Hague hits back at the West', article published in The Telegraph, 13 December 2014, www.telegraph.co.uk/news/worldnews/europe/serbia/11291971/Serbian-indicted-war-criminal-released-by-The-Hague-hits-back-at-the-West.html.

105 Antonio Cassese, "The International Criminal Tribunal for the Former Yugoslavia and Human Rights", European Human Rights Law Review, (1997), p. 333.

106 *Prosecutor v. Lubanga*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision of the Defence Challenge to the Jurisdiction of the Court pursuant to Art. 19 (2)(a) of the Statute of 3 October 2006, App. Ch., Case No. ICC-01/04-01/06 (OA4), 14 December 2006, Para. 37.