IT-03-67-T
D16080-D16074
06 DECEMBER 2006

16080

UNITED NATIONS	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991	Case No.	IT-03-67-T
		Date:	6 December 2006
		Original:	English

IN TRIAL CHAMBER I

Before: **Judge Alphons Orie, Presiding**
Judge Frank Höpfel
Judge Ole Bjørn Støle

Registrar: **Mr. Hans Holthuis**

Date: **6 December 2006**

PROSECUTOR

v.

VOJISLAV ŠEŠELJ

URGENT ORDER TO THE DUTCH AUTHORITIES REGARDING HEALTH AND WELFARE OF THE ACCUSED

The Office of the Prosecutor:

Ms Hildegard Uertz-Retzlaff
Mr Dan Saxon
Mr Ulrich Müssemeyer
Ms Melissa Pack
Ms Joanne Motoike

The Kingdom of the Netherlands

Counsel for the Accused:

Mr David Hooper
Mr Andreas O'Shea

Background

1. At a Status Conference on 22 November 2006, the Trial Chamber was informed in detail by the Deputy Registrar about the fact that Vojislav Šešelj ("Accused") had begun a hunger strike on 10 November 2006 until various demands were met.[1] The Chamber has regularly, and with increasing frequency, been receiving information about the condition of the Accused, whose hunger strike continues unto the present day.

2. The Trial Chamber is primarily and deeply concerned about the impact of the Accused's hunger strike on his health and welfare. However, the Trial Chamber is also concerned with the impact of the hunger strike on the exercise of its judicial function in furtherance of the mission of the Tribunal.

Demands of the Accused

3. The Accused has to date made several and often changing demands related to his hunger strike, some of which do not fall within the competence of this Trial Chamber or even the Tribunal. Two demands which clearly address the Chamber in the exercise of its judicial functions are the Accused's wish to be provided with all Prosecution case documents both in the Serbian language and in hard-copy format, and his insistence that then-standby, now assigned, counsel for the Accused be removed from the proceedings.

4. Regarding the first issue, on 4 July 2006, the Trial Chamber issued a Decision on the form of disclosure (concerning the provision of materials in hard-copy or electronic format and in the language of the Accused), holding that the Prosecution was entitled to provide Rule 66 (A) and (B) and Rule 68 (i) of the Tribunal's Rules of Procedure and Evidence ("Rules") material in electronic format, and that an obligation existed to provide Rule 68 (i) material in a language the Accused understands. On the same date, the Accused expressed his intention to apply for certification to appeal the decision. As no reasoned request was made, as required under Rule 73(B) of the Rules, the Trial Chamber did not issue any decision. The Accused proceeded, in a submission dated 31 July 2006, to appeal the decision directly to the Appeals Chamber. The submission was returned to the Accused since no certification had been granted. On 22 November 2006, the Trial Chamber, in view of the importance of the decision

[1] Transcript pages (T.) 780-781. Deputy Registrar: "Well, firstly, Your Honours, was the question of the limitation on the visits by his wife, which was in connection with an order made at the request of the Prosecution. Secondly, he has made a number of requests so far as the translation of documents to enable him to conduct his defence. He has also asked for stand-by counsel to be dismissed. And in addition to that, he has asked for his own legal advisers on his nomination to be authorised to appear before Your Honours". Subsequent

on the form of disclosure, decided to revisit the issue and grant certification.[2] The Accused, who had chosen not to be present at the Status Conference during which the certification was granted, was provided with recordings of the session on the same day. The Chamber will further consider whether the Accused became aware of his right to appeal the Decision on the form of disclosure, and explore whether any reason existed which might explain why no action was taken by the Accused and consequently, whether a right to appeal still lies.

5. Regarding self-representation, on 27 November 2006, the Trial Chamber revoked the Accused's self-representation and decided to assign counsel, finding that the Accused was "substantially and persistently obstructing the proper and expeditious proceedings in this case without any sign of improvement".[3] A request for certification to appeal this decision was filed on 4 December 2006 by independent counsel and granted on 5 December 2006.[4]

6. The Accused has expressly made cessation of his hunger strike dependent on fulfilment of all his demands, including the two areas mentioned above. Under these circumstances, there is reason to believe that the Accused may persist in his refusal to accept nourishment. The Trial Chamber expresses its concern and regrets that the Accused has chosen non-legal avenues in pursuit of his demands.

Health and Welfare of the Accused

7. At this moment, the Accused is under medical supervision in a penitentiary hospital. The Accused has, however, made it clear that he rejects "any form of medical treatment while on hunger strike" and "any attempts at forced artificial nourishment", both when conscious and unconscious. He explicitly refuses to be taken to any Dutch hospital, and should this be done against his wishes when he loses consciousness, he also prohibits any medical treatment, resuscitation or artificial feeding. At the same time, the Accused has declared that he "consciously entered upon a hunger strike in the pursuit of [his] requests" and that he had "neither the motivation nor the intention to commit suicide".[5]

---

to 22 November 2006, the Accused has made additional demands, such as the disqualification of the judges currently composing the bench and unfreezing of overseas assets.

[2] T. 805-806.

[3] Decision (no. 2) on Assignment of Counsel, 27 November 2006.

[4] Request for Certification pursuant to Rule 73 (B) to Appeal against the Trial Chamber Oral Decision to Assign Counsel to the Accused, 4 December 2006; Decision on Request for Certification to Appeal Decision (No. 2) on Assignment of Counsel, 5 December 2006.

[5] Professor Vojislav Šešelj's Decision to Refuse Medical Treatment and Artificial Feeding While on Hunger Strike, 24 November 2006, addressed to the President of the International Tribunal. By Order of 1 December 2006, the President of the International Tribunal seized this Trial Chamber with the Accused's submission.

8. The welfare of any accused being in the custody of the Tribunal is the primary responsibility of the Registrar, under the control and supervision of the President of the Tribunal.[6] Medical services to an accused are provided by the Kingdom of the Netherlands ("Host State") under Rule 30 *et seq.* of the Rules Governing the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal[7] and Article 2 of the UN Detention Unit Services and Facilities Agreement of 13 September 2002 ("Agreement"). Even while at the penitentiary hospital, an accused remains in the custody of the Tribunal. Therefore, it remains the responsibility of the Registrar, under the supervision of the President, to ensure an accused's health and welfare.

9. The Trial Chamber is concerned that a situation might arise where the Accused's right to physical integrity and the obligation of the Tribunal to protect the Accused's health and welfare are in conflict. Ultimately, the Accused may create a situation in which it may not be possible to preserve his life without medical intervention. The Trial Chamber notes that the health services provided to an accused are embedded in the domestic penitentiary structures and general health care facilities of the host country, whereas the mission of the Tribunal is mandated by the international community.

The Mission of the Tribunal

10. Turning to the exercise of the Tribunal's judicial function to determine the criminal responsibility of those indicted before it, be it through an acquittal or conviction, the Trial Chamber cannot accept the conditions of trial being determined by non-legal processes dictated by an accused. The Chamber notes in this respect that the Accused on various occasions has expressed his deep disregard for the Tribunal and for the international community that created it. The Trial Chamber has elaborated such instances more fully in its recent decisions on self-representation.[8] For example, at his initial appearance on 26 February 2003, the Accused compared the robes of the judges to those of "the inquisition of the Roman Catholic Church".[9] In his Submission No. 69, the Accused referred to the Tribunal as "the international bastard of the great powers and the Security Council", and in this context also cited an "old Serbian proverb" according to which "[n]obody will admit to being a whore's

[6] Rule 19 of the Rules of Procedure and Evidence; Rule 2 of the Rules Governing the Detention of Persons Awaiting Trial or Appeal Before the Tribunal or Otherwise Detained on the Authority of the Tribunal Detention.
[7] IT-38/Rev. 9.
[8] Decision on Assignment of Counsel, 21 August 2006; Decision on Appeal Against the Trial Chamber's Decision on Assignment of Counsel, 20 October 2006; Reasons for Decision (No. 2) on Assignment of Counsel, 27 November 2006.
[9] T. 54 and T. 82.

son". [10] The Accused has further stated that he would "shatter the Tribunal in The Hague [such] that even the Queen of Holland would not remain whole".[11]

11. Under the present circumstances, the Trial Chamber finds that there is a prevailing interest in continuing with the trial of the Accused in order to serve the ends of justice. The trial, which is suspended until further notice,[12] should not be undermined by the Accused's manipulative behaviour. In order to resume trial proceedings and fulfil the Tribunal's duty to protect the Accused's health and welfare, it is necessary for the Host State to take decisive measures.

Considerations for the Host State

12. A very first preliminary review of the domestic and international legal standards applied to detainees who engage in hunger strikes already reveals a lack of uniformity.[13] However, according to jurisprudence of the European Court of Human Rights, 'force-feeding' does not constitute torture, inhuman or degrading treatment if there is a medical necessity to do so, if procedural guarantees for the decision to force-feed are complied with and if the manner in which the detainee is force-fed is not inhumane or degrading.[14]

13. The Trial Chamber requires that all authorized measures be taken to medically intervene in the interests of protecting the health and welfare of the Accused and to avoid loss of life, even if this would include drip-feeding. At the same time, the Trial Chamber is aware that the persistence of the Accused in refusing nourishment may reach a point where subsequent medical intervention may be met by an absolute obstacle, that being an obstacle not subject to any reasonable dispute, in generally accepted international standards of medical ethics. While

[10] Submission No. 69, filed on 5 January 2005, p. 1.
[11] See Decision on Assignment of Counsel, 21 August 2006, para. 30 and references therein.
[12] Scheduling Order, 1 December 2006.
[13] For example, under German law, force-feeding is permissible if a detainee, due to a hunger strike, would be subject to injuries of a permanent character or danger for the individual's life exists (Strafvollzugsgesetz, §101). According to Austrian law, a prisoner who is persistently refusing nutrition is to be medically monitored. As soon as it is necessary the detainee is to be force-fed on order and under supervision of the doctor- in- charge (Strafvollzugsgesetz, §69(2)). Great Britain has officially recognized a prisoner's legal right to starve. In 1994, the High Court of Justice Family Division held that as long as the prisoner can demonstrate sanity, he is free to refuse food and sustenance (*State v. Robb* [1995] Fam 127). The Australian Government introduced a Migration Regulation in 1992 which empowers its Department of Immigration and Multicultural and Indigenous Affairs to authorize medical treatment including force-feeding to be given to a person in immigration detention without their consent (*Migration Regulations* 1994 [Commonwealth], Regulation 5.35). The regulation is invoked when a Commonwealth Medical Officer, or registered medical practitioner, provides written advice that if medical treatment is not given to a particular detainee, there will be a serious risk to his or her life or health, and that the detainee refuses to give, or is not reasonably capable of giving, consent for the medical treatment. Non-consensual treatment, including the use of reasonable force, may then be authorized.
[14] *Nevmerzhitsky v. Ukraine*, ECHR Judgment, Application No. 54825/00, 5 April 2005 (final 12 October 2005), para. 94.

recognising that the health and welfare of the Accused is the primary responsibility of the Registrar, the Trial Chamber's exercise of its authority in this regard stems – apart from its genuine concern with the well-being of an accused before it – from its responsibility to contribute to the performance of the Tribunal's judicial role in furtherance of the mission assigned to it by the international community.

14. The Trial Chamber has been informed that a protocol concerning patients who refuse nourishment is applied in the penitentiary hospital where the Accused is presently accommodated.[15] The Chamber notes that the Protocol Eet/Drinkstaker ("Protocol"), adopted by health care professionals under the authority of the Ministry of Justice of the Host State in January 2003, refers to the World Medical Association's Declaration of Malta of 1991 and 1993, rather than the October 2006 version of this Declaration, and should therefore be reviewed to ensure conformity with the most recent developments in the standards of medical ethics.

Disposition

15. For the foregoing reasons, the **TRIAL CHAMBER**, pursuant to Article 29 of the Statute of the Tribunal and Rule 54 of the Rules

ORDERS the authorities of the Kingdom of the Netherlands:

1. to provide medical services under the Agreement – which may, in the case of medical necessity, include intervention such as drip-feeding – with the aim of protecting the health and welfare of the Accused and avoiding loss of life, to the extent that such services are not contrary to compelling internationally accepted standards of medical ethics or binding rules of international law;

2. to ensure that the medical professionals providing care to the Accused seek professional advice, both in terms of specialized medical expertise and ethics, domestically and internationally, and not limited to the medical expertise invoked by the Accused when considering whether or not to medically intervene or to continue medical interventions;

3. to review whether the Protocol adopted under the authority of the Ministry of Justice of the Host State in January 2003 reflects in every respect the latest international medical and ethical standards;

[15] Registry Submission on President's Order to the Registrar, 1 December 2006, Annex I.

and **INSTRUCTS** the Registrar to convey this Order to the authorities of the Kingdom of the Netherlands without delay.

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

Judge Alphons Orie
Presiding Judge

Dated this sixth day of December 2006
At the Hague
The Netherlands

[Seal of the Tribunal]