UNITED NATIONS

INTERNATIONAL RESIDUAL MECHANISM FOR CRIMINAL TRIBUNALS

MICT-17-111-R90 (Contempt)

IN THE APPEALS CHAMBER

Before:	**Judge Theodor Meron, President** **Judge William Hussein Sekule** **Judge Ivo Nelson de Caires Batista Rosa**
Registrar:	**Mr Olufemi Elias**
Date:	**29 July 2018**

THE PROSECUTOR

-v-

PETAR JOJIĆ
VJERICA RADETA

PUBLIC

APPEAL

-

REPLY TO THE RESPONSE OF THE REPUBLIC OF SERBIA TO THE APPEAL BRIEF OF THE *AMICUS CURIAE* PROSECUTOR

***Amicus Curiae* Prosecutor**

Ms. Diana Ellis QC
Mr. Sam Blom-Cooper

Office of the Prosecutor

Mr. Serge Brammertz

Government of the Republic of Serbia

Introduction

1. The *Amicus Curiae* Prosecutor ("Appellant") appeals against the Order of a Single Judge of the International Residual Mechanism for Criminal Tribunals ("Mechanism"), referring the case of Petar Jojić & Vjerica Radeta ("Respondents") to the Republic of Serbia ("Serbia") for trial.[1] A Notice of Appeal was filed on 26 June 2018.[2] The Appeal Brief was filed on 11 July 2018.[3]

2. On 9 July 2018 Serbia filed Comments on the Appellant's Notice of Appeal.[4] On 19 July 2018, Serbia filed a Response to the Appeal Brief.[5]

3. The Appellant replies only in respect of the paragraphs of the Appeal Brief identified by Serbia in the Response to the Appeal Brief and commented thereon.[6]

4. The Appellant notes that Serbia does not take issue with the procedural history in this matter as set out in the Appeal Brief.[7]

Re: Paragraph 46 of the Appeal Brief

5. It is wrongly stated that Serbia has not disregarded its obligations to the Tribunal pursuant to Article 29 of the Statute of the Tribunal ("Statute"). This assertion is demonstrably incorrect in that for a period of more than three years Serbia has failed to execute the Warrants of Arrest and Orders for Surrender in respect of the Respondents ("Orders"). The fact that Serbia has, on other occasions, complied with its mandatory obligations under Article 29 of the Statute does not absolve it from its failure to execute the Orders. It underlines the fact that Serbia has approached the case of the Respondents differently from other transfer cases. Past compliance with orders does not mitigate non-compliance in the instant case.

[1] Order Referring a Case to the Republic of Serbia, MICT-17-111-R90, 12 June 2018
[2] Notice of Appeal Against the Order Referring a Case to the Republic of Serbia, 26 June 2018
[3] Appeal Brief Against the Order Referring a Case to the Republic of Serbia, 11 July 2018
[4] Comments of the Republic of Serbia on the Notice of Appeal of the *Amicus Curiae* Prosecutor of 26 June 2018, 9 July 2018
[5] Response of the Republic of Serbia to the Appeal Brief of the *Amicus Curiae* Prosecutor, 19 July 2018
[6] *Ibid*
[7] Appeal Brief Against the Order Referring a Case to the Republic of Serbia, 11 July 2018, paras. 5 - 42

6. Serbia continues to maintain that the Ruling of the High Court in Belgrade[8] establishes that the conditions for transfer are not fulfilled. Further that, as a consequence, the Orders cannot not be executed. Serbia has thus ignored the repeated requests of the Tribunal to recognise the supremacy of the Tribunal over national laws, and comply with the Orders.[9]

7. Serbia seeks to distinguish the approach that should be taken by the Tribunal, where the proceedings are for contempt and not war crimes. As such there has been a blatant disregard of the statements emanating from the Tribunal in which it has been confirmed that the Orders properly cover contempt cases.[10]

8. Serbia fails to recognise and acknowledge the accuracy of the opinion expressed by the President of the ICTY that Serbia's failure to comply with Article 29 of the Statute had an "*impact upon the proper administration of justice and undermined the integrity of the Tribunal*"[11] and were a "*stain on the legacy of the Tribunal and a lamentable blow to international justice*";[12] an opinion borne out of the failings of Serbia to execute the Orders.[13]

Re: Paragraph 47

9. Serbia "reject[s] in full" the statements cited by the Appellant that were, *inter alia*, the reasons given by the Representative of Serbia for non-compliance with the Orders. The Appellant asserts that what was said and written is a matter of record and not, therefore, subject to contradiction.

10. The criticisms of the Tribunal, as set out in the several Responses, underscore the hostile attitude adopted towards the activities of the Tribunal.[14] It does not address or excuse non-compliance with the Orders but serves to emphasize the concern raised by the

[8] Ruling of 18 May 2016, (Re: High Court in Belgrade, War Crimes Chamber, Pom Ik2 Po2 48/2016) Annexed to Report on Serbia's Efforts Pursuant to Arrest Warrants and Orders for Surrender of the Accused 18 May 2016
[9] See Appeal Brief – Against the Order Referring a Case to the Republic of Serbia, 11 July 2018, paras. 10 - 31
[10] *Ibid*, para. 67
[11] Letter from the President of the ICTY regarding the non-compliance of Serbia with its Obligations under the Statute of the Tribunal, 2 March 2017; Address to the Security Council, 8 December 2016, unofficial report
[12] *Ibid*, para. 70 & 71
[13] Response of the Republic of Serbia to the Appeal Brief of the *Amicus Curiae* Prosecutor of 11 July 2018, p. 4
[14] *ibid*; See also Response of the Republic of Serbia to the Addendum of the *Amicus Curiae* Prosecutor of the 12 April 2018, 3 May 2018, para. 10

Appellant that the Respondents may well not be tried in a manner consistent with the rules of justice.

Re: Paragraph 55

11. Serbia had a duty to execute the Orders. The Respondents should have been arrested immediately when they attended the High Court in Belgrade on 17 May 2018. Notably, at that point Judge Dilparić had not yet ruled that the conditions for transfer had not been fulfilled. He had previously ordered transfers in similar circumstances. Serbia, therefore, wrongly states that the Orders were not executed because the High Court had established the conditions for transfer had not been met.

12. The High Court in Belgrade ignored the supremacy of the laws of the Tribunal and ignored the fact that it was under a duty to comply with the Orders. There was no impediment to the execution of the Orders. Instead, Judge Dilparić proceeded to a hearing. He ruled the necessary conditions for transfer had not been met. This decision was immediately upheld by the higher court. No explanation has been proffered as to why the case of the Respondents has been treated differently, and to their perceived benefit. No reason was given for distinguishing their cases in spite of the fact that the Tribunal and the Appellant have both raised this point in the past. The failure to explain the change of approach to transfer in contempt cases must raise concerns for the future conduct of any trial, were it to take place in Serbia.

Re: Paragraph 60

13. The Appellant maintains that Serbia's unwillingness to execute the Orders is demonstrated by its consistent failure to do so over a 3-year period. Its disregard is highlighted by its failure to arrest the Respondents even when they were within the precincts of the court. It is irrelevant that Serbia has now expressed a willingness to put the Respondents on trial in Serbia. This course has been comprehensively rejected in the past.[15]

[15] Response of the Republic of Serbia to the Appeal Brief of the *Amicus Curiae* Prosecutor of 11 July 2018, p. 6; Comments of the Republic of Serbia on the Notice of Appeal of the *Amicus Curiae* Prosecutor of 26 June 2018, 9 July 2018, p. 5, para. 14

Re: Paragraph 63

14. Serbia wrongly states the legal position in that it fails to acknowledge the supremacy of the Tribunal over the national laws of Serbia. It is not an issue of the independence of the Serbian judiciary but a question of where the ultimate authority resides. Article 29 of the Statute clearly and unambiguously states that the orders of the Tribunal are to be complied with by national jurisdictions and take precedence.[16]

15. Furthermore, it is irrelevant that the Respondents are '*willing*' to be tried in Serbia. It is not for the Respondents to determine where they wish to be tried, nor should Serbia become complicit in their anti-Tribunal rhetoric or condone their behaviour. The courts of Serbia should not be subservient to the wishes of the Respondents.

Re: Paragraph 71

16. The explanation[17] relied upon by Serbia since 17 May 2016 to justify non-compliance with the Orders on the basis that a competent, independent national court has found a lack of jurisdiction for transfer, is relied upon in spite of its repeated rejection by the Tribunal as being wrong in law.

17. Serbia has shown a complete indifference to the views of Presidents and Judges of the Tribunal as to the impact and significance that non-compliance has on the role of international justice.

Re: Paragraph 74

18. Serbia submits that the rejection by the ICTY, in November 2015 and January 2016, to transfer the contempt proceedings to the Serbian national courts should be treated as *res judicata* and has no relevance to the current issue of referral. The Single Judge in his Order for Referral made no reference to this matter.[18]

[16] *Ibid*, Response p 6; Comments, para. 2
[17] Response of the Republic of Serbia to the Appeal Brief of the *Amicus Curiae* Prosecutor of 11 July 2018, p. 6 to 7 and Comments of the Republic of Serbia on the Notice of Appeal of the *Amicus Curiae* Prosecutor of 26 June 2018, 9 July 2018, p. 3, para. 6
[18] *Ibid* Response, p. 7; Comments, p. 3, para. 4

19. On the contrary, the Appellant submits that the previous history is relevant. Requests for transfer were comprehensively rejected by the Trial Chamber. At the time of those Requests by Serbia no reference was made to lack of jurisdiction to transfer.

Re: Paragraph 79

20. The Respondents are charged with contempt of the ICTY in that they threatened, intimidated, offered bribes to, or otherwise interfered with, witnesses in the case of *Vojislav Šešelj*.[19] All the acts alleged to have been undertaken by the Respondents (and others) were aimed at frustrating the trial and were contrary to due process. Serbia wrongly seeks to refute the evidence.[20] The Appellant maintains that the Single Judge should have taken into account the views expressed by the ICTY, that Serbia had been obstructing justice, as relevant when considering referral. Patently, the interests of justice demanded that Serbia executed the Orders without undue delay to allow a trial.

21. Furthermore, the opinion expressed in the Response that "*I consider the statement that the International Tribunal, established by the United Nations, may be susceptible to anybody's influence as inappropriate*"[21] must give cause for concern. The jurisprudence of the ICTY establishes that in the past there has been interference with ICTY proceedings. Views such as these, expressed by Serbia, undermine confidence in the way the case for the Respondents would be treated.

Re: Paragraphs 86 - 89

22. The Appellant is aware of the existence of a witness protection programme within the Serbian judicial system. It may have been effective in many cases. The facts and circumstances of each case are different. It is for this reason that the protection afforded to witnesses varies from mere anonymity to relocation in a new country.[22] Protective measures cannot guarantee the total safety and security of a witness. In this case, the nature of the case, the ability of the Respondents to mobilize the masses and cause public

[19] *The Prosecutor v Vojislav Šešelj*, Case No. IT-03-67-T
[20] Response of the Republic of Serbia to the Appeal Brief of the *Amicus Curiae* Prosecutor of 11 July 2018 , p. 7 and Comments of the Republic of Serbia on the Notice of Appeal of the *Amicus Curiae* Prosecutor of 26 June 2018, 9 July 2018, p. 4, para. 7
[21] *Ibid*, Response, p7 and Comments, p. 4, para.7
[22] Ibid Response, p. 8 - 9 and Comments, p. 4, para. 8 - 11

disorder, and the degree of hostility that Serbia has shown to complying with the Orders inevitably impacts on the safety, security and attitude of the witnesses.

23. The witnesses have expressed their fears and concerns and the effect that has on their apprehension of engaging with Serbian authorities directly. Due to the non-compliance of Serbia with the Orders, the proceedings have gone on for many years placing a considerable additional strain on the witnesses. The views of witnesses in a case of this nature should have been given proper consideration by the Single Judge.

Re: Paragraphs 90 & 91

24. It is an undeniable fact that the Appellant has a comprehensive understanding of the case having been involved in it for many years. Serbia's lack of understanding of significant aspects of the contempt case is demonstrated by the following statement "*I resolutely refute the Amicus Curiae Prosecutor's statement that the main charge in the indictment was interference in and obstruction of the course of the proceedings in The Hague, with the intention of influencing the proceedings before the Tribunal*". [23] The facts upon which the charges are based are clearly set out and if proved establish interference with the trial process. The assessment of the evidence by Serbia that the alleged contempt is confined to the "offering/taking of bribes"[24] is likewise wrong.

25. It is incorrectly inferred that the *Amicus Curiae* Prosecutor is an "*associate of the Chief Prosecutor*" when in fact she has at all times acted independently of the Office of the Prosecutor and is not, and never has been, part of the Office of the Prosecutor.[25]

Re: Paragraph 92 & 97

26. The Appellant contends that, in the circumstances of the case, the views of the Respondents as to where they are willing to be tried are not relevant. It is wrongly asserted that their willingness is a '*determining*' factor in a decision as to whether to refer the case.

[23] *Ibid* Response, p.9 and Comments, p.4, para. 9
[24] *Ibid* Response, p.9
[25] *Ibid*, Response, p. 9 and Comments, p. 4, para. 9

Re: Paragraph 101

27. The Appellant contends that the past compliance of Serbia to the orders of the Tribunal does not excuse or eradicate current non-compliance. On the contrary, as previously submitted, it raises the obvious question as to why for more than 3 years these Respondents have been treated so differently from others and why Serbia has felt compelled to blatantly disregard the Orders of the Tribunal.[26]

Re: Paragraph 104

28. There is a monitoring system in place to safeguard the position of persons referred from the Tribunal to another jurisdiction. If monitoring raises cause for concern, revocation is available and, if appropriate, also the making of a deferral order. In the case of the Respondents there is no prospect of transfer out of Serbia should there be any lack of due process or a problem of any other kind. This is because Serbia maintains it has no jurisdiction to transfer. It follows that the case will never go back to the Mechanism. Thus the safeguarding provisions have no relevance or significance in this instance, and the Single Judge was accordingly wrong to rely upon their existence.[27]

Re: Paragraph 105 - 114: Immunity from Prosecution

29. Serbia has failed to address the Appellant's submission that Article 103 of the Serbian Constitution provides for a broader immunity which may extend beyond the narrow immunity relating to *"…votes cast and opinions expressed…"* by Deputies in the performance of their duties.

30. The broader immunity extends to criminal proceedings; it may be removed by the National Assembly of Serbia. It is outside the remit of the Minister of Justice. A former State Secretary for Justice in Serbia, Slobodan Homen, recognised that the practice

[26] Response of the Republic of Serbia to the Appeal Brief of the *Amicus Curiae* Prosecutor of 11 July 2018 , p. 10 and Comments of the Republic of Serbia on the Notice of Appeal of the *Amicus Curiae* Prosecutor of 5 July 2018, Concluding paragraphs
[27] *Ibid*, Response, p. 10

should stop and that it would necessitate an amendment to the Constitution. To date there has been no such amendment. Serbia has not suggested to the contrary.[28]

31. Given the special treatment that the Respondents appear to enjoy, there is concern as to the likely prospect of immunity successfully being invoked in this case.

Re: Paragraph 115 - 117

32. The Appellant has never argued that Serbia lacks jurisdiction to try the case, but contends that it is not in the interests of justice and expediency to order referral. The Appellant submits that to 'note' or 'consider' points made by the parties, as done by the Single Judge, does not constitute provision of a reasoned decision as to why submissions made by one side are to be preferred over the other.

33. Furthermore, the Appellant submits that a number of key matters relevant to referral were simply ignored by the Single Judge without explanation.

Re: Paragraph 118

34. The Appellant cites the judicially approved standard of review in her submissions when respectfully contending that the Single Judge has not properly exercised his discretion.[29]

Conclusion

35. In the premises, it is submitted that the case of the Respondents should not be referred to the Serbian national court system.

[28] *Ibid,* Response, p. 11 and Response of the Republic of Serbia of 3 May 2018, paras. 4, 5 and 6; Response of the Republic of Serbia of 23 May 2018, Section II; Comments of the Republic of Serbia on the Notice of Appeal of 5 July 2018, para. 12

[29] Response of the Republic of Serbia to the Appeal Brief of the *Amicus Curiae* Prosecutor of 11 July 2018, p. 12 and Comments of the Republic of Serbia on the Notice of Appeal of the *Amicus Curiae* Prosecutor of 26 June 2018, 9 July 2018, para. 15

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Respectfully submitted,

Dated this day the 29 July 2018
At London, UK

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Amicus Curiae Prosecutor
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