International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No.: IT-03-67-T

Date: 9 June 2011

Original: ENGLISH
French

IN TRIAL CHAMBER III

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

Registrar: **Mr John Hocking**

Order of: **9 June 2011**

THE PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC DOCUMENT

SEPARATE CONCURRING OPINION OF PRESIDING JUDGE ON CONSOLIDATED DECISION REGARDING ORAL MOTIONS BY THE ACCUSED CONCERNING THE PRESENTATION OF HIS DEFENCE

The Office of the Prosecutor

Mr Mathias Marcussen

The Accused

Mr Vojislav Šešelj

I agree **completely** with the decision of the Chamber **denying** oral Motions nos 1, 2, 3 and 4 of the Accused, partially admitting Motion no. 5 and noting that Motion no. 6 had become moot.

The direct consequence of the **unanimous decision** of the Chamber is that the Accused will have to disclose to us his list of witnesses six weeks after receiving the translation of our Decision.

At first glance an uninitiated reader could conclude that the requests of the Accused were completely justified and that his right to a **fair trial** was therefore violated, since the Judges denied him their support to receive the help of his associates, as he is self-representing, the allocated funds (1.3 million euros), the translation of documents indispensable to his defence and easy access to his two close associates: Messers Krasić and Aleksić.

If an uninformed third party were to reach this conclusion, he would be totally mistaken. The truth of the matter is quite the opposite.

First, the Accused decided to represent himself, without the assistance of an attorney. The fact that he is self-representing, while having **advantages**, also brings **inconveniences** that can be important, considering the complexity of the procedure followed at the Tribunal. Once the Accused made his choice, there was never any reason for me to question this. The Accused has to bear the consequences himself and not have others put up with them. In this context, if he has lost the support of some associates for various reasons, he can find others, of the same standing, or even higher …

Second, there can be no talk of a **retroactive effect** of the Decision on Financing Defence of 29 October 2010. The Judge is neither the treasurer nor the accountant. There is another authority for this purpose: **the Registry**. The Judge's intervention is only justified if, in the absence of the Registry or its inability to function, the right to a fair trial is brought into question.

The Decision was endorsed by the Appeals Chamber on 8 April 2011, and there is no more reason for it to be discussed or brought into question. If the Accused believes

that he has the right to a certain amount of money, he must contact the appropriate authority, and by no means the present Trial Chamber.

Third, the issue of the translation of these books was dealt with a long time ago. I would also say that if these books have considerable importance for the Accused in his defence, he had the means of translating them, through his editor, through his supporters or his political party, into the working languages of the Tribunal, namely into French, since the judgement will be rendered in this language. Therefore this is not an actual problem, especially since with the technology available, should the Accused bring witnesses or testify himself, he will have the possibility of placing the key passages on the projector and to read them out in the original version, which will immediately lead to a translation into English and French. In addition, the Accused has recently acquired the English translation of these two books.

On the **key question** of assistance from his former privileged associate, the Trial Chamber decided to recall in the disposition that he is allowed to assist the Accused during public hearings should there be a presentation of defence evidence.

On the matter of **Boris Aleksić**, I believe that this question is within the remit of the Disciplinary Council which was seized of it.

As we can see, the requests presented orally at the hearing do not stand up to examination and should be denied.

I would also like to add that the Accused's system of defence is well known, he has had many opportunities to develop it in detail, and I wish to emphasise that he has not missed these opportunities.

Indeed, in assessing the time spent by the Accused himself during the testimony of witness, I note that he used **577 hours and 24 minutes during 176 days in court!** For the cross-examination of witnesses the Accused used **117 hours and 46 minutes**, which goes to show that he had ample opportunity, with the various witnesses who testified, on the one hand potentially to refute

Prosecution witnesses and, on the other, to develop his system of defence through his questions.

In general, in national systems, the accused, either personally or through his lawyer, does not have at his disposal this amount of time to present his case, whatever it may be!

In order to elucidate my opinion fully, I wish to recall in general terms the lines of the defence of the Accused, while also first recalling the position of the Prosecution on the alleged complaints in order to respect the ***audi alteram partem***.[1]

A) The position of the Prosecution

The Prosecution notably recalled orally the broad lines of its argument on **8 March 2011**, during the **Rule 98 *bis* of the Rules** procedure.

According to the Prosecution, the Accused considerably contributed to the execution of the goal of the joint criminal enterprise which was to remove by force the non-Serbian population from the zones that the Accused and other participants in the joint criminal enterprise claimed belonged to them historically.

The Prosecution recalled that to conclude that the Accused had participated in a joint criminal enterprise, it was necessary for him to have committed a specific crime, but that his participation could have taken the form of assistance or contribution to the execution of a plan or a common objective. In this case, the contribution of the Accused is alleged to have taken three forms: promoting the idea of an ethnically pure and homogeneous Greater Serbia; raising an army of volunteers in order to realise this objective; and finally, the Accused is alleged to have engaged in acts of persecution, deportation and inhumane treatment through his speeches inciting hatred.

[1] I would like to express my gratitude to **Ms Flore Hardy**, *pro bono* attorney, who helped me in my research and the compiling of the lines of defence of the Accused based on the Accused's motions and the many oral interventions during the trial, which constituted a colossal task that I could not have completed on my own, considering the 202 days in court, the 1,381 documents admitted and the 17,008 pages of transcript.

With regard to the spreading of the idea of a Greater Serbia, the Prosecution specified that the acts and words of the Accused should be considered within the historical context and, notably, the inter-ethnic hostilities that were especially important at the time. The Prosecution equally insisted on the need to take into account the political ideology and the military tradition of extremist Chetniks, whose greatest proponent is the Accused. The revival of Chetniks promoted by the Accused and recourse to rhetoric of hate and violence specifically contributed to the joint criminal enterprise.

The second component of the Accused's participation in the joint criminal enterprise consisted of recruiting, training and deploying an army of volunteers and justifying the commission of their crimes. The SRS/SČP volunteers were recruited and sent to join the JNA or the Serbian MUP with this aim.

According to the Prosecution, the Serbian leaders of the Socialist Republic of Yugoslavia pooled their resources and joined the Accused in the quest for a Greater Serbia. With this aim in mind they created and used Serbian military, administrative and political structures.

The Prosecution considered that the Serbian forces sent by the Accused and other members of the joint criminal enterprise committed systematic and widespread atrocities in Croatia, Bosnia and Herzegovina, as well as in Serbia, in order to achieve ethnic cleansing.

Finally, according to the Prosecution, in speeches presented in the media or at public rallies the Accused promoted a climate of fear and intimidation among the Serbian population. He invoked historical injustice suffered by the Serbs in World War Two in order to incite contempt, hatred and violence and to justify ethnic separation as morally legitimate and necessary. According to the Prosecution, the Accused also nurtured a mix of nationalism, fear and calls for revenge.

The Prosecution emphasised that the Accused and the SRS/SČP did not stop sending out warnings about non-Serbs, recalling that they represented a physical, demographic, cultural and even economic danger to the Serbs. According to the Prosecution, as the undisputed leader and commander of the Chetniks, the Accused

enjoyed a legitimacy and popularity of great importance that gave him access to an audience ready to respond to his calls to violence.

The Prosecution equally recalled the case-law of the ICTY establishing that speech inciting hatred may constitute an underlying act of persecution. The use of the pejorative term Ustasha in his speeches, with the historical connotations that are implied and in such a tense context, according to the Prosecution constitutes an example of the incitement to hatred and to persecution carried out by the Accused.

B) The position of the Accused

Between September 2003 and June 2006 the Accused Šešelj filed 15 documents (notably, transcripts of his interviews, his statements before the Assembly or extracts from his books) pursuant to Rule 67 (A)(i) of the Rules and presented his arguments with regard to **his special defence**. Following a procedural question raised by the Prosecution on 7 November 2006 during the Pre-trial phase, an order was issued to the Accused on 1 October 2007 to provide a consolidated notice of the special defence, while respecting the limit of 3,000 words. The Accused then sent a document to the Registry which was forwarded to the Prosecution without it being forwarded to Chambers for reasons that were unclear at the time.

Nevertheless, it can be defined as his defence.

The Accused denied all of the charges believing that all the allegations were false and unfounded. He emphasised the lack of rigour and professionalism of the Prosecution, which, according to him, drafted the Indictment with the sole aim of finding him guilty, independently of all factual truth or judicial rigour.

With respect to the **joint criminal enterprise**, on the one hand the Accused objected to even the existence of such an enterprise, recalling that the Statute expressly excluded the responsibility of legal entities and, on the other hand, he denied participating in any such enterprise. He recalled that he had no links and was in clear opposition to all the people mentioned in the Indictment as having participated in the joint criminal enterprise and considered that the Prosecution had not presented any evidence showing a common goal.

With respect to the allegation that the Accused gave speeches stirring up hatred, he acknowledged that he had said the words for which he had been charged by the Prosecution, but contested the fact that this constituted a breach of international penal law. He specified that his attitude towards ethnic minorities was never in breach of international or local laws and at that the Serbian Radical Party was always in favour of equality of rights for all ethnic minorities, so long as they respected the civil laws inherent to their belonging to the Federal Republic of Yugoslavia.

For each of the counts, the Accused wanted specific details about the identity of the victims and the perpetrators of the alleged crimes, the locations and times when the crimes were committed, and for the cause and effect to be proved between his words and crimes that may have been committed. Failing that, he considered that he could not be held personally responsible.

The Accused focused more specifically on contesting his responsibility for Counts 10 and 11 (transfers and forcible transfers). He denied any idea of ethnic cleansing and maintained that this was simply an exchange of population between Croats and Serbs, which was carried out while respecting the laws and without violence.

Moreover, the Accused contested the existence of an armed conflict in Vojvodina and the Republic of Krajina in the period covered by the Indictment, in that crimes against humanity could not be invoked in these regions. In support of his arguments, the Accused notably considered that fighting had not reached a sufficient intensity.

The defence strategy of the Accused at this stage of the proceedings was to focus on the uniquely political nature of the indictment and his detention, to contest the legality and the legitimacy of the Tribunal and to criticise the work of the Prosecution, which he considered had no evidence that would allow it to establish his responsibility for each of the counts.

In his **pre-trial brief, filed in its original BCS version on 2 November 2007,** the Accused also presented different points on which his defence relies and rejected all charges against him laid out in the Indictment.

The Accused first of all confirmed that the Prosecution's allegations were based on false accusations and that the Prosecution witnesses were coached by the Prosecution to provide false testimony. The Accused also contested the credibility of expert witnesses and the reliability of their reports.

The Accused considered that the Prosecution had not established clearly, for each of the counts taken on its own, the form of responsibility on which it was based. He denied inciting, provoking or encouraging persons, whether armed or not, to commit crimes or to have supported them, led them and coordinated their action. He denied committing the crimes cited in the Indictment himself. Moreover, the Accused wanted to establish the truth about the crimes alleged by the Prosecution, to have their perpetrators named, to have the time of their commission specified and to establish the cause and effect between the perpetrators and the crimes. The Accused specified that a distinction should be made between SRS/SČP volunteers and other Serbian forces, specifying that he always instructed his volunteers to respect the rules of international humanitarian law and, if crimes had been committed, his volunteers were not responsible for them.

The Accused denied the allegations of a **joint criminal enterprise**, claiming that this theory did not have any legal basis either in the Statute or customary international law, and could not in any event be applied in this case. He recalled that the Statute specifically excluded the responsibility of a legal entity and that the way it was used by the Tribunal only endeavoured to conceal the responsibility of those who were actually responsible for the fall of former Yugoslavia, to the detriment of the Serbian people. The Accused specified that he would fight these biased views with historical, factual, legal and political arguments and that he would also contest its applicability in this case, by proving that there was no "criminal purpose, that there was no criminal organisation or any sort of coordination for the purpose of committing crimes". Thus, the Accused contested that he had acted in concert with other combat units. He specified that the Serbian Radical Party was the sole defender of the concept of Greater Serbia, and that he had not benefited from any media or political support in order to spread his ideology. Moreover, the Accused specified that the Greater Serbia concept had never relied on expanding the borders of Serbia and never involved incitement to violence.

The Accused equally denied the allegations of hate speech and added that the ICTY case-law on this point cannot be used in this case. The Accused specified that he primarily used words of caution against Croats and Muslims, which they regarded as really being responsible for the conflict.

The Accused vigorously contested the legitimacy of the Tribunal and claimed that the rights that were guaranteed to him were violated several times, notably his right to a fair process, and that the Prosecution had engaged in an abuse of process with complete impunity.

Finally, the Accused considered that the Prosecution's arguments were confused, imprecise and contradictory, both in fact and in law, and that is why it had still not proved that criminal acts could be attributed to him.

The Accused also presented his defence orally on **8 November 2007**, during his **Statement pursuant to Rule 84 *bis* of the Rules**.

On this occasion, the Accused contested the legitimacy and the mission of the Tribunal, which he accused of acting solely for political aims and on the dictates of the United States. The Accused equally attacked the Office of the Prosecutor, which he accused of falsifying and exaggerating facts, as well as of manipulating witnesses.

The Accused considered that his Indictment was botched and wanted to show all the errors it contained. Thus, he corrected several facts presented by the Prosecution concerning his biography, notably his political career. The Accused emphasised his independence and specified that he had always supported Serbian unity and had never called to war unless it was in the defence of the Serbian people. He added that the true enemies of the Serbian people were not the Croats or the Muslims, but the western forces that led them.

On the matter of participation in a **joint criminal enterprise**, the Accused denied having had any links with the majority of the persons mentioned in the Indictment as having participated in the joint criminal enterprise. On this point, he referred to the reading of his statement in the *Milošević* Case. Moreover, the Accused stressed the absence of any legal basis for this theory whether on the local or international level.

Finally, the Accused stated that, if a joint criminal enterprise did exist, it was organised by those who wanted to break up former Yugoslavia and not by the Serbian Radical Party, which had always been opposed to this and worked for a Greater Serbia. The Accused developed the foundation and ideology of this concept and thus intended to emphasise that the common objective of the joint criminal enterprise was non-existent.

With respect to allegations of hate speech, the Accused contested the basis of this offence in international penal law and customary law, referring to numerous judicial sources (Counsel of Europe, the House of Lords in England, the ICTR and the Nuremberg Military Tribunal). Moreover, the Accused emphasised the need to put these words in their context and denied that he had the political and moral influence assigned to him by the Prosecution to the extent that these speeches could have had the sort of impact that the Prosecution alleged. The Accused specified that most of the statements for which he had been charged were neither threats, nor incitement, but caution against the dangers threatening the Serbs and that, in the historical and political context of the time, these warnings had to be "strong" to be effective. He added that certain statements had only been "jokes".

On the crimes of deportation and forcible transfers, the Accused did not deny that such acts might have occurred, but he specified that this question also needed to be broached in the light of the context of war in order to establish its criminal nature, and that in any case, he could not be held responsible for these crimes since he had no political power at the time in question.

With respect to the implication of SRS/SČP volunteers in crimes alleged in the Indictment, the Accused covered the facts municipality by municipality. He acknowledged the presence of SRS/SČP volunteers in these municipalities and the fact that such crimes could have been committed, but he asserted that none of the SRS/SČP volunteers had been identified as having personally committed the crimes. The Accused insisted on a distinction being made between SRS/SČP volunteers and other volunteer units. He denied any coordinated action and confirmed the good reputation of his volunteers, specifying that if any of them had engaged in criminal activities, sanction would have been taken.

On the question of speeches, the Accused denied holding a meeting in Vukovar on 12 November 1991 and at Nevesinje in 1991 and 1992. With respect to the meeting in Zvornik on March 1992 and the one in Hrtkovci in May 1992, the Accused acknowledged that he had attended the meetings, but denied uttering the words for which he is charged by the Prosecution.

In conclusion, the Accused considered that his rights to defence had been violated (excessively long detention, question of funding), notably the right to a fair trial (concealing procedure, excessive measures of protection for witnesses, intimidation of witnesses by the Office of the Prosecutor) and reiterated the unfounded nature of all the allegations against him in the Indictment.

Finally, at the **hearings of 7 and 9 March 2011**, the Accused also presented arguments pursuant to Rule **98 *bis* of the Rules**.

The Accused considered that he could not be held responsible under Article 7 (1) of the Statute for any of the charges against him, because the Prosecution could not prove his responsibility as a participant in a joint criminal enterprise in which he is alleged to have planned, ordered, instigated, committed – physically or otherwise – or otherwise aided and abetted in the planning, preparation or execution of crimes.

The Accused contested the vague and generalised phrasing (especially with respect to incitement, planning and abetting) used by the Prosecution during the 98 *bis* hearing and in the Indictment. The Accused emphasised that all individual participation in the commission of a crime must also be proved individually and that the alleged crimes must be proved in concrete terms.

The Accused emphasised that he had been indicted for acts (incitement to war) which the Tribunal, according to its own remit, is not supposed to examine. Likewise, the Accused confirmed that he had been charged with acts (speech inciting hatred and exchange of population) for which the qualification of the criminal offence has no basis in international customary law. The Accused also stated that the concept of a joint criminal enterprise, and the third form in particular, was invented by the Tribunal.

Even if all the acts alleged in the Indictment should be qualified as criminal offences, the Accused denies having committed such crimes and specified that the Prosecution did not present valid evidence of either him or SRS/SČP volunteers having committed crimes. The Accused considered that the evidence presented was not credible and wanted to remind the Chamber that it had been presented with numerous false testimonies and witnesses who expressed themselves in an uncertain and contradictory manner, so that most of the testimony should be put in perspective. Lastly, the Accused said that in the Prosecution's presentation of evidence, there was much confusion with regard to dates, places and people.

In more detail, the Accused emphasised with respect to Count 1 (persecution) that it was not prohibited to make speeches that were extremist, xenophobic or that generalised and used stereotypes, and he also added that there was no proof that he had spread untruths. The Accused claimed that he had only warned against the dangers that threatened the Serbs. On Counts 4 (murder), 8 and 9 (torture and cruel treatment) and 10 and 11 (deportation and forcible transfer), the Accused emphasised the absence of proof showing, beyond any reasonable doubt, the implication of SRS/SČP volunteers. Moreover, the Accused contested the existence of a general and systematic attack that would allow the deportation and forcible transfers to be qualified as crimes against humanity. On Counts 12 to 14 (wanton destruction and plunder of public or private property), the Accused specified that if any destruction had occurred, it had occurred as part of military operations and if SRS/SČP volunteers had committed such acts for personal gain, they would have been expelled from the Serbian Radical Party.

In conclusion, the Accused emphasised that it was impossible to prove beyond reasonable doubt that criminal acts could be attributed to him and he considered that the Chamber should acquit him of all charges.

Moreover, the Accused **testified under oath for several hours in the trial of Slobodan Milošević in 2005**, noting that the transcript was 1,692 pages long!

This document, filed under number P 00031, allows an in-depth assessment of the Accused's position on all the points in his Indictment. In this respect, it should be

specified that Slobodan Milošević and Vojislav Šešelj were placed in the same joint criminal enterprise in their respective Indictments.

Overall, as stated above, we find the following broad terms at each stage of the current procedure:

During his testimony, the Accused had cause to expand the concept of Greater Serbia advocated by his political party. He insisted on setting apart this concept from the vision of keeping a Federal Yugoslavia, supported by the majority of Serbian politicians.

The Accused expressed his support for the creation of a central and united Serbian state that would abolish autonomous provinces, while recognising the rights of ethnic minorities, but did not imply any deportation plan or ethnic cleansing. Specifically, Greater Serbia encompassed all the lands were the Serbs were in the majority, or rather that, according to the Accused, Serbian ethnicity should not be defined by religion but by the language (Shtokavian).

The Accused was then questioned about links with each of the participants in the joint criminal enterprise alleged in the Milošević Indictment. At the time he said that most of the people cited were ideological opponents with whom he had never had close relations.

On the subject of participation in the recruitment, formation and training of SRS/SČP Serbian volunteers, the Accused considered that his role was limited to motivating members of the Serbian Radical Party to joint the JNA or the TO. The Accused insisted that his volunteers were disciplined, that he had always charged them with respecting the laws and customs of war. The Accused however acknowledged that it could not be completely excluded that the volunteers had engaged in crimes, but asserted that these practices were never endorsed by the party.

The Accused also specified that the weapons and military equipment needed by the volunteers were provided by the MUP and the JNA and that the SRS/SČP volunteers were never under his command. He denied having his own paramilitary unit and, according to him, the expression "Šešelj's men" was used in a vague, inconsistent and improper fashion. In addition, if his volunteers were accused of crimes, this was by

assimilating them with other paramilitary units, although according to the Accused, the SRS/SČP volunteers did not have any connections with these groups.

The Accused categorically denied the fact that his Greater Serbia ideology contained within it roots of ethnic hatred. He acknowledged that he had given speeches about Croats that could have been interpreted as war propaganda, but he claims that he did not want to incite hatred but only to warn the Serbs about the Ustasha regime, to avoid a new genocide. Moreover, the Accused maintained that the speeches only contained threats with respect to any possible Ustasha elements bent on genocide, and not to the Croatian population itself, and that he had only ever recalled established historical facts.

Finally, the Accused maintained that the forcible transfer of the non-Serbian population was never a goal of the Greater Serbia project. He asserted that there had never been any "organised or systematic forcible transfer or deportation" of the Croatian or Muslim population. According to the Accused, the transfer of the population that had occurred in the course of the conflict occurred voluntarily and could be explained primarily by the desire of numerous people to flee the combat.

From my point of view, the Accused has said practically everything and on numerous occasions and in an almost identical way each time. Consequently, a reasonable judge who knows the case inside out, may ask himself at the time of deciding on the amount of time to allocate for the presentation of the defence case, whether it would be appropriate to allocate the same amount of time to the Accused as to the Prosecution or a proportionately reduced amount of time, considering the current case?

Although the Accused has the absolute right to present his defence case, it would nevertheless be appropriate to recall that this right is strictly regulated in the Rules and notably in Rule 90, which stipulates the following:

"The Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to

"(i) make the interrogation and presentation effective for the ascertainment of the truth; and

"(ii) avoid needless consumption of time."

This is why the Rules envisage that the Chamber sets the time required for the presentation of Prosecution and Defence evidence.

As we see it, the length of a trial does not depend on the wishes of the parties, but on the Judge who, having full knowledge of the facts, sets the length of the trial. This is a crucial rule without which the international judicial machine would be out of control, which was never the intention of the authors of the Statute.

International justice should not allow one of the parties to dictate its running. By applying the general principles of law and the right to a fair trial, it must state very precisely what amount of time is allocated to both for the presentation of their evidence.

It seems to me contrary to the spirit of a trial and prejudicial to judicial economy to allow the Accused to present again the subjects and questions already thoroughly presented and well known to the Judges of the Trial Chamber. This phase of the procedure should be a phase that brings **additional value both to the ascertainment of the truth and to the Defence** and not a phase of repetition, a launching pad for political speeches dissociated from the heart of the case or, indeed, to call into question at every turn the competence of the Tribunal.

It is through these considerations that I wish to assess **when the time comes** the need to **set the number of hours required for the defence of the Accused by integrating all the parameters described above.**

Of course, if the Accused decides not to present a defence through witnesses or himself as a witness, the question will be settled permanently and I, like the other Judges, will simply need to set allocate time for the Prosecution and Defence closing arguments and a judgment could then be rendered some time in 2012 since the Prosecution's closing argument and the Accused's closing argument could take place at the beginning of December 2011; should this not be the case, we should anticipate this for 2013 or even 2014!

The forthcoming scheduling decision must also take into account the fact that there are ongoing **contempt proceedings**, I referred to this in my opinion to the 98 *bis* Decision.

I would like to add that this Chamber, **in the majority**, adjourned the proceedings in the Decision of 11 February 2009 because of allegations brought against the Accused's associates with regard to the intimidation and pressuring of witnesses, which could constitute charges of contempt of court.

In the present case, we are in **the same situation** because there have been allegations brought by the Accused against the Prosecution with regard to pressuring witnesses.

The same logic applied in this case should lead the Chamber to adjourn, otherwise how can we justify the majority Decision of 11 February 2009?

In this case, the trial reopened and it was also logical for the trial to continue, with which I am totally in agreement. Nevertheless, unlike the witnesses being pressured and intimidated by the Accused, as alleged by the Prosecution, the same pressure and intimidation of Prosecution witnesses by the Prosecution have, **in themselves**, direct consequences on the Indictment, which may, should the instances of pressure and intimidation be proven, call for a reconsideration of the Indictment.

In this context, what is the purpose of beginning the phase of the Accused's defence when the question has not been completely resolved by the *Amicus Curiae*?

The *Amicus Curiae*, acting completely independently, must submit a report **this coming October** and it would be best to wait for this report before beginning the presentation of the defence case phase, if the Accused decides that it is needed.

In fact, should it be proved that witnesses have made false statement as a result of having been pressured and intimidated by investigators of the Office of the Prosecution, and nobody can say whether this is the case at present, in addition to the media fallout, there will be **direct effect** on the Indictment, either in its entirety or in part. Should this be the case, the "reduction" of the Indictment will also result in a direct "reduction"of the number of witnesses and the hours allocated.

For reasons of judicial economy, it is not possible to start the phase involving the presentation of the defence case until the *Amicus Curiae* has provided his conclusions.

Normally, taking into account technical reasons (translation, delays in the responses by the parties), we should render either our decision on the allocation of the amount of time and the number of witnesses, or our scheduling decision, if the lists are not presented, **this August 2011**, while the BCS and English translations will bring it to the **beginning of October 2011**; this would settle the matter of the time sequence of the *Amicus Curiae* report and the reopening of the trial, either with the presentation of the defence case phase, **or with the Prosecution and Defence closing arguments.**

It seemed necessary to me to attach to the unanimous Decision of the Trial Chamber this opinion in order to "enlighten" the reader who is not one of the parties about the fundamental questions raised and the procedural aspects involved in **a fair trial**, on the one hand, and to call the parties' attention to certain given fundamentals, on the other, so that this trial can continue, in line with the rules and spirit of the Statute, in the best possible conditions and **expeditiously**, and so that the Judgement can be rendered as soon as possible, in view of the length of the provisional detention of the Accused which has gone beyond all recognised standards in this matter.

Undeniably, the provisional detention of the Accused has been very long and should in the coming days, weeks and months, be of constant concern for all the Judges. However, since the Appeals Chamber rendered its Decision on 19 May 2010 following the contempt proceedings sentencing the Accused to **15 months in prison**, the question arises of what the Accused's position legally is: should he be considered as having been sentenced and serving his sentence, or simply as a defendant who will serve the temporarily suspended sentence in the future?

Careful reading of the Appeals Chamber's Decision does not provide a decisive answer since, unlike the practice of the Tribunal, no credit has been given for provisional detention. The Appeals Chamber has not really said anything on this matter. On this basis, the question will arise in the future of whether the 15-month prison sentence pronounced by the Appeals Chamber should be served concurrently with any potential sentence, should he be found guilty or, conversely, whether it will be considered as a completely separate sentence?

If the sentence is separate, then we can consider that the Accused is in the process of serving his 15-month prison sentence and that from this point, the idea of provisional detention should be discarded. In this case, there would be no need to speed up the trail since, in any case, he must serve this sentence.

In support of this approach, it should be said that the Accused's provisional detention does not give him **credit for time in prison** that would allow him to commit offences as he pleases that would come within the total number of years that have already passed.

Moreover, there are rules about the **concurrence of sentences** in national systems and principle in this matter stipulates that the sentences should be of the same nature and the offences must have been committed **within the same time frame**. However, this is not the case here, since the contempt of court sentence pronounced by the Appeals Chamber (an offence that was not expressly provided for in the Statute) is completely separate from the crimes set out in the Statute. The offence for which he has been found guilty and sentenced to 15 months in prison took place 15 years after that facts covered by the initial Indictment.

Firstly, to my mind there can not be a concurrence of sentences and the Accused must, in one way or another, serve this 15-month prison sentence.

This is an important question and should be settled at a given time by the Appeals Chamber seized of the matter, or otherwise, by the parties through an **interpreting judgement** of the judgement rendered on 19 May 2010.

On the other hand, considering that the 15 months in prison must be deducted from the length of his provisional detention, there is nothing that leads to this conclusion since the judgement of the Appeals Chamber does not say this and, moreover, I do not see why this sentence would be included in the length of the provisional detention, **unless we consider that the Accused must serve only one and the same sentence for all the offences committed (whatever their date).**

A consultation of the texts and the case-law does not allow me to conclude in this sense. There is therefore a serious problem that warrants **clarification by the Appeals**

Chamber because, if we consider that this sentence is separate from any sentence that may be pronounced on the allegations presented by the Prosecution in the Indictment, we need to know from what point it will start running.

It should be noted that a new Indictment for contempt was raised against him on **24 May 2011** and, should he be found guilty, the question of attributing the newly pronounced sentence to the current provisional detention must not be neglected …

If it starts running from the moment the sentence is pronounced by the Appeals Chamber, I do not believe that we will be under **time constraints** and **pressure**. Of course, in the opposite case, the time constraints and urgency would oblige the Judges to do their utmost to proceed as rapidly as possible.

My opinion is filed **publicly** since there are no references to the identity of **any protected witness.**

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

/signed/
Jean-Claude Antonetti
Presiding Judge

Done this ninth day of June 2011
At The Hague
The Netherlands

[Seal of the Tribunal]