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: 29 September 2011

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IN TRIAL CHAMBER III

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

Registrar: **Mr John Hocking**

Order of: **29 September 2011**

THE PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC

SEPARATE OPINION OF PRESIDING JUDGE ANTONETTI REGARDING THE MOTION OF THE ACCUSED VOJISLAV ŠEŠELJ TO DISCONTINUE THE PROCEEDINGS

The Office of the Prosecutor

Mr Mathias Marcussen

The Accused

Mr Vojislav Šešelj

Although I fully subscribe to the position of the Chamber, taking into account the issue raised, it is my duty to present the personal factors which have led to my sharing of my colleagues' position.

The issue raised by the Accused is of crucial importance in international criminal proceedings because it directly relates to the **duration of the proceedings**. Indeed, **in order to conform with the Statute, must one subject oneself to the expeditiousness of the trial as an imperative, or should international justice take its time to conclude a trial?**

This is one of the major issues of international justice because public opinion, and the victims in particular, usually expect the judgment and punishment to be swift, which is what happened in Nuremberg, where the trial of several Nazi officials was dealt with in record time.[1] A little closer to home, the trial of the former Iraqi President Saddam Hussein, which led to his conviction, was also dealt with rapidly.[2]

Almost all chambers at the ICTY have dealt with the issue of rapidity in the best possible way to meet the requirements of the Statute. Thus, in the Milošević case, the Trial Chamber decided to approach the trial one indictment at a time.[3] The Appeals Chamber, however, decided differently, ruling that all indictments should be joined and the crimes committed treated as a whole at the trial.[4]

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[1] The trial started on 20 November 1945 and the Judgement was delivered on 1 October 1946 (i.e. 315 days).

[2] The trial lasted for three years and 14 days, including the appeals phase (from 13 December 2003 to 26 December 2006).

[3] *The Prosecutor v. Slobodan Milošević*, Case No. IT-99-37-PT, "Decision on Prosecution's Motion for Joinder", public, 13 December 2001.

[4] *The Prosecutor v. Slobodan Milošević*, Case No. IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73, "Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder", public, 1 February 2002.

Several days ago, the Prosecution seized the Mladić Chamber of a motion for severance so that only the acts committed in Srebrenica would be dealt with.[5]

In this case, the Accused has spent more than eight years in pre-trial detention.[6] For a long time now he has been arguing that the length of his trial is excessive, implying that the Tribunal and, consequently, the judges, were responsible and announcing in a public hearing that he intended to institute legal proceedings against the judges.[7]

What is the reality? Have the judges of this Trial Chamber been dragging their feet in this case? Have they acted flippantly, amateurishly and incompetently, or is the reality completely different?

Prior to providing answers to the various aspects of this question, one should present in detail the arguments of the Accused and the submissions of the Prosecution.

Arguments of the Accused

The principal argument set forth by the Accused in his motion[8] rests on the fact that he has been detained for more than eight years, which constitutes a violation of his right to a trial within a reasonable time and an abuse of process. Recalling in this sense the legal provisions relevant in this matter, he asserts that the undue length of his pre-trial detention constitutes illegal practice with respect, on the one hand, to the

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[5] *The Prosecutor v. Ratko Mladić*, Case No. IT-09-92-PT, "*Consolidated Prosecution Motion to Sever Indictment, to Conduct Separate Trials and to Amend Resulting Srebrenica Indictment*", public with confidential and public annexes, 16 August 2011.

[6] The Accused was transferred to the detention centre on 24 February 2003.

[7] During an administrative hearing of 9 March 2011 (T(F), p. 16820), the Accused publicly spoke of his intentions: "*I already have a lawyer in New York, Mr. Jonathan Libby, who is going to sue the United Nations. And as I learn, I have the right to sue every Judge and every Prosecutor in civil proceedings for compensation based on the principle of their solitary responsibility because they participated in a joint enterprise that ended in such a bad result.*"

[8] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, "*Motion to discontinue the proceedings due to flagrant violation of the right to a Trial within a reasonable period in the context of the doctrine of abuse of process*", confidential, 8 July 2011.

Statute of the Tribunal[9] and the Rules of Procedure and Evidence,[10] both of which prescribe speed in the proceedings, and, on the other, international conventions.[11]

He added that, according to the case-law of the Human Rights Committee[12] and the European Court of Human Rights (ECHR),[13] an accused either had to be tried speedily or released, and that the presumption of innocence had to be maintained throughout the process.[14] Also, a decision imposing or continuing pre-trial detention must be justified by reasons of public interest,[15] by there being objective grounds to suspect that the Accused had committed a crime,[16] by there being a risk of his intimidating witnesses[17] or fleeing,[18] or by the complexity of the case.[19] According to the Accused, none of these criteria were met and no decision had been adopted, either ordering or continuing his pre-trial detention, providing any specific reasons.[20]

Concerning the duration of the proceedings, the Accused recalls that, in spite of its vast complexity, the Nuremberg Trials took only a little more than a year,[21] as did the

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[9] Articles 20 and 21 of the Statute (*Ibid.*, p. 7).

[10] *Ibid.*, pp. 3-7.

[11] European Convention on Human Rights, International Covenant on Civil and Political Rights, American Convention on Human Rights, African Chart on Human and People's Rights, Fundamental Chart of Human Rights (*Ibid.*, pp. 9-10), Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (*Ibid.*, pp. 10-11) and the Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States (*Ibid.*, p. 11).

[12] The most famous case was *Michael and Brian Hill* (*Ibid.*, p. 9).

[13] In particular, cases *Brogan et al v. United Kingdom*, *Aquilina v. Malta* and *Eckle v. Germany* (*Ibid.*, p. 8).

[14] ECHR, *Neumeister v. Austria,* 27 July 1968 (*Ibid.*, p. 12).

[15] ECHR, *Erdem v. Germany,* 5 July 2001, para. 39 (*Ibid.*, p. 13) and *Richet v. France* 13 February 2001 (*Ibid.*, p. 15).

[16] ECHR, *Labita v. Italy,* 6 April 2000 (*Ibid.*, pp. 15-16).

[17] ECHR. *Labita v. Italy,* 6 April 2000 (*Ibid.*, p. 19).

[18] ECHR, *Bebboub aka Hussein Ali v. France,* 9 November 1999, *Erdem v. Germany*, and *Kreps v. Poland,* 26 July 2001 (*Ibid.*, pp. 17-20).

[19] ECHR, *Contrada v. Italy,* 24 August 1998 (*Ibid.*, pp. 20-21).

[20] *Ibid.*, pp. 15-16, 19.

[21] *Ibid.*, pp. 34-40 The interpretation of the *nulla poena sine lege* principle (*Ibid.*, p. 35); the interpretation of personal responsibility and the theories of Hans Kelsen (*Ibid.*, p. 36) and from the

judgement in the case of *Bosnia and Herzegovina v. Serbia and Montenegro*, rendered by the ICJ also a year after the start of the hearings.[22] Finally, the Palermo "maxi-trial" which dealt with threats and assassinations carried out by a mafia-type organisation, albeit beset by problems with the intimidation of witnesses, led to the conviction of 365 accused (out of 465) in less than two years.[23]

With regard to the cases at the ICTR,[24] the Accused recalls that so far none have lasted for more than eight years. The longest case, appellate proceedings included, was that of *Tharcisse Muvunyi*, which lasted for 7 years and 10 months (the appeals judgement demanded a retrial which took place two years later). At the level of the European Union,[25] the Court of First Instance deals with its cases in approximately thirty months, and at the Court of Justice in twenty,[26] and this includes the Member States' pre-trial detention procedures.[27] The law in the United States precisely defines the issue of pre-trial detention and speed of the trial,[28] as does the German Basic Law.[29] This is also a concern in Serbia,[30] Germany, England[31] and France.[32]

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technical aspect: four languages, 403 sessions, 22 accused, 300,000 documents, 240 witness testimonies, 16,000 pages of transcripts (*Ibid.*, p. 38).

[22] *Ibid.*, pp. 26-34.

[23] *Ibid.*, pp. 52-58.

[24] *Ibid.*, pp. 62-64; According to the letter of the President of the ICTR to the Security Council on 5 November 2010.

[25] The EU is close to the Tribunal: it requires that Member States or candidate states cooperate with it (*Ibid.*, pp. 45-46); moreover, Serge Brammertz has met with numerous EU officials (p. 46).

[26] (*Ibid.*, pp. 48-49).

[27] As proven by the EU questionnaire sent to Serbia in 2010 inquiring in particular about the rules governing pre-trial detention and its extension (*Ibid.*, pp. 49-50).

[28] The *Speedy Trial Act* stipulates that the guilt of the accused must be established within 70 days from the start of the process (*Ibid.*, p. 23); the 6th amendment to the Constitution prescribes the speediness of trials (*Ibid.*, p. 23); and the US Supreme Court delivered an average of 1,200 judgments in eight years between 1980 and 2000 (*Ibid.*, pp. 24-25).

[29] Article 104, paras 1, 2 and 4 (*Ibid.*, p. 25).

[30] Ivan Kuzmanović of the Helsinki Committee for Human Rights remarked with horror that a detainee in Serbia had spent five years in pre-trial detention without a judgement (*Ibid.*, p. 59).

[31] *Ibid.*, (pp. 60-62).

[32] The 1958 Code of Criminal Procedure and ECHR convictions in: *Letellier v. France*, 26 June 1991, and *Müller v. France* for three years of pre-trial detention (*Ibid.*, pp. 59-60).

Submissions of the Prosecution

In response to the Accused's Motion,[33] the Prosecution claims that, in order for something to be considered abuse of process, *serious and egregious* violations[34] of the accused's rights must be demonstrated, *undue* delays[35] in the proceedings in particular. Whether a delay is considered undue is determined by circumstances,[36] *duration in itself is not sufficient for such qualification*: certain cases lasted between six and 15 years without their duration being qualified as unreasonable,[37] and periods of delay that are attributable to an accused are not taken into account.[38] In this context, according to the Prosecution, the motion must be rejected because:

- Firstly, **on 10 February 2010, the Trial Chamber found no undue delay that could be qualified as abuse of procedure, and has no cause to reconsider its decision**, hence contending that the *complexity of the case* was a decisive factor for the Trial Chamber, and that the number of witnesses and exhibits had increased further since.[39] On this point, according to the Prosecution, the Chamber, the Prosecution and other authorities have respected the right of the Accused to be tried

[33] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, "*Prosecution's response to the accused's July 2011 motion to discontinue the proceedings*", confidential, 22 July 2011.

[34] *Ibid.*, para. 8.

[35] *Ibid.*, para. 10 ; Article 21(4)(c) of the Statute of the Tribunal.

[36] *Ibid.*, para. 11 ; ICTR: *Nahimana*, 28 November 2007 (Appeals Chamber), *Mugiraneza*, 27 February 2004 (Appeals Chamber), *Nyiramasuhuko*, 24 June 2011, ICTY: *Perišić*, 23 November 2007.

[37] *Ibid.*, paras 12-13; ICTR: *Nyiramasuhuko*, 28 November 2007 (12 and 15 years), *Ntahobali*, 26 November 2008, *Bagosora*, 18 December 2008 (11 years), *Mugarineza*, 10 February 2009 (10 years), *Nahimana*, 28 November 2007 (7 years), *Rwamakuba*, 3 June 2005 (6 years); ECHR: *Neumeister v. Austria*, 27 June 1968.

[38] *Ibid.*, para. 11 ; ICTR: *Rwamakuba*, 3 June 2005; ECHR: *Pretto et al. v. Italy*, 8 December 1983, *Deumeland v. Germany*, 29 May 1986, *Lechner and Hess v. Austria*, 23 April 1987.

[39] *Ibid.*, paras 32-33.

without undue delay:[40] the Accused did not contest the witness schedule and delays in the processing of motions cannot be called into question.[41]

- Secondly, **the Accused did not make use of the options available to him to be tried without undue delay or for the length of his pre-trial detention to be reduced**. On this point, the Prosecution posits that the Accused did not seek provisional release until June 2004,[42] that the Accused's motions contesting the length of the proceedings or of his pre-trial detention in the pre-trial phase were denied, that the Accused did not appeal these decisions[43] and that he refused to seek his country's guarantees in order to obtain provisional release.[44]

In the opinion of the Prosecution, **the length of the proceedings is partially due to the behaviour of the Accused**, in particular by his embarking on a hunger strike between 2006 and 2007 instead of waiting for the appellate decision on self-representation,[45] his writing of voluminous, futile or redundant motions[46] and his behaviour which led to the contempt proceedings.[47] Finally, concerning **the duration of pre-trial detention,**[48] the Prosecution refers to the ICTY, ICTR and ECHR case-law which considers a period of pre-trial detention of up to five years as not *per se* unreasonable.[49] Moreover, according to the Prosecution, the national laws mentioned by the Accused regarding this subject are not binding on the Tribunal.[50]

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[40] *Ibid.*, para. 34.

[41] *Ibid.*, paras 38-47.

[42] *Ibid.*, para. 18.

[43] *Ibid.*, paras 19-23 and 27.

[44] *Ibid.*, para. 52.

[45] *Ibid.*, para. 25.

[46] *Ibid.*, paras 28-29.

[47] *Ibid.*

[48] Even though the Prosecution distinguishes between the dispute over the length of "*pre-trial detention*" and the dispute over the overall length of the proceedings (see para. 7), it responds to the former dispute in paras 48-54 by repeating certain arguments used in the latter.

[49] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, "*Prosecution's response to the accused's July 2011 motion to discontinue the proceedings*", *op. cit.*, para. 17; ICTY: *Blaškić*, 20 November 1996, ICTR: *Mugiraneza*, 29 May 2007, ECHR: *Ventura v. Italy*, 15 November 1980, *Ferrari-Bravo v. Italy*, 14 March 1984, *W. v. Switzerland*, 26 January 1993.

As for my point of view, although I have already had the opportunity to express my position on this issue in one of my previous opinions,[51] recognising that this trial has lasted too long, I nonetheless believe that the **responsibility** is **shared** by many, not necessarily solely the judges of the current Trial Chamber.[52]

Why ?

First of all, we should recall that, from the outset, the trial has been hindered by the **appointment of a *stand by* counsel**, which was done **against the will of the Accused**. As a member of the pre-trial chamber (in other cases as well), having just arrived in October 2003, I realised that there was a real problem with this Accused because a counsel had obviously been appointed for him against his will; thanks to the several decades of my trial experience, I immediately realised that we were hurtling towards disaster. However, being a member of a pre-trial chamber, I had very limited means of informing someone of these feelings, as I was neither a presiding nor a pre-trial judge, but merely a member of a collegium of three judges, and I could not question the adopted decision alone.

The position adopted by the Accused who, at the time, having refused any disclosure on the part of the Prosecution, and having no knowledge of Prosecution's evidence and, even less so of my opinion which had not been translated into his language, did not facilitate the proceedings. In fact, that situation led to the Accused embarking on a

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[50] *Ibid.*, para. 51; regarding the *US Speedy Trial Act* mentioned by the Accused, the Prosecution notes that certain pre-trial delays are excludable from the time limit, for instance in the case of motions or unavailability of witnesses, see para. 14.

[51] *The Prosecutor v. Vojislav Šešelj,* Case No. IT-03-67, Separate Opinion of Presiding Judge Jean-Claude Antonetti regarding the Decision on Prosecution's Motion for Admission of Evidence Relating to Mladić Notebooks, public, 22 October 2010.

[52] See, however, *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67, Dissenting Opinion of Presiding Judge Jean-Claude Antonetti regarding the Decision on Prosecution Motion for Adjournment, public, 11 February 2009.

hunger strike soon after his trial began, causing the Appeals Chamber to rule on the issue of *self- representation* seized in this sense by the Accused.[53]

All this has manifestly affected the duration of the proceedings. Naturally, the Accused could, in spite of the imposition of a *stand-by* counsel, "have played the game" by accepting the documents and becoming involved in the judicial debate, but he definitely did not want that, leaving no room for doubt.

After the Appeals Chamber adopted a decision reinstating his right to conduct **his own** defence, I took over the case, initially as the pre-trial judge and subsequently as the Presiding Judge of the current Chamber. I have to say that my participation in the case was not obvious because, at the time, I was the presiding judge in another Chamber, in charge of a considerable case, and **my sole reason for accepting this mission was to give international justice an opportunity to overcome the impasse it had reached by imposing the *stand-by* counsel**.

Other difficulties subsequently arose for which the Accused was not chiefly responsible but which directly affected the duration of the trial. The Registry thus suspended the contacts between the Accused and one of his privileged associates (Mr Krasić), which had serious consequences for the following part of the trial because the Accused could no longer write submissions as he had been used to…

Also, without consulting the Trial Chamber, the Registry took administrative measures at prison level, provoking negative reactions on the part of the Accused.

For instance, even though the Trial Chamber had set a date for the Accused to file his 65 *ter* list, the Registry initiated disciplinary proceedings against the Accused's associates, which, according to the Accused, resulted in him not being able to file his 65 *ter* list…

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[53] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67, *"Decision on Appeal against the Trial Chamber's Decision (no. 2) on Assignment of Counsel"*, public, 8 December 2006.

It seems to me that the Prosecution also bears personal responsibility for failing to understand that the proceedings should proceed swiftly, because it "flooded" the Trial Chamber with motions for reconsideration, requests for certification to appeal, even motions for additional time, and was unwilling to understand that its own witnesses, known as the "Prosecution witnesses", had decided to "swing over to the defence", causing enormous problems in the management of the trial. In this spirit, the majority of the Trial Chamber, with a dissenting opinion, stayed the proceedings for a year due to allegations which have not been resolved to date…

Also, during the pre-trial phase, it should have shown due diligence by bringing up the issue as quickly as possible.

The English common law procedure followed by this international court **does not speed up the course of a trial because the management of a trial**, in its administrative aspect, does not depend solely on the **Presiding Judge** but also on the will of the Prosecution, the Defence and, at times, of all the judges. Unfortunately, the Rules of Procedure and Evidence do not provide for a fixed deadline by stipulating, for instance, that the pre-trial phase may last for a maximum of six months after the initial appearance and that the trial must immediately start as soon as the deadline expires.

It also seems very important to me, and I must point this out, that the majority of the proceedings held before this Tribunal have resulted in problems with **the appointment, or absence, of counsel**. The Rules and the directives have entrusted these issues with the Registry. I believe this to have been a **major error** because there is not a single trial without problems. This was particularly obvious in the Karadžić case[54] and we can also see it in the case of General Mladić.[55]

[54] On this point, see in particular the Trial Chamber decision maintaining the presence of Mr Harvey as the *stand-by* counsel, but restricting his remit, thus allowing the Accused to practically defend himself, *The Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, "Decision on Designation of Standby Counsel", public, 15 April 2010.

[55] In the present case, the Registry, in a motion submitted to the Trial Chamber on 19 August 2011, demanded the extension of time for the Accused to appoint a counsel of his choice, specifying that, in

In my opinion, this matter should have been very precisely defined: it should have been specified that all disputes regarding the choice of counsel must be brought **before the Presiding Judge** who, presiding over the hearings, is **the only one** in a position to deal with these issues in advance and, in cases where this matter is not resolved swiftly, would **alone** take the responsibility in the matter which should not be diluted between the parties.

In my opinion, the picture painted above shows that the Accused is not entirely responsible for the procedural vagaries affecting the duration of these proceedings. Nevertheless, in my view, he is **partly responsible** and, assuming this responsibility, I find it astonishing that he should demand a dismissal of the proceedings as this period of eight years can partly be attributed to him.

Why ?

Since his arrival in The Hague,[56] the Accused, a professor of law by trade and one of his country's eminent politicians, has had years to prepare himself for the trial. Although he has, of course, prepared himself, we have to admit that he has also "squandered" his time, either by persisting in his domestic political engagement or by writing more than 100 works in excess of 100,000 pages. In my opinion, had he consecrated 100% of the time he had dedicated to these two activities to his trial instead, it is almost certain that the trial would have been long finished by now.

Admittedly, the Accused maintains that he had neither the practical nor the financial means to ensure his defence. I cannot follow him down that road because, being the leader of an important political party in his country, he must have at his disposal "minions" willing to voluntarily assist him in his defence, as testified by the video

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the meantime it would appoint a *stand-by* counsel. On this point, see *The Prosecutor v. Goran Hadžić*, Case No. IT-04-75-I, *"Registry Submission pursuant to Rule 33 (B) requesting an extension of time for the assignment of Counsel"*, public, 19 August 2011.

[56] The Accused Vojislav Šešelj was transferred to the detention unit in The Hague on 24 February 2003, and his initial appearance before the judges took place on 26 February 2003.

available on his website.[57] It is obvious to everyone that he enjoys the support and goodwill (particularly in Russia) of people who can help him.

To put an end, once and for all, to the issue of the financing of his defence, the Trial Chamber rendered a decision ordering the Registry to bear 50% of the cost of his defence, the rest being his responsibility.[58] This is now, in my opinion, a **false problem** because, during the cross-examination of Prosecution witnesses, the Accused has on multiple occasions shown an **encyclopaedic knowledge** of events and facts and an ability of presenting his views in a very precise manner, without anyone's help or any notes prepared by his colleagues or associates on a subject. This tells me that the Accused, hiding behind the obstacles raised in his defence, is invoking a line of defence that I do not find serious.

This is understandable if we take into account the statements made by the Accused on numerous occasions in this and other trials, declaring himself a "chief enemy of the Tribunal".[59] The Accused has gone even as far as saying that he is using the procedures of the Tribunal to this end.[60] Accordingly, he seems to have also assumed part of the responsibility for the duration of the proceedings.

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[57] Video available at: http://www.vseselj.com.

[58] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67, "Redacted Version of the 'Decision on Financing of Defence', filed on 29 October 2010", public, 2 November 2010. In its disposition, the Trial Chamber "***orders proprio motu*** *the Registrar, from this day forward until the end of the trial, to fund 50% of the funds allocated in principle to a totally indigent accused, to the defence team for the Accused consisting of three privileged associates, a case manager and an investigator, based on the Scheme for Persons Assisting Indigent Self-Represented Accused and on the basis of a determination of the complexity of this case at Level 3, unless other information is provided"* .

[59] By way of introduction, Vojislav Šešelj said, "*Yes, Dr Vojislav Šešelj here, university professor and chief enemy of the Hague Tribunal"*. Initial appearance in the contempt proceedings against Vojislav Šešelj (Case No. IT-03-67-R77.3), 29 April 2010, T(F), p. 4.

[60] During the administrative hearing of 9 March 2011 (T(F) p. 16823), the Accused reminded the judges, "*I would like to draw your attention to the fact that you are duty-bound by the Rome Statute and the Rules of Procedure and Evidence /of the International Criminal Court/ because those are the only two relevant codifications of the international criminal law"*.

On a different level, the Accused could have presented to the Appeals Chamber his arguments on the undue length of the trial when this Chamber adjourned the trial at the Prosecution's request.[61] The majority of the Trial Chamber decided to grant the motion and adjourn the trial.[62] Aware of the significance of the issue, I issued a 10-page dissenting opinion.[63] To summarise, I pointed out that the proceedings under way regarding the Prosecution's allegations risked taking a considerable time and that it would be better, in the interest of justice, to continue the trial.

The Accused could have used this decision to file a request for certification to appeal in order for the Appeals Chamber to adopt a position on the issue. To my great surprise, the Accused neither said nor did anything about that, contenting himself with invoking the difficulties he had with the financing of his defence. It is certain that, had he appealed this decision, the Appeals Chamber may have quashed the majority decision and we could have perhaps gained a year.

From the legal point of view, even though it is true, as he has pointed out in his submissions, that there is case-law at the European Court of Human Rights (ECHR) dealing with **the issue of reasonable delay**, any informed jurist knows perfectly well that the ECHR has been very prudent in its assertions because it has subordinated the treatment of the reasonable delay to the difficulty of the trial.[64] Of course, our Tribunal is not subordinated to ECHR case-law and it would be very easy for me to "sweep it aside" by evoking our independence from it. I do not think, however, that this is necessary because, in my opinion, in this particular case, the reasonable delay,

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[61] Oral application of the Prosecution, public hearing of 15 January 2009, T(F) 13591.

[62] Decision on Prosecution Motion for Adjournment with Dissenting Opinion of Judge Antonetti, public and confidential, 11 February 2009.

[63] *Ibid.*

[64] Article 6.1 of the European Convention on Human Rights recognizes that *"In the determination of (…) any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law"*. This principle must, nevertheless be analysed *in globo* by means of the exact assessment criteria defined by the Tribunal, in particular the criterion regarding the complexity of the case *de facto* (to establish the relevant facts) and *de jure* (the complexity of adducing evidence). For a synthesis of this issue, on this point see in particular: ECHR, *McFarlane v. Ireland*, 10 September 2010, Application no. 31333/06.

even though it may seem unreasonable in certain circles, is reasonable in certain other aspects that are directly linked to the behaviour of the Accused.

In my view, the conclusion is obvious, I cannot but **dismiss the request of the Accused**, all the more so since we have previously been seized of the same issue that resulted in the Chamber deciding to dismiss the request.[65]

This Trial Chamber, aware of the fact that one day this issue would be raised, brought up the subject itself, pointing out to the Accused that he had the **possibility of requesting release** provided he was, under Rule 65 of the Rules, able to produce the necessary guarantees from the host country. It should be noted that the Accused has never submitted a request for release to the present Trial Chamber. Perhaps, had he been released for short periods of time (during the court recess, for instance), his state of mind would have been different because, having borne the burden of his detention for many years, he cannot be but hostile towards the Tribunal and, perhaps, even towards the current Trial Chamber, although it should be made clear that his behaviour in the courtroom has always, as a general rule, been good.

During the **administrative hearing of 23 August 2011**, the Accused was informed that the Chamber had dismissed his request.[66] It seems to me that the current status of the proceedings allows for a quick resolution of the trial if the Accused presents no exculpatory evidence. We should not forget that the burden of proof falls solely on the Prosecution and that the Accused can, if he so wishes, present exculpatory evidence, but that this is merely an **option** offered to him, **not an obligation.** The Prosecution, on the other hand, has the obligation to present its evidence which would allow the judges, if necessary and beyond reasonable doubt, to conclude that the Accused is guilty. In common law proceedings, as we have seen in the recent case of the former Director of the International Monetary Fund (IMF), the Prosecution must reach a

[65] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67, "Decision on Oral Request of the Accused for Abuse of Process", public, 10 February 2010.

[66] On this point, see the transcript of the public administrative hearing of 23 August 2011, T(F), p. 17013.

point where a reasonable judge has no other option than to conclude that the person is guilty.

Within this "procedural framework", the Accused must think carefully before deciding to defend himself by bringing in his own witnesses who will be subject to the Prosecution's cross-examination and the Chamber's "credibility test". Also within this framework, should the Defence fail to present exculpatory evidence, in its deliberations the Trial Chamber will have to decide whether the Prosecution witnesses were sufficiently credible and whether the evidence was such as to warrant a conviction. Although we have not reached this phase yet, everyone should keep this in mind.

Furthermore, it should be recalled that, regardless of what may happen, the Trial Chamber will be **bound by the filing of the report of the Amicus Curiae on the pressure exerted on certain witnesses by the members of the Office of the Prosecutor**. It should also be said here that the time required for the resolution of the issue of contempt of court raised by the Accused in his motion will affect the duration of the proceedings, and that the time spent on the management of this case is directly attributable to him.

Personally, being fully aware of the side effects of the proceedings related to the main case, I have made an unequivocal decision to withdraw from all related proceedings in order to gain time and prevent the Chamber from being contaminated by having to deal with them. Concerning, more specifically, the complaint of the Accused implicating certain members of the Office of the Prosecutor, the management of this issue over several months has not caused any waste of time; unfortunately, however, we have come to a point where, due to certain unforeseeable developments, the Trial Chamber can no longer deal with certain issues directly and has therefore appointed an Amicus Curiae.[67]

[67] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67, "Redacted Version of the Decision in Reconsideration of the Decision of 15 May 2007 on Vojislav Šešelj's Motion for Contempt against Carla del Ponte, Hildegard Uertz-Retzlaff and Daniel Saxon", public, 29 June 2010.

The Prosecution has tackled this problem by filing submissions for the clarification of further proceedings. Although the Trial Chamber will have the opportunity to respond to these submissions, it should be made clear that, in my previous opinion, I pointed out that the filing of the conclusions of the Amicus Curiae could **directly affect** the Indictment if, indeed, pressure had been exerted on witnesses.

The filing of the conclusions of the Amicus Curiae will have serious consequences because, in my opinion, it will either completely exonerate the members of the Office of the Prosecution targeted by the motion, in which case the trial can conclude without any further interventions, or, else, enable the Prosecution to know which position to take, in particular, whether to completely withdraw its Indictment and abandon the prosecution according to *nolle prosequi* procedure[68] or to retain only certain elements of the case and confine itself to one or several counts. For now, however, it is difficult to go any further into the matter. This issue will, of course, have to be settled by a decision of the current Chamber.

To resume, if the Accused is not fully responsible for the length of his proceedings, he still bears some personal responsibility. Although the duration of his trial will certainly go down in the history of international justice, I think it will not be alone there, and here I am referring to the trial of the **former Polish General Wojciech Jaruzelski**.[69]

In fact, the position of the Accused is easy to understand: he is asking from the Tribunal to pay him a sum of **1.4 million Euros** for his past defence because,

[68] This procedure of common law authorises the prosecutor to dismiss all or part of the charges brought against one or several accused, in particular if he considers that the case file is not substantial enough. The Trial Chamber must validate a motion, although it is often satisfied with little more than running a minimal check, verifying that a motion is in the interest of justice; for illustration, see in particular *U.S. Federal Rules of Criminal Procedure*, Ch. IX, *Rule* 48 (a) and the appeal judgment in *State v. Clinch* at the Missouri Court of Appeals, 22 March 2011.

[69] The trial of Polish General **Wojciech Jaruzelski**, champion of martial law and high-ranking official during Polish Communist rule, opened in Warsaw in 1996 but had to be interrupted due to the state of his health. The process resumed in Warsaw in 2008, but had to stop in July 2011 for the same reasons.

according to him, this is the sum that would have been paid to a counsel and his team had he had one.

Based on this principle expressed a long time ago, he argues that he will not mount a defence and that he did not have the right to a **fair trial**.

Unfortunately, his line of reasoning cannot be followed. He had been offered all procedural guarantees, and if he did not want to conform to the decisions of the Chamber and, in particular, the filing of the 65 *ter* list of the Rules, he only has himself to blame.

To make it absolutely clear, I insist on adding that the Trial Chamber has **no competence whatsoever** in the matter of payment because this is the **exclusive** remit of the Registry and nobody else and that therefore a judge cannot **order** the Registry to do it for the Registry is independent of the judges and, pursuant to Article 7 of the Statute, solely responsible for the administration and services of the International Tribunal.

From where I stand, I have done **everything** to try and find a solution acceptable to all. However, the **bad habits** acquired from the outset, soon after the arrival of the Accused at the Tribunal, are such that **unless there is a miracle**, the situation will remain blocked by the uncompromising views adopted by the Registry and the Accused, each arguing his case.

Under these conditions, when the report of the Amicus Curiae is filed, it would be advisable to move on to a new phase as quickly as possible, either to the closing arguments of the Prosecution and the Accused, or to the withdrawal of the Indictment.

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

/signed/

Jean-Claude Antonetti
Presiding Judge

Done this twenty-ninth day of September 2011
At The Hague
The Netherlands

[Seal of the Tribunal]