NATIONS

UNIES

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: 22 December 2011
ENGLISH
Original: French

IN TRIAL CHAMBER III

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

Registrar: **Mr John Hocking**

Decision of: **22 December 2011**

THE PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC DOCUMENT

With a Separate Ppinion of Presiding Judge Jean-Claude Antonetti and a Partially Dissenting Opinion of Judge Flavia Lattanzi

And with a Separate Opinion of Presiding Judge Jean-Claude Antonetti in an Annex, Confidential and *ex parte* for the Two Parties

DECISION ON VOJISLAV ŠEŠELJ'S MOTION FOR CONTEMPT AGAINST CARLA DEL PONTE, HILDEGARD UERTZ-RETZLAFF AND DANIEL SAXON AND ON THE SUBSEQUENT REQUESTS OF THE PROSECUTION

Office of the Prosecutor

Mr Mathias Marcussen

Accused

Mr Vojislav Šešelj

I. INTRODUCTION

1. Trial Chamber III ("Chamber") of the 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 ("Tribunal") is seized of the Motion of Vojislav Šešelj ("Accused") for contempt against Carla Del Ponte, Hildegard Uertz-Retzlaff and Daniel Saxon, filed on 23 March 2007 as a confidential document[1] and an Addendum to the motion for contempt filed on 2 July 2007 as a confidential document[2] (together, "Motion for Contempt"),

II. PROCEDURAL BACKGROUND

2. In the "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'" issued on 29 June 2010 as a public document ("Decision of 29 June 2010"), the Chamber ordered the Registry of the Tribunal ("Registry") to appoint an *amicus curiae* in order to conduct an investigation into the Motion for Contempt and ordered the *amicus curiae* to indicate to the Chamber if there are sufficient grounds to initiate proceedings for contempt against members of the Office of the Prosecutor ("Prosecution"), to identify these persons by name and to submit to the Chamber a report with the conclusions ("*Amicus Curiae* Report).[3]

3. On 5 October 2011, the Registry filed and sent to the Chamber confidentially and *ex parte* for the two Parties the *Amicus Curiae* Report.[4]

4. In the "Decision on New Filing of Public Redacted Version of the *Amicus Curiae* Report" issued on 28 October 2011 as a public document ("Decision of 28 October 2011"), the Chamber ordered a redacted version of the *Amicus Curiae* Report to be filed as a public document ("Public Version of the *Amicus Curiae* Report") and ordered the Parties to file their written observations on the Public Version within 15 days of the filing of the Decision of 28 October 2011 for the

[1] English translation of BCS original, "Motion by Professor Vojislav Šešelj for Trial Chamber III to Instigate Proceedings for Contempt of the Tribunal Against Carla Del Ponte, Hildegard Uertz-Retzlaff and Daniel Saxon", confidential, 23 March 2007.
[2] English translation of BCS original, "Addendum to Professor Vojislav Šešelj's Motion for Trial Chamber III to Instigate Proceedings for Contempt of the Tribunal Against Carla Del Ponte, Hildegard Uertz-Retzlaff and Daniel Saxon", confidential, 2 July 2007.
[3] "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.
[4] "Confidential *ex parte* Report of Amicus Curiae Directed by Decision of 29 June 2010 on Vojislav Šešelj's Motion for Contempt", confidential and *ex parte*, 5 October 2011.

Prosecution, and within 15 days of receipt of the BCS translation of the Public Version of the *Amicus Curiae* Report for the Accused.[5]

5. On 14 November 2011, the Prosecution filed "Prosecution's Observations on *Amicus* Report Filed Pursuant to Trial Chamber's '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'" ("Prosecution's Observations").[6]

6. The Accused did not draft any observation on the Public Version of the *Amicus Curiae* Report within 15 days of receipt of the BCS translation of the Public Version, as he was directed to do in the Decision of 28 October 2011.[7]

III. ARGUMENTS OF THE PARTIES

A. Arguments of the Accused in Support of the Motion for Contempt

7. The Chamber refers to the Decision of 29 June 2010 concerning arguments raised by the Accused in support of the Motion for Contempt from which it transpires in particular that, according to the Accused, members of the Prosecution resorted to threats, intimidation and bribes in order to ensure the testimony of certain witnesses named in the Motion for Contempt.[8] Sleep deprivation during interviews, psychological pressuring, blackmail, threats or even illegal payments were all practised by members of the Prosecution, according to the Accused.[9] Finally, Carla Del Ponte, Hildegard Uertz-Retzlaff and Daniel Saxon were responsible for these acts, in their capacity as, respectively, Prosecutor of the Tribunal and representatives of the Prosecution at the time of the alleged facts.[10]

[5] "Decision on New Filing of Public Redacted Version of the *Amicus Curiae* Report", public, 28 October 2011.
[6] "Prosecution's Observations on *Amicus* Report Filed Pursuant to Trial Chamber's '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 with a confidential annex, 14 November 2011.
[7] The Accused received the BCS translation of the Public Version of the *Amicus Curiae* Report on 30 November 2011 (*see* Procès-verbal of Reception filed on 2 December 2011) and therefore had until 15 December 2011 to respond.
[8] Decision of 29 June 2010, paras 13-18.
[9] Decision of 29 June 2010, para. 17.
[10] Decision of 29 June 2010, para. 13.

B. The Prosecution's Observations

8. On the one hand, the Prosecution seeks to have the Motion for Contempt dismissed and, on the other, seeks the admission of the Public Version of the *Amicus Curiae* Report and the cited documents.[11]

9. In support of its request to dismiss the Motion for Contempt, the Prosecution argues that this Motion for Contempt is one of the Accused's campaigns against the Tribunal, with the aim of manipulating and influencing witnesses and compromising the integrity of the proceedings.[12] The Prosecution submits that the Public Version of the *Amicus Curiae* Report contains a detailed analysis of the allegations by 38 witnesses who said that they had been subjected to threats and intimidation by the Prosecution;[13] that, in view of this analysis, the *amicus curiae* concluded that all of the allegations were without merit[14] and that there was no basis for contempt proceedings; that accordingly the Public Version of the *Amicus Curiae* Report exonerates the members of the Prosecution wrongly accused of having committed professional "misconduct".[15]

10. Furthermore, also in support of its request to dismiss the Motion for Contempt, the Prosecution indicated that in 2008, in other contempt proceedings, the Chamber ordered an *amicus curiae* to investigate allegations of contempt; that it adopted the conclusions of the *amicus curiae*; that it dismissed the motion on contempt without taking any further steps and that, in the same way, no additional proceeding are therefore necessary to rule on this Motion for Contempt.[16]

11. In support of its request for the admission of the Public Version of the *Amicus Curiae* Report and the cited documents,[17] the Prosecution recalls that the Chamber had expressed its intention to rely on the conclusions reached by the *amicus curiae* in weighing the credibility of the evidence in this case and dismissed as a result the requests of the Prosecution to present evidence refuting the allegations of intimidation.[18]

12. The Prosecution submits that the use of the Public Version of the *Amicus Curiae* Report for any purpose, apart from ruling on the Motion for Contempt, requires that it be first admitted into

[11] Prosecution's Observations, paras 2, 3, 7 and 14.
[12] Prosecution's Observations, para. 1.
[13] Prosecution's Observations, para. 6 and Public Version of the *Amicus Curiae* Report, para. 52. The Chamber recalls that in the Decision of 29 June 2010, it excluded from the field of investigation of the *Amicus Curiae* two witnesses, since they were neither witnesses in the case nor potential Defence witnesses (*see* in this respect para. 31 of the Decision of 29 June 2010). The Chamber notes that the identity of these two witnesses appears in the Public Version of the *Amicus Curiae*, para. 52, and that they are Vjadimir Deanović and Zarko Latinović.
[14] Prosecution's Observations, para. 6.
[15] Prosecution's Observations, para. 1.
[16] Prosecution's Observations, para. 5, footnote 4 citing the "Redacted version of the 'Decision on Motions by the Prosecution and the Accused to Instigate Contempt Proceedings Against Ms Dahl (from the Office of the Prosecutor) and Mr Vučić (Associate of the Accused)', dated 10 June 2008", public, 8 July 2008 ("Decision of 8 July 2008").
[17] Prosecution's Observations, paras 4 and 14.

evidence and, accordingly, the Parties should be given an opportunity to study a confidential version of the *Amicus Curiae* Report with fewer redactions before it is admitted.[19] The Prosecution submits in this respect that the "extensive" redactions made to the Public Version of the *Amicus Curiae* Report affect the Parties' abilities to test the conclusions of the *amicus curiae* and to assess the weight to be given to the Public Version of *Amicus Curiae* Report, in particular with respect to the admission procedure for the public version.[20] The Prosecution adds that these redactions also affect the ability of the Parties to evaluate the impact of the *amicus curiae*'s conclusions on the credibility and reliability of exhibits that they wish to analyse in their final briefs.[21]

13. The Prosecution submits that a confidential *inter partes* version of the *Amicus Curiae* Report should be transmitted to the Parties, after consulting the *amicus curiae* and the persons who provided the documents cited in the Report on what redactions to make in order to protect the safety of individuals and sensitive operational information.[22]

14. Finally, referring to case-law of the International Criminal Tribunal for Rwanda ("ICTR"), the Prosecution maintains that the investigative reports and related documents concerning the credibility of evidence have already been admitted into evidence pursuant to Rules 89 and 92 *bis* of the ICTR Rules of Procedure and Evidence.[23]

IV. APPLICABLE LAW

15. Rule 77 of the Rules of Procedure and Evidence ("Rules") states that:

> (A) The Tribunal in the exercise of its inherent power may hold in contempt those who knowingly and wilfully interfere with its administration of justice, including any person who:
> […]
>
> (iv) threatens, intimidates, causes any injury or offers a bribe to, or otherwise interferes with, a witness who is giving, has given, or is about to give evidence in proceedings before a Chamber, or a potential witness; […].

16. Rule 77 (C) of the Rules sets out the procedure when "a Chamber has reason to believe that a person may be in contempt of the Tribunal".[24] In that case, pursuant to Rule 77 (C)(ii) of the Rules, "where the Prosecutor, in the view of the Chamber, has a conflict of interest with respect to

[18] Prosecution's Observations, paras 8, 10 to13.
[19] Prosecution's Observations, paras 8-9.
[20] Prosecution's Observations, paras 9 and 14.
[21] Prosecution's Observations, paras 9 and 14.
[22] Prosecution's Observations, para. 9.
[23] Prosecution's Observations, para. 16.
[24] *See* also the English version of Rule 77 (C) of the Rules, according to which "When a Chamber has reason to believe that a person may be in contempt of the Tribunal" (not underlined in the original); *The Prosecutor v. Ramush*

the relevant conduct, [the Chamber may] direct the Registrar to appoint an *amicus curiae* to investigate the matter and report back to the Chamber as to whether there are sufficient grounds for instigating contempt proceedings".

17. Thus, with respect to the present decision, it is for the Chamber to establish on the basis of the *Amicus Curiae* Report, which the Chamber has received and the Parties have in its public redacted version, whether there are sufficient grounds to instigate proceedings for contempt against Carla Del Ponte, Hildegard Uertz-Retzlaff and Daniel Saxon.

V. DISCUSSION

A. Preliminary Observations

18. First, the Chamber recalls that the subject of the investigation of the *Amicus Curiae* Report, as defined in the Decision of 29 June 2010, was limited to the investigation of the Motion for Contempt.[25] Therefore, the present Decision comes within this framework.

19. With respect to the disclosure to the Parties of a confidential *inter partes Amicus Curiae* Report, the Chamber recalls that Rule 77 of the Rules does not indicate that the Chamber must transmit to the Parties the *Amicus Curiae* Report.[26] Nevertheless, and even though it is not required to, the Chamber wanted to disclose the Public Version of the *Amicus Curiae* Report for the sake of transparency and of informing the Parties and the public. In any case, the Chamber notes that the Prosecution does not establish how, in the context of the present decision as recalled in the previous paragraph, the failure to disclose a new confidential and *inter partes* version of the *Amicus Curiae* Report would be prejudicial to it, especially since the Prosecution is able to see for itself from the Public Version of the *Amicus Curiae* Report that the *Amicus Curiae* Report absolves the members of the Prosecution targeted in the Motion for Contempt.[27]

20. With respect to the request of the Prosecution to have the Public Version of the *Amicus Curiae* Report and the cited documents admitted into evidence, the Chamber deems that they should not become evidence in the main trial, since their ultimate purpose is to establish whether there are

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Haradinaj, Idriz Balaj and Lahi Brahimaj, Case No. IT-04-84-T, "Order Pursuant to Rule 77 C)(i) in Relation to Witness 18", public, 31 October 2007, para. 10.

[25] Decision of 29 June 2010, para. 32.

[26] *See* also in this sense, *The Prosecutor v. Pauline Nyiramasuhuko*, Case No. ICTR-98-42-T, "Decision Regarding Ntahobali, Nyiramasuhuko, and Kanyabashi's Motions to Transmit the *Amicus Curiae* Report", public, 4 March 2010 ("ICTR Decision of 4 March 2010") paras 18, 20 and 21; *The Prosecution v. Alex Tamba Brima et al.*, Case No. SCSL-04-16-T, "Decision on Confidential Defence Request for Disclosure of Independent Investigator's Report on Contempt of Court Proceedings and Request for Stay of Proceedings", public, 30 June 2005, pp. 2 and 3.

[27] *See* on this point, *mutatis mutandis*, ICTR Decision of 4 March 2010, para. 20.

sufficient grounds to instigate proceedings for contempt.[28] The Chamber further notes that the *prima facie* reliability of evidence related to the allegations of intimidation, threats and pressure brought against the Prosecution is not affected by the conclusions of the *amicus curiae*, since he concludes that the allegations are without merit. Finally, the Chamber recalls that it is solely for the Chamber to carry out the final assessment of the reliability and credibility of related evidence in light of the overall evidence during the final deliberations.

B. Conclusions of the *Amicus Curiae*

21. The *amicus curiae* was given the mandate to investigate allegations of intimidation and pressure brought by 38 "accusers" against some members of the Prosecution.[29] In his report, the *amicus curiae* indicates first of all that he eliminated from the field of his investigation eight accusers, judging that their allegations could not justify instigating proceedings for contempt.[30] The *amicus curiae* explains that he reviewed all the Prosecution documents relating to the contacts that these members had with the remaining accusers, and on this basis excluded an additional accuser on the same grounds.[31] The *amicus curiae* also specifies that he reviewed the documents provided by the Tribunal's Victims and Witnesses Section.[32] Finally, the *amicus curiae* says that he interviewed witnesses, including the investigators, prosecutors and members of the VWS, in order to obtain information needed for the investigation of the Motion for Contempt.[33] At the same time, the *amicus curiae* indicates that he did not find it necessary to interview the "accusers" since they had already provided sufficiently detailed and clear information on the allegations in their statements, testimonies and Defence interviews.[34]

22. At the end of his investigation, the *amicus curiae* reached the following conclusions:

- The testimony or statement of five accusers is false.[35]

- Six accusers testified or gave statements which, if not false, are undermined by the transcripts of complete, recorded statements they gave to the Defence or that appear in

[28] The Chamber moreover notes in this respect that the report submitted on 17 April 2008 by the *amicus curiae*, instructed by the Chamber to investigate the motion for contempt brought by the Prosecution against Mr Vučić and the motion for contempt brought by the Accused against Ms Dahl, were not admitted into evidence and neither Party requested such admission. *See* the Decision of 8 July 2008.
[29] *See* on this point footnote 13 of the present Decision. *See* also the Decision of 29 June 2010, paras 31 and 32 and the Public Version of the *Amicus Curiae* Report, paras 52 and 53.
[30] Public Version of the *Amicus Curiae* Report, para. 54.
[31] Public Version of the *Amicus Curiae* Report, para. 55.
[32] Public Version of the *Amicus Curiae* Report, para. 56.
[33] *See* in particular the Public Version of the *Amicus Curiae* Report, paras 57, 60 and 61.
[34] Public Version of the *Amicus Curiae* Report, para. 62.
[35] Public Version of the *Amicus Curiae* Report, para. 78.

books they wrote, which shows that their statements were exaggerated or that their complaints do not meet the criteria required for contempt.[36]

- Six accusers were never interviewed in the Šešelj Case.[37]

- The statements of 11 other accusers, even if they were truthful, did not constitute a contempt of the Tribunal.[38]

- Five accusers were not able to identify any person that could be charged with contempt.[39]

- There is no evidence that five other accusers ever had contact with members of the Office of the Prosecutor.[40]

23. With respect to the above, the *amicus curiae* finds that "there are not sufficient grounds to instigate proceedings under Rule 77 against any identifiable person in this case as alleged in the Accused's Motion and the statements and testimony submitted in support thereof."[41]

C. The Chamber's Conclusions

24. The Chamber duly takes note of the *Amicus Curiae* Report and finds that in light of the Report and pursuant to Rule 77 of the Rules, sufficient grounds do not exist to instigate proceedings for contempt against Carla Del Ponte, Hildegard Uertz-Retzlaff, Daniel Saxon or any other member of the Prosecution.

[36] Public Version of the *Amicus Curiae* Report, para. 79.
[37] Public Version of the *Amicus Curiae* Report, para. 80.
[38] Public Version of the *Amicus Curiae* Report, para. 80.
[39] Public Version of the *Amicus Curiae* Report, para. 80.
[40] Public Version of the *Amicus Curiae* Report, para. 80.
[41] Public Version of the *Amicus Curiae* Report, para. 880.

VI. DISPOSITION

25. **FOR THE FOREGOING REASONS**, pursuant to Rules 54 and 77 (D) of the Rules,

26. **DECIDES** that there is no need to disclose a new confidential *inter partes* version of the *Amicus Curiae* Report,

27. **DENIES** the request of the Prosecution to admit the Public Version of the *Amicus Curiae* Report as evidence in the main trial,

28. **TAKES NOTE** of the *Amicus Curiae* Report and its conclusions **AND**,

29. **DECIDES** that sufficient grounds do not exist to instigate contempt proceedings against Carla Del Ponte, Hildegard Uertz-Retzlaff, Daniel Saxon or any other member of the Prosecution with respect to the Accused's allegations relating to witnesses Jovan Glamočanin (VS-044), Nebojša Stojanović (VS-048), Aleksandar Stefanović (VS-009), Zoran Rankić (VS-017), Vojislav Dabić (VS-029), VS-1066, Nenad Jović (VS-032), Zoran Dražilović (VS-010), Zdravko Abramović, Slavoljub Jovanović, Mirolad Gogić, Zoran Subotić, Jovo Ostojić, Dragan Cvetinović, Miroslav Vuković, Srećko Radovanović, Slavko Aleksić, Borislav Bogunović, Andelko Trninić, Slobodan Zečević, Živomir Avramović, Janko Lakić, Zoran Mijatović, Milojko Lukić, Simeun Čuturić, Ana Simonović, Krsto Jasić, Goran Simović, Selemir Stojanović, Radovan Novačić, Todor Lazić, Milan Lukić, Rade Čubrilo, Marinko Vasilić, Momir Radaković, Dragan Kerkez, Muharem Ibraj, Dušanka Babić,

30. **Presiding Judge Antonetti, attaches a separate opinion and Judge Lattanzi attaches a partially dissenting opinion.**

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

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Jean-Claude Antonetti
Presiding Judge

Done this twenty-second day of December 2011
The Hague
Netherlands

[Seal of the Tribunal]

SEPARATE OPINION OF PRESIDING
JUDGE JEAN-CLAUDE ANTONETTI

First, I must provide a few explanations on why my opinion will be either confidential *ex parte*, or public.

As we have seen, the *Amicus Curiae* Report was made public after certain parts of passages were cut.

For this reason, readers who are not able to understand why a part of the report was censored need to be provided with an explanation.

I have had the opportunity many times to say that I am unhappy that our decisions are of a confidential *ex parte* or confidential nature, because I come from a legal system where there are no confidential decisions and even fewer secret ones, as the overarching principle is adversarial.

Since it was set up, the ICTY has operated on this system, which has surprised many.

The main reason for this seems to be the three parameters:

- the protection of witnesses under Rule 75 of the Rules;

- the protection of the national security interests of states under Rule 54 *bis* of the Rules;

- the safety of employees of the Tribunals in line with the Registrar's interpretation.

The Rules further take care to specify in Rule 53, under the heading "Non-disclosure" the following:

"In exceptional circumstances, a Judge or a Trial Chamber may, in the interests of justice, order the non-disclosure to the public of any documents or information until further order."

As we can see, **the public**, does not have access to all information even though justice should be transparent and accessible to everyone.

Of course, it seems vital to me to ensure that the identity of a protected witness is not disclosed to just anyone, but technically, it is possible to protect this witness without obscuring the essence of his testimony.

Equally, with respect to the documents that may concern national security of a State (again, one needs to know what these terms exactly cover), documents can be made public, after a justified redaction, solely for the purpose of national security, but all of this should be done in a public and transparent procedure.

The option chosen at the start by the first judges was very broad and more or less automatic, and this is why it is practically impossible to make public some of our decisions

To my great regret, I must take note of the "practice" and conform, which explains why **I am forced** to cut certain parts of my opinion, thus not allowing the public to know my entire argument.

Considering the importance of the matter in question in this complaint, I must add to the decision of the Chamber the present separate opinion and in a confidential and *ex parte* annex, which will not be made public because of the protected witnesses mentioned, I will expand in greater detail on some elements presented by the 34 witnesses of the Accused and the six witnesses who testified before the Chamber.

The complaint by the **Accused Šešelj** about **Ms Carla Del Ponte** and her collaborators is an extremely serious one, as it concerns the workings of international justice. In national systems, it is not common for a Prosecutor to be accused of pressuring witnesses. As a general rule, it is the investigators who are accused, in rare cases, and not the Prosecutor and his own collaborators, who represent the Ministry of Justice in a trial.

To my knowledge, this is the first time in international justice that a Prosecutor is accused of pressuring and/or intimidating witnesses in a trial. For this reason, this unusual complaint, which could potentially bring international justice into disrepute, must be dealt with **professionally and faultlessly.** In fact, it seems to me that if an accusation is brought against an international Prosecutor, appointed in line with very strict international criteria, there is a potential problem that could bring into question the institution itself.

This type of complaint cannot be brushed aside; I believe it must be dealt with promptly and competently. The person charged with dealing with the investigations must be "**the best of the best**" and, I believe, must be completely independent from the complainant and, even more

importantly, from those being accused. He must be beyond reproach as a person and in his **methods of investigation**, he must verge on perfection, to say the least. His standard of competence must be as high as possible and beyond anyone's reproach.

I must recall the arguments of the Accused in support of his complaint and the observations of the Prosecution in this matter.

I. The Position of the Accused[42]

According to Vojislav Šešelj, the Prosecution persuaded certain witnesses to testify against him and obtained Prosecution evidence by resorting to threats, intimidation and attempted bribery in order to obtain false testimony.[43] In addition to the factual elements,[44] the Accused also put forward legal arguments.

A) Legal Basis for Contempt Charges at the Tribunal[45]

The Accused defines the elements that constitute contempt as set out in Rule 77 of the Rules of Procedure and Evidence ("Rules").[46] He specifies that the *actus reus* is the physical act of violating an obligation and committing acts of threatening, intimidation, bribery and pressure or any other interference with witnesses.[47] He defines these different modes of interference precisely.[48]
The *mens rea* is the guilty intent of the perpetrator, that is, his wish to interfere with the course of justice (knowing and wilful interference).[49] He also sets out the elements that constitute an attempt.[50]

The Accused bases his contempt proceedings on the "coercion" applied by the Prosecution investigators in order to obtain false testimony against Vojislav Šešelj.

[42] "The Motion by Professor Vojislav Šešelj for Trial Chamber III to Instigate Proceedings for Contempt of the Tribunal Against Carla Del Ponte, Hildegard Uertz-Rezlaff and Daniel Saxon" ("Main Motion"), confidential, 8 March 2007; "Addendum to Professor Vojislav Šešelj's Motion for Trial Chamber III to Instigate Proceedings for Contempt of the Tribunal Against Carla Del Ponte, Hildegard Uertz-Retzlaff and Daniel Saxon", confidential, 21 May 2007.
[43] Main Motion, p. 5.
[44] Main Motion, pp. 6-23 and Addendum, pp. 7-46 and 52-137.
[45] Addendum, p. 3.
[46] Contempt of the Tribunal is committed by "those who knowingly and wilfully interfere with its administration of justice, including any person who […] threatens, intimidates, causes injury or offers a bribe to, or otherwise interferes with, a witness who is giving, has given, or is about to give evidence in proceedings before a chamber, or a potential witness".
[47] Addendum, p. 3.
[48] Addendum, pp. 3-4.
[49] Addendum, pp. 3-4.
[50] Addendum, p. 4.

B) Elements Constituting Coercion

According to the Accused, coercion is "a punishable act directed against personal freedom and […] induces a person to do something contrary to his will."[51] These constituent elements are the use of force or threats and imminent harm to a victim who acts in a manner intended by those using coercion.[52]

1. Threats or Use of Force

Threats can be "simple" or "implicit". Coercion does not have the same characteristics as in national law, since under Rule 77 of the Rules, the criteria for contempt are "fewer and less stringent".[53] The objective is to guarantee the best administration of justice.

The person making the threat must convey or indicate to a victim that he will come to harm (physical, legal, material or other); and should the nature of the harm be specified, the threat is "specific".[54] In this case, it means arrests, indictments, etc.

The type of threat is not important (verbal, written, through gestures or other implicit actions).[55] The Accused provides examples in this particular case.[56] He insists on the fact that the investigators should have followed the procedure.

A threat can be direct or indirect, that is, through a third party.[57]

2. Harm

The harm conveyed in threats should be an illegal act, as is the case when alluding to arrest or an indictment.[58]

[51] Main Motion, p. 23.
[52] "Coercion begins when force or serious threats start, or when threats are made known, and ends when the threats of imminent harm induce a person to begin to behave and act in the way intended as the result of coercion" (Main Motion, p. 23).
[53] Main Motion, p. 23.
[54] Main Motion, p. 23.
[55] Main Motion, p. 23.
[56] Main Motion, p. 24.
[57] Main Motion, p. 24.
[58] Main Motion, pp. 24-25.

A threat must have an objective; here, to obtain false testimony. It could also involve pressure on potential Defence witness. The Prosecution should obtain from all potential Prosecution witnesses an initial statement that their free will was respected.[59]

3. The Characteristics of the Case

In this case, a threat can be qualified as serious when it "can be carried out". In fact, the Prosecution can abduct anyone it wishes in Serbia.[60]

The possibility of harm implied to the "witnesses" marries into coercion, since the threat can be carried out.[61]

Coercion in this case is both direct and indirect, since it was used both on "witnesses" and on the entire Serbian population.[62]

4. Intent

The fact that the persons guilty of making threats are highly qualified persons, proves that these threats were made knowingly and willingly, in a premeditated manner.[63]

C) The Persons Responsible and the Deliberate "Style of Work of the Office of the Prosecutor"[64]

The Accused recalls Rule 77 of the Rules which states that the ICTY may hold in contempt "any person" who knowingly and wilfully inteferes with the administration of justice.

For the Accused, they are the ones who directly carried out the acts,[65] but especially the most senior officials of the Prosecution, Carla Del Ponte, Hildegard Uertz-Retzlaff et Daniel Saxon[66]. He recalls Rule 37 of the Rules.[67]

[59] Main Motion, p. 25.
[60] Main Motion, p. 26.
[61] Main Motion, p. 26.
[62] Main Motion, p. 26.
[63] Main Motion, p. 27.
[64] Main Motion, p. 27.
[65] Main Motion, p. 30.
[66] Main Motion, p. 26 ; Addendum, p. 48.
[67] Addendum, p. 6.

The Prosecution resorted simultaneously to threats, intimidation and bribery, that is, to acts that violate their professional code of conduct.

The ICTY judges, including Judge Schomburg,[68] are themselves witnesses of the "*Prosecution's disrespect for the Tribunal*".[69]

Witnesses are the main form of evidence used by the Prosecution and, at the same time, the easiest form to manipulate. Thus, the Prosecution tries to impose its system of work as a rule within the ICTY;[70] for example, by using indirect witnesses.[71]

The Prosecution has taken advantage of Šešelj's detention to intimidate as many witnesses as possible,[72] while the Accused himself has never attempted to establish contact with Prosecution witnesses.[73]

According to the Accused it is more than clear that the Prosecution has not respected the procedure set out by the Rules at all.[74] Thus, it intentionally failed to respect the obligation to disclose the documents concerning the interviews with witnesses, which constitutes additional evidence of contempt of the Tribunal. [75]

II. The Position of the Prosecution[76]

The Prosecution recalls that the motion of the Accused pursuant to Rule 77 of the Rules clearly represents part of the campaign by the Accused against the Tribunal in order to manipulate and influence witnesses and to undermine the integrity of the proceedings. Concerning this Report, it calls on the Chamber to adopt three measures:

[68] Interview published in the weekly *Globus* on 13 October 2006 (Main Motion, p. 28).
[69] Main Motion, p. 28.
[70] Addendum, p. 49.
[71] "Second-hand witnesses" (Addendum, p. 49).
[72] Addendum, p. 48.
[73] Addendum, p. 6.
[74] Main Motion, p. 31-32.
[75] Main Motion, p. 31.
[76] "Prosecution's observations on Amicus Report Filed Pursuant to Trial Chamber's '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" (Prosecution's Observations), public, 14 November 2011, with confidential annex.

A) Concerning the Contempt Proceedings: Deny the Motion for Contempt and Exonerate the Members of the Office of the Prosecutor Who Were Falsely Accused

The Prosecution does not feel that more extensive comments or proceedings with respect to the Report are needed. It relies on the procedure followed by the Chamber in 2008 for the contempt proceedings against Ms Dahl and Mr Vučić when it simply adopted the conclusions of the *amicus curiae* and denied the motions of the Accused.[77]

The Prosecution states that, in line with the *Amicus Curiae* Report, the allegations of the 38 accusers have no grounds and, therefore, there is no reason to instigate contempt proceedings in accordance with Rule 77 of the Rules. The Prosecution emphasises that the persons who were the subject of the public allegations have had their reputation brought into question, and asks that the Chamber exonerate them immediately and unequivocally, and deny the Motion of the Accused.

B) Concerning the Trial Proceedings: Admit the Amicus Curiae *Report as Evidence*

The Prosecution believes that the Chamber should first admit the Report into evidence because, firstly, the Chamber has already indicated that it will use the Report to assess the credibility of evidence in the trial,[78] the President having added that the Chamber will be bound by the conclusions of the Report in respect of the use of pressure on witnesses;

Secondly, the Prosecution must be able to present evidence to refute the allegations concerning the Prosecution witnesses;[79]

And thirdly, the Report is relevant so that the credibility of evidence presented by certain witnesses on the commission of the crimes and on the Joint Criminal Enterprise can be examined.[80]

The Prosecution deems that before admitting the Report, the Chamber should allow the Parties the possibility to test this evidence and to present observations on its admissibility.[81] In order to do so,

[77] Public version of the "Decision on Motion by the Prosecution and the Accused to Instigate Contempt Proceedings Against Ms Dahl (from the Office of the Prosecutor) and Mr Vučić (Associate of the Accused)", public, 8 July 2008.
[78] Prosecution's Observations, p. 4.
[79] Prosecution's Observations, pp. 1-5.
[80] In particular, VS-1066 and Dabić (crime-base witnesses), and Dražilović, Stojanović, Stefanović, VS-034, Glamočanin and Rankić (insider witnesses), Prosecution's Observations, para. 12.
[81] Prosecution's Observations, pp. 3 and 5.

the Parties must have access to the *inter partes* version of the Report and to the material evidence cited in the Report, after the *amicus curiae* and those who provided the evidence have been consulted as to what specific redactions need to be made in order to protect people and information. They must also be consulted and interviewed by the Parties.[82]
The Prosecution relies on the statements of the Accused[83] in this respect and the decisions of the International Criminal Tribunal for Rwanda.[84]

Finally, the Parties must also be able to present their observations on the impact and weight of the evidence in their closing arguments.[85]

C) Keep to the Trial Schedule

The Prosecution deems that the Chamber's scheduling of the closing arguments for February and March 2012 generally allows the Parties time for the admissions procedure of the Report.

As positions of the Accused and the Prosecution have been made clear, other important points must now be broached.

I will leave the responsibility for the submissions up to the Prosecution, but I must say that I am quite surprised by its arguments in respect of the admission of the Report and its possible "testing. It was quite clear that the Report would be subject **solely** to written observations of the Parties and that any "testing" by anyone would be out of the question.

In addition, it must also be quite clear that **everyone** is bound by the conclusions of the *amicus curiae*, whatever they happen to be. In this case, they go in the Prosecution's **favour**; what more could it want? Other than to spread more confusion …

The question of the credibility of witnesses will be examined **if need be** during the final deliberations by the Judges. The Prosecution will also have an opportunity, at the time of its closing argument, to say that the witnesses are credible and why, and the Accused will also have an opportunity, in his closing argument, to say why the Prosecution witnesses are not credible, in his opinion.

[82] Prosecution's Observations, pp. 4-5.
[83] Prosecution's Observations, p. 5.
[84] Prosecution's Observations, p. 6
[85] Prosecution's Observations, p. 5.

With this as their starting point, the Judges will decide during their final deliberations.

III. The Gravity of the Prosecutor's Charges

The Tribunal comprises three organs: the Judges, the Prosecutor and the Registrar. The accusations made against one of them inevitably affect the entire structure. The Office of the Prosecutor and its trial attorneys are defined by **Article 16 of the Statute of the Tribunal**.

"1. The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.

2. The Prosecutor shall act independently as a separate organ of the International Tribunal. He or she shall not seek or receive instructions from any Government or from any other source.

3. The Office of the Prosecutor shall be composed of a Prosecutor and such other qualified staff as may be required.

4. The Prosecutor shall be appointed by the Security Council on nomination by the Secretary-General. He or she shall be of high moral character and possess the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases. The Prosecutor shall serve for a four-year term and be eligible for reappointment. The terms and conditions of service of the Prosecutor shall be those of an Under-Secretary-General of the United Nations.

5. The staff of the Office of the Prosecutor shall be appointed by the Secretary-General on the recommendation of the Prosecutor."

The Prosecutor is thus at the same level as the Judges and the Registrar. He is appointed by the Security Council of the United Nations on nomination by the Secretary-General and "*shall be of high moral character and possess the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases"*. These qualities apply equally to the staff members of the Office of the Prosecutor (the trial attorneys), appointed by the Secretary-General on recommendation of the Prosecutor. The trial attorneys, thus, play an important role because, as stipulated under Rule 37 (B) of the Rules of Procedure and Evidence, "*The Prosecutor's powers and duties under the Rules may be exercised by staff members of the Office of the Prosecutor authorised by the Prosecutor, or by any person acting under the Prosecutor's direction"*. An accusation made against investigators or trial attorneys is an accusation against the **Prosecutor himself**.

Graver still are the accusations made against the investigative function. This is a fundamental function because it is on the basis of the results of the investigation that the Indictment is raised and executed by policemen who have **already** performed the investigative function in their countries. The investigator has training, knowledge and competencies, in particular competencies concerning witnesses and suspects. Consequently, **if one accuses an investigator by accusing the trial attorneys or the investigators, one undermines the equilibrium of the international institution.**

III. The Role of the Chamber in the Examination of the Report Submitted by the *Amicus Curiae*

I wish to stress that the Chamber fully conformed to its obligation of **waiting for the results of the investigation of the *amicus curiae* before pronouncing its judgement**. This obligation was firmly asserted by the Appeals Chamber of the International Criminal Tribunal for Rwanda in the case of *Tharcisse Renzaho.*[86]

In this case, Mr Renzaho's counsel informed the Registry of the Tribunal of the threats made against potential witnesses of the Defence aimed at dissuading them from testifying.[87] An *amicus curiae*, Mr Jean Haguma, was appointed with the mandate of investigating the allegations of pressure exerted on witnesses by certain Defence investigators.[88]

The *amicus curiae* handed in his report on 18 January 2008, but the report was qualified as inadequate. The Registry had to make several requests to Jean Haguma to complete his investigation.[89] On 22 July 2010, however, the Appeals Chamber was informed that Jean Haguma had died on 17 July 2002, before he could submit his complete and final report on the behaviour of Defence investigators in the *Renzaho* case.

Nevertheless, without having received the complete report of the *amicus curiae* and the testimony of all witnesses, the Trial Chamber rendered a judgement of guilty against Mr Renzaho.[90]

The Accused therefore appealed the Judgement, submitting that the Trial Chamber had committed an error of law by rendering the Judgement before receiving the results of the investigation

[86] *The Prosecutor v. Tharcisse Renzaho*, Case No. ICTR-97-31-T, Appeals Judgement, 1 April 2011 (*Renzaho* Appeals Judgement), para. 209.
[87] *Renzaho* Appeals Judgement, para. 197.
[88] *Renzaho* Appeals Judgement, para. 202, footnote 448.
[89] *Renzaho* Appeals Judgement, para. 205, footnote 460.
[90] *The Prosecutor v. Renzaho,* Case No. ICTR-97-31-T, Judgement and sentence, 14 July 2009 (*Renzaho* Judgement).

conducted by the *amicus curiae*.[91] He also argued that the Trial Chamber had infringed upon his right to a fair trial when it established that the absence of several witnesses was not prejudicial to the Accused. According to the Prosecution, however, any perceived or actual intimidation is in principle related to their participation in the proceedings.[92]

In its Appeal Judgement, the Appeals Chamber considers that, when one of the parties asserts that the trial is unfair because one of the crucial witnesses could not testify, it is incumbent on this party to demonstrate, first, that such interference has in fact taken place and, second, that all measures available for the protection of witnesses under the Statute and the Rules have been exhausted.[93] Consequently, the Trial Chamber shall **provide every practicable facility** it is capable of granting under the Rules and the Statute when faced with a request by a party for assistance in presenting its case, in order to guarantee the parties **equal access to witnesses**.[94]

Moreover, the Appeals Chamber recalls that, when a party argues on appeal that its right to a fair trial has been infringed upon, it must prove, **on the one hand**, that the provisions of the Statute and/or the Rules were violated and, **on the other hand**, that this violation caused it such prejudice and rendered the process so "*unfair*" that it amounted to an error of law invalidating the judgement.[95]

Having recalled the relevance it accorded to the right to a fair trial and the protection of victims and witnesses,[96] the Appeals Chamber considered, in the case in point, that the Trial Chamber was

[91] *Renzaho* Appeals Judgement, para. 195, footnote 426.
[92] *Renzaho* Appeals Judgement, para. 225, footnote 499.
[93] *Renzaho* Appeals Judgement, para. 196; *The Prosecutor v. Tadić*, Case No. IT-94-1, Appeals Judgement of 15 July 1999 (*Tadić* Appeals Judgement), para. 55; *The Prosecutor v. Aloys Simba*, Case No. ICTR-01-76-A, Appeals Judgement of 27 November 2007, para. 41.
[94] *Tadić* Appeals Judgement, para. 52.
[95] *Renzaho* Appeals Judgement, para. 196.
[96] *Renzaho* Appeals Judgement, para. 207.

obliged to ensure that the investigations were carried out diligently and that they were completed[97]. It also considered it unacceptable that its investigations had been abandoned without explanation.[98]

It added that, **even if the Defence does not require the Chamber's assistance** in ensuring the protection of witnesses and the conclusion of the investigation, "*the Trial Chamber must counter witness intimidation by informing them of all measures that are reasonably open to them, both at the request of the parties or* **proprio motu**".[99]

It also concluded that the Trial Chamber was well and truly obliged to ensure that the report of the *amicus curiae* had been received before delivering the Trial Judgement and that, by failing to do so, it violated the Accused's right to a fair trial.[100]

For all that, according to the Appeals Chamber, **this violation of the Accused's right to a fair trial was not sufficient in itself to render the Judgement invalid**. It must be proven that the violation caused such prejudice as to amount to an error of law invalidating the judgement.[101]

Consequently, the Appeals Chamber **examined the situation of every witness** who had not been questioned by the *amicus curiae* in order to determine whether the fact that the judgement had been rendered prior to obtaining the report on the investigation carried out by the *amicus curiae* constituted such an error of law.[102]

Regarding Witness Dieudonné Nkulikiyinka, the Chamber considered that the Trial Chamber had committed an error when it concluded that the pressures to which Dieudonné Nkulikiyinka had

[97] *Renzaho* Appeals Judgement, para. 208; *Tadić* Appeals Judgement, para. 52.
[98] *Renzaho* Appeals Judgement, para. 208.
[99] *Renzaho* Appeals Judgement, para. 209; *Haradinaj et al.* Judgement, para. 35.
[100] *Renzaho* Appeals Judgement, para. 209.
[101] *Renzaho* Appeals Judgement, para. 196.
[102] *Renzaho* Appeals Judgement, paras 210-236.

been exposed had not been sufficiently demonstrated.[103] In its opinion, a reasonable judge could not expect the Accused to establish witness intimidation while an investigation launched to that end was still ongoing.[104] Nevertheless, it also recalled that, even if it was incumbent upon the Tribunal to do its utmost to ensure that trials are fair, in particular to settle the issue of granting protective measures, the parties were not relieved of their responsibility to ensure the fully secure arrival of witnesses to the trial.[105] Also, it considered that the Accused had not established that the fact that the judgement had been delivered before the results of the investigation carried out by the *amicus curiae* were obtained caused him prejudice.[106]

Regarding Witness NIB, the Tribunal considered, as in the case of the aforementioned Witness, that it could not be incumbent upon the Accused to establish witness interference, since an *amicus curiae* had been appointed for that purpose.[107] It recalled, however, that the Accused had not exhausted all protective measures that would allow him to summon Witness NIB safely.[108] Moreover, it deemed that the Accused failed to establish the importance of this Witness for his defence, or the fact that the Trial Chamber's decision had caused him prejudice.[109] The Appeals Chamber also considered that the fact that the Trial Chamber had delivered its Judgement before the *amicus curiae* presented his report did not cause prejudice to the Accused or constitute an error of law invalidating the judgement.[110]

Regarding Witness Alexis Bisanukuli, the Appeals Chamber considered that the Trial Chamber had not committed an error of law when it found that the evidence presented by the Defence demonstrating the fear of reprisals was indirect and vague.[111] It considered that the Appellant had not exhausted all remedies available to ensure that witnesses were protected and that he failed to

[103] *Renzaho* Appeals Judgement, para. 215.
[104] *Renzaho* Appeals Judgement, para. 215.
[105] *Renzaho* Appeals Judgement, para. 216.
[106] *Renzaho* Appeals Judgement, para. 218.
[107] *Renzaho* Appeals Judgement, para. 220.
[108] *Renzaho* Appeals Judgement, para. 221.
[109] *Renzaho* Appeals Judgement, para. 222.
[110] *Renzaho* Appeals Judgement, para. 222.

establish that the absence of this victim had caused him prejudice, specifying that the elements the Witness was to testify to had already been corroborated by other witnesses.[112]

Finally, we must accept the arguments of the Appeals Chamber according to which, if a reasonable judge cannot expect the Accused to establish intimidation while an investigation launched to that end is still ongoing, the fact remains that the latter is obliged to present evidence of the prejudice he had been caused through the intimidation and absence of those witnesses. If this is not the case, the Appeals Chamber does not consider that the fact that the Trial had delivered its judgement before the results of the investigation had been made known constitutes an error of law invalidating the judgement.

In the case in question, the result of the investigation was released prior to the closing arguments.

IV. The Methodology Used by the *Amicus Curiae*

The criminal inquiry has been a subject of numerous studies described in numerous manuals, such as the *Handbook of Policing* by T. NEWBURN, or *The Oxford Handbook of Criminology* by M. MAGUIRE. Numerous works, in the US in particular, allow us to understand how an investigation is conducted.[113] Nevertheless, without going into detail, I find it necessary to reconstruct the legal framework of these investigations that were under the full and entire responsibility of the *amicus curiae*.

[111] *Renzaho* Appeals Judgement, paras 234-235.
[112] *Renzaho* Appeals Judgement, paras 234-235.
[113] *See* in particular, J. ADAM et al., *Criminal Investigation. A Practical Textbook for Magistrates, Police Officers and Lawyers*, 5th Edition, Sweet & Maxwell Limited, London, 1962; F. CLARK and K. DILIBERTO, *Investigating Computer Crime*, CRC Press, New York, 1996; W. DIENSTEIN, *Technics for the Crime Investigator*, Charles C. Thomas Publisher, Springfield, Illinois, 1952; GREENWOOD, CHAIKEN and PETERSILIA, *The Criminal Investigation Process,* D.C. Heath and Company, Lexington, Massachusetts, 1977; J.M. PALMIOTTO, *Criminal Investigation*, Nelson-Hall Publishers

Rule 77, in particular paragraph 77 (A) (iv), of the Rules defines the Contempt of the Tribunal:

> *A) The Tribunal in the exercise of its inherent power may hold in contempt those who knowingly and wilfully interfere with its administration of justice, including any person who:*
>
> > *iv) threatens, intimidates, causes any injury or offers a bribe to, or otherwise interferes with, a witness who is giving, has given, or is about to give evidence in proceedings before a Chamber, or a potential witness (…).*

The rest of the Rule distinguishes between two periods:

- the period before the Indictment (Article 77 (C)) and;
- the period after the Indictment (Article 77 (D)).

In this case, we are dealing with the period prior to the Indictment, i.e., the search for **sufficient grounds** to instigate contempt proceedings.

In the investigation phase, to find out whether sufficient grounds existed, it seemed necessary, taking into account the conflict of interests, to order the Registry to appoint an *amicus curiae*.

Only when there are sufficient grounds does the Chamber, following the report of the *amicus curiae*, find itself in the situation described under Rule 77 (D).

Chicago, 1994; J. SKOLNICK, *Justice Without Trial*, John Wiley and Sons, New York, 1966; J.Q.WILSON, *The Investigators*, Basic Books, New York, 1978.

That being the case, in the situation under Rule 77 (C), one should not immediately believe that a person is guilty of a crime simply because a complaint has been made. In order to **believe**, one needs to have **intangible evidence that goes beyond reasonable doubt**.

This approach should have been adopted by the *amicus curiae* when verifying **the materiality of facts** before deciding on whether there were **sufficient grounds** to instigate proceedings.

In my opinion, it was therefore absolutely necessary, prior to taking any steps whatsoever, to find evidence, primarily, by interviewing the **plaintiff** because one should always remember that a plaintiff might not be of a sound mind or, if he is, that he could have made up the story from start to finish.

The accusation of persons deemed respectable by virtue of their office calls for "extreme wariness" in the conduct of the investigation.

Equally, if the plaintiff is sincere, it may seem that he has been abused by others, and this is the motive behind the pressing obligation to question the 40 "witnesses" who had given statements (Cf. my opinion in the confidential annex on the facts claimed by these witnesses).

This was the groundwork that should have been done.

Bearing this in mind, in an investigation worthy of its name, the investigator in charge of showing that contempt was committed at the Tribunal must, in the first place, ask himself about the **materiality** of these allegations because, at this point, there is no room for assumptions, but only for the statements of facts. Over several decades, I have personally conducted inquiries, sometimes in cases that are, in other ways, more complicated than the one we are currently dealing with. I wish to say that an investigation into this type of crimes must, first, involve a hearing with the plaintiff

and test the evidence provided by him. The work must primarily be focused on the complaint and not on the accusatory statements because, prior to dealing with the accusations, one needs to verify the materiality of the alleged facts.

In this case, materiality would follow from a very detailed interview of the Plaintiff, followed by the hearings of his main associates, including those who have left his team (T. NIKOLIĆ and N. VUCIĆ); as well as from a very detailed hearing of each of the 40 witnesses whose statements had been attached to the complaint. This would have to be done **as a priority** because, in the light of this preliminary work, the investigator might very likely conclude that the allegations were mere fantasies, or completely groundless at this point.

Unfortunately, it must be acknowledged that the *amicus curiae* did not follow this method and, in my opinion, "put the cart before the horse".

I must say that, when I was first seized of this complaint, my initial reaction at the time, in April 2007, was to entrust this case to an *amicus curiae* who would conduct a serious investigation. Several days later, taking into consideration the seriousness of the problems, I came to the conclusion that the pre-trial Judge should conduct the investigation himself. Finally, the Trial Chamber decided to leave it up to the Judges seized of the trial to deal with the complaint.[114]

At this point, I have to specify that 6 witnesses (VS 044, VS 048, VS 009, VS 017, VS 029 and VS 1066) were not included in the initial complaint of the Accused, or its Addendum.

[114] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, "Order regarding Mr. Šešelj's Motion for Contempt Proceedings", public, 15 May 2007.

After these witnesses had testified before the Chamber and made questionable the conditions under which the investigators had taken their preliminary statements, the Chamber deemed it necessary to include them into the *amicus curiae*'s investigation.

This task was done while the witnesses were being heard. One need only to refer oneself to the *transcripts* to conclude that each witness was systematically questioned on the conditions in which his previous statements had been taken.[115] However, during the hearing of 12 May 2010, the Accused informed the Chamber that an interpreter had accused a member of the Office of the Prosecutor of the manner in which he had conducted the investigation.[116] From that crucial moment, the investigation entered a new dimension and I seriously wondered whether the present Chamber could continue exercising its mandate ensuing from the "first" decision, or whether the complaint should be passed on to another Chamber.

In fact, I seriously wondered whether the handling of this complaint by the present Chamber would not risk delaying the main case, which has priority over everything else.

It should be kept in mind that the Indictment was raised on 15 January 2003 and confirmed on 14 February 2003, and that the Accused Vojislav Šešelj surrendered voluntarily on 23 February 2003.

He has therefore been in pre-trial detention since 24 February 2003. Bearing this in mind, as the judge in charge, I have done everything to avoid any needless delays, even on pain of the trial being criticised by all parties.

[115] As was the case with Witness Vojislav Dabić (VS-029) who testified on 26 and 27 January 2010, T(F) 15103–15107, public hearing.
[116] T(F), 12 May 2010, pp. 16003-16005, public hearing.

The current Prosecutor of the Tribunal, Mr Serge Brammertz, said in an interview that this trial is not an example for international justice.[117]

I fully agree with the expressed point of view and take the liberty of reminding the Prosecutor that the trial is still ongoing because, against all obstacles, the Prosecution wanted to impose a *stand-by* counsel on the Accused,[118] causing in him a reaction of total resistance, all the way to a hunger strike, endangering his life in such a way that the Appeals Chamber granted him the right of self-representation. Moreover, the Prosecution also requested an adjournment of the trial due to the allegations of witness intimidation;[119] the cumulative effect of these two positions taken by the Prosecution has led to a considerable delay of the trial.

Inasmuch as the President of the Tribunal recalled that, before any decision is made, the "first" decision had to be amended, the Chamber **unanimously decided** to appoint an *amicus curiae*, and did so by its Decision of 29 June 2010.[120] From my point of view, an *amicus curiae* should have outstanding qualities and my first instinct was to recommend a professional magistrate with experience in international investigations, for example someone like Judge Garzón. In my view, this was all the more necessary because the appointment of the *amicus curiae* meant that **our discretionary powers would be fully delegated to the *amicus curiae***. There is no ambiguity

[117] Trial to Seselj Unsuccessful Story, Prosecutor Brammertz Claims – V.I.P : "*A trial to Vojislav Seselj is not an example of how the international law should function, because it is obviously an unsuccessful story and it has lasted so long, the chief prosecutor Serge Brammertz said, Tanjug agency reported on Thursday. He explained there have been many delays, Seselj was on hunger strike, he represented himself before the court and he did not make it easy for the court to speed up the trial. However, Brammertz believes that the trial will enter its final phase in March, after which a judgement will be handed down. Ambassador of Russia in UN Vitali Curkin requested earlier from the Hague Tribunal and the prosecutor Brammertz to explain why the trial to Seselj lasted nearly nine years, and the first instance judgement was not handed down yet. "Seselj's case is horrid and he has been in detention for nine years without a judgement and we are concerned about this", Curkin said at a meeting of the UN Security Council. Curkin expects that Brammertz will provide his opinion about this as well as about Seselj's medical condition in the next report*".

[118] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, "Prosecutor's motion for order appointing counsel to assist Vojislav Šešelj with his defence", public, 28 February 2003; "Prosecutor's second motion for order appointing counsel to assist Vojislav Šešelj with his defence", partially confidential, 22 May 2006.

[119] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, public version of the "Consolidated Decision on Assignment of Counsel, Adjournment and Prosecution Motion for Additional Time", public redacted, 24 November 2009, paragraph 13, footnote 20 citing, for the oral request, the hearing of 15 January 2009, T(F) 13591, 13593-13595 (private session) and for the written motion, "Urgent Prosecution Motion for Adjournment", confidential and *ex parte*, 16 January 2009, para. 17.

whatsoever in my opinion of 29 September 2011 where I clearly stated that, depending on the conclusions of the *amicus curiae*'s report, several legal situations could potentially ensue; this was to say that the Chamber had **limited competence** and would not question the final conclusions of the *amicus curiae*, whether good or bad.

The *amicus curiae* submitted his conclusions, and, although I wholeheartedly agree with him that there was no contempt of court, I absolutely do not agree with **the method** he followed, and this for the following reasons.

A) The Responsibility Incumbent Upon the Judges and the Tribunal

Firstly, I have a very precisely defined responsibility towards the victims. In their eyes, I have to appear as an impartial and extremely professional judge; otherwise they may doubt the competence of an international court of law that is in charge of trying the perpetrators of the crimes committed against them. Upon hearing their story, a professional judge must give his all, his best, to reach a conclusion in a professional manner. Such responsibility towards these victims calls for us to cast a highly critical look at the report of the *amicus curiae*.

Secondly, notwithstanding the victims, I also have a responsibility towards the witnesses, be they Prosecution or Defence witnesses. If they testify, it is because they believe in international justice and because they have faith in the judges; otherwise, what purpose would giving testimony serve? The witnesses identified in the Accused's complaint gave him statements authenticated in accordance with the procedures of the Serbian state, which were attached to the complaint. These witnesses expect the judge and thus, *a fortiori*, the investigator, to take into account their statements, even if they said that they had lied, or that their statements had been taken under duress.

[120] *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, "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 redacted, 29 June 2010.

In this case, too, they should be interviewed, which, unfortunately, the *amicus curiae* avoided doing.

Thirdly, I also have a particular responsibility towards the members of the Office of the Prosecutor, because the Office of the Prosecutor is an organ of the Tribunal and, let me repeat, any criticism against it affects the entire Tribunal. Inasmuch as the Office of the Prosecutor proclaims its innocence and rejects any accusations, as a judge, I have the duty of verifying **all** their arguments in order to present them in my decision as irreproachable. The members of the Office of the Prosecutor thus expect the judge and the investigator to clear them and to restore their honour by conducting an **irreproachable investigation procedure**. If the investigation is poorly conducted, they may rightly assume that doubt will remain, and this doubt must be completely removed to that they can once again assume the role of irreproachable representatives of the international community. My task is therefore either to severely sanction them in case of misconduct, or re-establish their worthiness. There is no room for half-measures in this case because we are dealing with their honour and reputation.

Fourthly, regarding the Accused who claims to be the greatest enemy of the Tribunal. I must act so that he understands that a judge of this Tribunal is independent, impartial and competent. If the Accused, who lodged the complaint, has doubts about these three fundamental qualities, he will never be convinced that his cause has been **fairly** tried and might conclude that there is a bias against him. I state and claim: no *a priori* positions whatsoever have been taken with respect to this Accused, the Chamber's decision concerning him will be taken at the moment of the **final deliberations** and of the **pronouncement of the Judgement**. For the time being, this Accused is **presumed innocent** and, as such, when he draws up a complaint, I must examine it seriously, if I wish to avoid losing credibility, because if I fall victim to such workings, it will mean that he was right to accuse the Tribunal.

This seems all the more crucial because of the public accusations made against our institution by persons of indisputable character who said the following in a text published in *Le Monde*:

"The proceedings developed by the ICTY call more to mind the trials conducted by totalitarian regimes than the great principles of international law to which they supposedly adhere. It was the very judges she had criticised who lodged the complaint, ordered and, subsequently, ran the investigation, indicted her, appointed the prosecutor, suggested the prosecution witnesses, eliminated the defence witnesses, handed down a conviction and convicted her on appeal. All this without ever precisely specifying the charges against her, all the better to sabotage her defence. If their inability to tolerate criticism can drive the judges to turn the international legal system upside-down, it means that they are undermining the credibility of international justice".

As we can see, I personally cannot espouse a scheme described as a trial of a "totalitarian regime". I therefore must clarify certain elements in this separate opinion.

Fifthly, and finally, I am bound to irreproachable behaviour by my **judge's oath**. One of the fundamental aspects of this oath is that of competence. One cannot act at being a judge, as one can at being a construction worker. Anyone can put one brick on top of another, but not everyone can render a judgement. Rendering justice is a mission requiring highest possible standards of competence, and competence is assessed in particular by the manner in which a judge is able to conduct an investigation. Unfortunately, I must say that this investigation has not been conducted according to the rules of the profession; it suffers from several omissions.

B) The Omissions in the Investigation of the Amicus Curiae

1. Failure to interview the Plaintiff and the witnesses mentioned in his Motion[121]

The first of the omissions resides in the fact that the *amicus curiae* did not consider it helpful, for reasons of his own, to interview the plaintiff and the witnesses mentioned in his Motion. And yet, this procedural step would have been necessary. How can we explain to a plaintiff that his complaint has been taken into account if the investigation does not revolve around it? Certainly, the investigator was faced with a considerable amount of work, but it was up to him to submit to the Chamber, in case of a problem, a request for an additional *amicus curiae* and/or subordinate investigators; we have to admit that this was never done. In this context, the questioning of the Accused at the Scheveningen prison would have taken half a day at the most (it is not at all certain, for that matter, whether the Accused would have accepted to respond to the questions of the *amicus curiae*). Conducting interviews with the witnesses attached to the Motion on the basis of a questionnaire would not have taken a lot of the time either. This was, thus, a procedural choice which was very much open to criticism.

2. Failure to submit the records of witness testimonies for persons questioned

Secondly, the *amicus curiae* questioned the members of the Office of the Prosecutor, including Carla Del Ponte.[122] That is very good, but we should have also been given a document of the interview, signed by those concerned, which might have allowed the investigator to carry out an objective analysis. Quite reversely, his report only contains subjective summaries, inevitably influenced by his own conclusions, without our being able to consult a signed document to find out

[121] Public redacted version of the "Report of *Amicus curiae* Directed by Decision of 29 June 2010 on Vojislav Šešelj's Motion for Contempt" (Public report of the *amicus curiae*), public, 5 October 2011, paras 62-76.
[122] Public report of the *amicus curiae*, paras 150-158.

what the witnesses said. As far as I know, I do not remember an investigation conducted by elaborating on a subjective analysis without records of statements being attached to the report…

Faced with such a situation, and in view of these failures, the logic would have dictated the Chamber to request that an additional investigation be conducted or that the *amicus curiae* be replaced. I did not envisage this because, as the judge in charge, I had to take into account other parameters and balance them out with the observed insufficiencies. Thus, if I were in pursuit of a perfect investigation, restarting it according to the rules of the profession would have taken months or, indeed, years, and the Accused has been in pre-trial detention for almost nine years. I cannot reconcile myself to this and, like a surgeon, I must proceed with the amputation to prevent a spreading gangrene. This image fits our case perfectly. I must therefore proceed with "a judicial amputation" and remain within the limit of the report.

My objective is to save the essence of this case and thus prune all that may slow down the course of justice, in particular all legal errors, in order to forge ahead. I am well aware that the Accused will once again reproach the Tribunal and the judges for the lack of professionalism because he will have a profound feeling that his complaint has not been treated in accordance with the rules of the profession. I cannot but subscribe to this view, but faced with contradictory interests, I am obliged to focus on the essence: to render as soon as possible a judgement on events which took place more than 15 years ago. Regarding events that may have occurred recently, these may not be taken into consideration in the overall assessment due to a judicial amputation in the interest of international justice which requires that **justice be rendered swiftly.**

It will always be to the Judge's credit if he rules in the sense that the facts which led to the commission of crimes are decided in the interest of the victims. The rest is peripheral for it will always be easy to accuse an investigator, this may frequently happen; it is not surprising and should not **paralyse** a trial.

In conclusion, I delegated all my discretionary powers to the *amicus curiae*, insisting that he conduct a serious and thorough investigation. I expected a lot from him. We have to admit, unfortunately, that he failed to achieve his objective. I am sorry about that, but it is unfortunately too late to restart the machine and, at this important moment, it is also highly likely that after **a full investigation,** I would have arrived at the same conclusion as the *amicus curiae*, even though it should have been arrived at in accordance with the rules of the profession.

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

/signed/

Jean-Claude Antonetti

Presiding Judge

Done this twenty-second day of December 2011

The Hague (the Netherlands)

[Seal of the Tribunal]