**UNITED NATIONS**

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| | International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of former Yugoslavia since 1991 | Case No. | IT-03-67-R77.2 |
| | | Date: | 24 July 2009 |
| | | Original: | English |

**IN THE TRIAL CHAMBER**

**Before:** **Judge O-Gon Kwon, Presiding**
**Judge Kevin Parker**
**Judge Iain Bonomy**

**Registrar:** **Mr. John Hocking**

**Judgement of:** **24 July 2009**

**PROSECUTOR**

**v.**

**VOJISLAV ŠEŠELJ**

***PUBLIC***

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# PUBLIC EDITED VERSION OF "JUDGEMENT ON ALLEGATIONS OF CONTEMPT" ISSUED ON 24 JULY 2009

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***Amicus Curiae* Prosecutor:**

Mr. Bruce MacFarlane, Q.C.

**The Accused:**

Mr. Vojislav Šešelj

# CONTENTS

# I. PROCEDURAL HISTORY

1. On 10 October 2008, the Office of the Prosecutor in the case of *Prosecutor v. Vojislav Šešelj* ("*Šešelj* case") filed a confidential and *ex parte* "Prosecution's Motion under Rule 77 Concerning the Breach of Protective Measures" ("Motion"), in which it sought, *inter alia*, an order in lieu of an indictment to prosecute Vojislav Šešelj ("Accused") for contempt under Rule 77(D)(ii) of the Rules of Procedure and Evidence of the Tribunal ("Rules"). The Motion was filed originally before Trial Chamber III, which is trying the *Šešelj* case ("*Šešelj* Trial Chamber"). On 29 October 2008, the President of the Tribunal ordered that this Chamber deal with the Motion.

2. On 21 January 2009, the Chamber issued an order in lieu of an indictment ("Indictment"), which charged the Accused with one count of contempt of the Tribunal, punishable under Rule 77(A)(ii) of the Rules, for "knowingly and wilfully interfering with the administration of justice by disclosing confidential information in violation of orders granting protective measures" in respect of witnesses (together, the "Protected Witnesses"), and "by disclosing excerpts of the written statement" of a witness in a book authored by him, ("Book") .[1]

3. On 11 February 2009, Bruce MacFarlane, Q.C., was appointed as *Amicus Curiae* Prosecutor in this case ("*Amicus* Prosecutor").[2]

4. On 3 March 2009, the Accused submitted a disqualification motion against Judge Carmel Agius, which was filed on 27 March.[3] On 2 April, Judge Agius decided to recuse himself in the interests of ensuring a fair and expeditious process.[4] On 3 April, the President assigned Judge Iain Bonomy to the case.[5]

5. The Accused pleaded not guilty during the initial appearance held on 6 March 2009 and chose to represent himself.[6] A Status Conference was held on 7 May 2009 and the trial was conducted on 29 May 2009, after a short pre-trial conference on the same day.

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1 Decision on Allegations of Contempt, 21 January 2009, public version, pp. 7-8.
2 Ex. P7, "Acting Registrar's Decision of 11 February 2009".
3 *See* Order Regarding the Filing of a Motion, 25 March 2009.
4 *See* Decision on Motion for Disqualification and Order Replacing a Judge in a Case before a Trial Chamber, 3 April 2009, p. 3, referring to "Report Concerning Vojislav Šešelj's Motion for Disqualification of Judge Agius from Case IT-03-67-R77.2", submitted to the President pursuant to Rule 15(B)(i) by Judge Kwon (the Trial Chamber considered that a Judge other than Judge Agius, then Presiding Judge of Trial Chamber II, should submit the report to the President pursuant to Rule 15(B)(i)).
5 Decision on Motion for Disqualification and Order Replacing a Judge in a Case before a Trial Chamber, 3 April 2009.
6 Initial Appearance, T. 2, 9 (6 March 2009); *see* also T. 14 (7 May 2009) (on the issue of self-representation).

6. No witnesses were called during the course of trial. The *Amicus* Prosecutor tendered into evidence 32 exhibits, out of which 25 were admitted under seal.[7] On 3 June 2009, the Accused submitted five press articles in support of his oral submissions.[8]

## II. APPLICABLE LAW

7. While the Tribunal's power in respect of contempt is not expressly articulated in the Statute, it is however firmly established that the Tribunal possesses an inherent jurisdiction, deriving from its judicial function, to ensure that its exercise of the jurisdiction expressly given to it by the Statute is not frustrated and that its basic judicial functions are safeguarded.[9] As such, the Tribunal possesses an inherent power to deal with conduct interfering with its administration of justice.[10]

8. Rule 77(A) of the Rules identifies various forms of conduct falling under the Tribunal's inherent jurisdiction. According to this provision, the Tribunal

> (A) 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:
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> (i) being a witness before a Chamber, contumaciously refuses or fails to answer a question;
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> (ii) discloses information relating to those proceedings in knowing violation of an order of a Chamber;
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> (iii) without just excuse fails to comply with an order to attend before or produce documents before a Chamber;
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> (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; or
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> (v) threatens, intimidates, offers a bribe to, or otherwise seeks to coerce any other person, with the intention of preventing that other person from complying with an obligation under an order of a Judge or Chamber.

9. In the present case, the Accused is charged with contempt of the Tribunal pursuant to Rule 77(A)(ii) for having disclosed information relating to Tribunal's proceedings in knowing violation of an order of a Chamber. Disclosure of information within the meaning of this Rule includes the publication of a witness's identity where protective measures have been granted to avoid such

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7 T. 42 (29 May 2009).

8 *See also* Order on the Filing of the Accused's Submission 419, 9 June 2009.

9 *Prosecutor v. Tadić*, Case No. IT-94-1-A-R77, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 January 2000 ("*Vujin* Judgement"), para. 13; *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-AR77, Judgment on Appeal by Anto Nobilo Against Finding of Contempt, 30 May 2001 ("*Nobilo* Appeal Judgement"), para. 36.

10 *Vujin* Judgement, para. 13. *See also ibid*., paras 18, 26(a); Nobilo Appeal Judgement, para. 30.

disclosure.[11] The passing of confidential information to a third party would amount to disclosure, as would its inclusion in a publication such as a newspaper or a book. In addition, the act of disclosing the particular information must objectively breach an order issued by a Trial or Appeals Chamber, whether such order is written or oral.[12] The *mens rea* element for this form of commission of contempt is the knowledge of the alleged contemnor that his disclosure of a particular piece of information is done in violation of an order of a Chamber. Proof of actual knowledge of an order, which can be inferred from a variety of circumstances, satisfies this element. The Appeals Chamber has held that mere negligence in failing to ascertain whether an order had been made granting protective measures to a particular witness could never amount to contempt.[13] However, it has also held that either wilful blindness or reckless indifference to the existence of the order granting protective measures to a witness is sufficiently culpable conduct to be dealt with as contempt.[14]

10. The formulation of Rule 77(A) indicates that knowing and wilful interference with the administration of justice is a consequence of the disclosure of information relating to Tribunal proceedings in knowing violation of an order of a Chamber.[15] There is therefore no additional requirement for the Prosecution to prove that such interference actually occurred.[16]

# III. SUBMISSIONS

## A. The *Amicus* Prosecutor

### 1. Concerning the material element

11. The *Amicus* Prosecutor submits that the Protected Witnesses can be identified by "anyone with a reasonable intellect"[17] who reads the Book, as it abounds with "identifier information"

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[11] *Nobilo* Appeal Judgement, para. 40(c). The Appeals Chamber referred to three different types of conduct which amount to contempt in the common law system, including "the publication of a witness' identity where protective measures have been granted to avoid such disclosure, with knowledge of the existence of those measures and with the specific intention of frustrating their effect, where the contempt is based not upon the violation of the order granting protective measures but because the disclosure interfered with the administration of justice. *Ibid*., referring to *Attorney-General v Leveller Magazine Ltd*, *per* Lord Diplock (at 452), Lord Russell (at 467-468) and Lord Scarman (at 471-472). *See* also *Prosecutor v. Domagoj Margetić*, Case No.: IT-95-14-R77.6, Judgement on Allegations of Contempt, 7 February 2007, para. 15.

[12] *Prosecutor v. Ivica Marijačić and Markica Rebić*, Case No. IT-95-14-R77.2, Judgement, 10 March 2006 ("*Marijačić and Rebić* Judgement"), para. 17.

[13] *Nobilo* Appeal Judgement, para. 45.

[14] *Ibid*., paras 45, 54.

[15] *See also Prosecutor v. Milošević*, *Contempt Proceedings Against Kosta Bulatović*, Case No. IT-02-54-R77.4, Decision on Contempt of the Tribunal, 13 May 2005, para. 17. In its decision on the appeal of this decision, the Appeals Chamber held that the Trial Chamber had not erred in this particular aspect of its ruling. *Prosecutor v. Milošević*, Case No. IT-02-54-A-R77.4, Decision on Interlocutory Appeal on Kosta Bulatović Contempt Proceedings, 29 August 2005, para. 40.

[16] *Marijačić and Rebić* Judgement, para. 19.

[17] T. 46 (29 May 2009); *see also ibid*., T. 51-52 (29 May 2009).

relating to the Protected Witnesses.[18] He contends that the three Protected Witnesses may be recognised by virtue of the Book disclosing extensive and detailed personal information about each of them.

2. Concerning the mental element

12. The *Amicus* Prosecutor submits that the Accused knew that the Protected Witnesses were protected and gave particular instructions for the Book to be compiled the way it was. It was the Accused's intention and plan to ensure the respective pseudonym and name of the Protected Witnesses would not appear together in the same area of the Book.[19]

## B. The Accused

1. Concerning the material element

13. Both before and during trial, the Accused admitted to being the author of the Book and having given instructions for its preparation.[20]

14. Concerning the gravity of the alleged offence, the Accused asserts that very few people would have the time to "read a book that is 1,200 pages long just to have the names of protected witnesses disclosed".[21] He stresses that the Book was not for the general public,[22] and that no one would have been able to identify the Protected Witnesses without having received some sort of indications prior to reading the Book.[23] The Accused further submits that it is often possible during proceedings conducted at the Tribunal to identify a protected witness on the basis of the subject of his or her testimony.[24] The Accused additionally contends that the Protected Witnesses appeared in public several times and gave interviews to newspapers using their real names, during which they communicated to the public the information they had previously revealed to the Office of the Prosecutor in the *Šešelj* case ("*Šešelj* Prosecution").[25] It is the Accused's submission that the Motion is just one of several attempts by the *Šešelj* Prosecution to have the Accused found guilty of contempt so that counsel may be imposed on him.[26]

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18 T. 39, 46, 51-52 (29 May 2009); *see also ibid*., T. 53-54 (29 May 2009) (private session).
19 T. 50 (29 May 2009).
20 Ex. P32, "T. 29-30 (7 May 2009)". The Accused stated as follows: "Not only do I accept the fact that I am the author of the Book, I'm very proud of being the author of that book […] I'm very satisfied to have been the author of that book. So that is an indubitable fact." T. 36 (29 May 2009).
21 T. 93 (29 May 2009).
22 T. 98 (29 May 2009).
23 T. 96-97 (29 May 2009).
24 T. 92 (29 May 2009).
25 T. 95 (29 May 2009).
26 T. 100-101 (29 May 2009); *see also* T. 96 (29 May 2009).

2. Concerning the mental element

15. The Accused argues that his intention was not to disclose the names of the Protected Witnesses, but to "unmask a plot in public" with respect to some events referred to in the indictment against him in the *Šešelj* case.[27] He explains that the Book was in fact a "study" attached to one of his submissions, which he later decided to publish.[28]

16. The Accused further contends that he did not reveal the names of the protected witnesses for the purpose of intimidating them.[29] To that effect, the Accused argues that, had he intended to intimidate witnesses, he would have "instructed someone to write a pamphlet printed in 10 or 20 pages and distributed it around".[30]

# IV. RESPONSIBILITY OF THE ACCUSED

## A. The material element of the offence

(a) Whether the Protected Witnesses were the subject of protective measure decisions or orders at the time the Book was published?

17. The Chamber has examined the written and oral decisions granting protective measures to the Protected Witnesses in the *Šešelj* case.

18. On 13 March 2003, the *Šešelj* Trial Chamber had decided that the non-disclosure to the public of the supporting material provided to the Accused in support of the indictment was justified due to exceptional circumstances relating to the safety of victims and witnesses.[31]

19. The Chamber is therefore satisfied that the Book was published after the decisions granting protective measures in respect of the witnesses had been issued and that, therefore, the disclosure to the public of the identity of the Protected Witnesses was prohibited.

(b) Whether the Book reveals the identity of the Protected Witnesses?

20. As further described below, the Book indicates that the witnesses are protected witnesses in the *Šešelj* case and offers a detailed description of each witness's personal information.

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27 T. 37 (29 May 2009).
28 T. 87-88 (29 May 2009).
29 T. 105 (29 May 2009).
30 T. 99 (29 May 2009).
31 Ex. P3, "*Šešelj* case, Decision on Prosecution's Motion for Order of Non-disclosure of 13 March 2003", p. 3, para. 3.

(i) First Witness

21. The Chamber is satisfied beyond a reasonable doubt that the information contained in the Book, when read as a whole, identifies the witness and thus violates the *Šešelj* Trial Chamber's decisions.

(ii) Second Witness

22. The Chamber is satisfied beyond a reasonable doubt that the information contained in the Book, when read as a whole, identifies the witness and thus violates the *Šešelj* Trial Chamber's decision. In addition, the Chamber notes that the Book reprints word for word numerous paragraphs from his confidential witness statement, and specifically indicates that the paragraphs originate from a statement given by the witness to the Prosecution. The Chamber is satisfied beyond a reasonable doubt that the publication of the statement of is a violation of the *Šešelj* Trial Chamber's decision.

(iii) Third Witness

23. The Chamber is satisfied beyond a reasonable doubt that the information contained in the Book, when read as a whole, identifies the witness and violates the *Šešelj* Trial Chamber's decisions.

## B. The mental element of the offence

24. As regards the question whether the Accused knew that the information contained in the Book was subject to protection orders or decisions issued by the Tribunal at the time of its publication, the Chamber notes that the decisions granting protective measures were *inter partes* documents, and that the Accused attended the hearing where additional protective measures were assigned to the witnesses.

25. The Chamber further notes that the witness statement of one of the Protected Witnesses was disclosed to the Accused on 17 March 2003 as part of the supporting material. The receipt provided to the Accused along with the supporting material indicated in English and BCS, *inter alia*, that the witness statement was not in the public domain. A Registry representative reported that the Accused did not sign the receipt on the basis that it was written in a language he did not understand but that he generally accepted service of the material. On 25 November 2005, a "replacement version of the supporting materials" for the modified amended indictment was disclosed to the Accused. The materials included the witness statement, and the receipt signed by the Accused reiterated, both in English and BCS, that the statement was not in the public domain.

26. The Accused was therefore aware of the protective measures granted to the Protected Witnesses and of the confidential status of the witness statement. The Accused's "strict instructions to [his] associates not to mention in this study the names of the protected witnesses" confirm that he knew of the protective measures accorded to them.[32] The Chamber is therefore satisfied beyond a reasonable doubt that the Accused knew he was disclosing information which identified the Protected Witnesses when he published the Book.

27. In the Chamber's view, Šešelj's contention that his motive for publishing the Book was to "unmask a plot in public" is irrelevant for the purposes of the present discussion as is his submission that the *Amicus* Prosecutor failed to prove that his intent was "to reveal the names of the protected witnesses for the purpose of intimidating them".[33] The Chamber reiterates that the *mens rea* element for the form of commission of contempt charged under Rule 77(A)(ii) is solely the knowledge of the alleged contemnor that his disclosure of a particular piece of information is done in violation of an order of a Chamber. Therefore, the *Amicus* Prosecutor was not required to demonstrate that the Accused had intended to intimidate the Protected Witnesses by disclosing their identities. The Accused also advanced during trial that the *Amicus* Prosecutor had presented no evidence suggesting that any of the Protected Witnesses had actually been threatened or intimidated after the Book was published.[34] However, the Accused is not charged under Rule 77(A)(iv). Further, the Chamber notes that, for the purposes of establishing the responsibility of an accused for having threatened, intimidated, or otherwise interfered with a witness under Rule 77(A)(iv) of the Rules, it is immaterial whether the witness was *actually* threatened, intimidated, deterred or influenced.[35]

28. It is observed that the fact that protected witnesses testifying at the Tribunal may occasionally be identified by persons in the public despite the use of a pseudonym as well as other protective measures cannot justify the disclosure of confidential information in a book published by an accused before the Tribunal. The Accused was bound to ensure that the information contained in the Book would not identify, or tend to identify the Protected Witnesses.

29. One of the five articles in support of the Accused's submissions that the full name and occupation of one of the Protected Witnesses were already available to the public before the publication of the Book is an interview with the said witness. The article does not contain any references to the pseudonym assigned to him in the *Šešelj* case. This article does not, therefore,

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32 T. 88 (29 May 2009).
33 T. 105 (29 May 2009).
34 T. 95 (29 May 2009).
35 *Prosecutor v. Astrit Haraqija and Bajrush Morina*, Case No. IT-04-84-R77.4, Judgement on Allegations of Contempt, 17 December 2008 ("*Haraqija and Morina* Judgement"), para. 18.

support the submission of the Accused that the identity of the Protected Witnesses was available to the public prior to the publication of the Book. The Chamber thus considers that this newspaper article has no effect on its previous finding that the Accused knew that the witness had been granted a pseudonym by the *Šešelj* Trial Chamber and intentionally published information in the Book leading to the revelation of his identity as a witness before the Tribunal. Similarly, the other four articles submitted by the Accused do not affect the Chamber's previous finding.

30. The Chamber is therefore satisfied beyond a reasonable doubt that the Accused knew he was disclosing information which identified three persons as protected witnesses before the Tribunal when he published the Book, and that, therefore, he did so intentionally, with the knowledge that by doing so he was violating Trial Chamber decisions.

# V. WITHDRAWAL OF THE BOOK FROM THE ACCUSED'S WEBSITE

31. In the Indictment issued on 21 January 2009, the Trial Chamber had directed the *Amicus* Prosecutor to propose redactions to the Book which, if implemented, would prevent identification of the Protected Witnesses.[36] The *Amicus* Prosecutor filed his proposals on 18 May 2009.[37] Given the degree and extent of redactions to the Book that would be required to ensure that the identification of the Protected Witnesses is no longer possible, the Chamber considers that the withdrawal of the Book in its entirety from the Accused's internet website is warranted.

# VI. SENTENCING

## A. Submissions of the Parties

### 1. The *Amicus* Prosecutor

32. The *Amicus* Prosecutor argues that the Accused "embarked on a deliberate course of action". He endeavoured to camouflage the names of the witnesses but, at the same time, knew that the witnesses would be identified, and "in that sense exposed them to the world".[38] The *Amicus* Prosecutor submits that the scope of the publication is to be taken into consideration when deciding upon the sentence to impose, and particularly, the fact that "the world can read the Book on the Accused's website".[39]

[36] Indictment, public version, para. 13.
[37] Prosecutor's Submission Respecting Proposed Redactions, confidential, 18 May 2009.
[38] T. 84 (29 May 2009).
[39] T. 84 (29 May 2009).

33. The *Amicus* Prosecutor points to the fact that the Protected Witnesses had been accorded "very tight protection" as an aggravating feature. Furthermore, the *Amicus* Prosecutor argues that the intention of the Accused was "to try to manipulate or intimidate the witnesses by exposing them".[40] He submits that a term of imprisonment "on the upper range as being appropriate on the facts of the case" is required in the present case so as to make it clear that the Tribunal "will not tolerate this sort of manipulation and subterfuge".[41]

2. The Accused

34. The Accused submits that "sanctions for contempt of court are symbolic" and, in his case, "even ludicrous", as he has already spent several years in prison. The Accused shows total disregard for any sanction.[42]

## B. Sentencing law

35. Rule 77(G) of the Rules provides that the maximum penalty that may be imposed on a person found to be in contempt of the Tribunal shall be a term of imprisonment not exceeding seven years, or a fine not exceeding 100,000 Euros, or both.

36. Article 24(2) of the Statute and Rule 101(B) of the Rules provide factors to be taken into account in the determination of sentence, although they do not constitute "binding limitations on a chamber's discretion to impose a sentence".[43] The most important factors to be taken account of in determining the appropriate penalty in this case are the gravity of the contempt and the need to deter repetition and similar conduct by others.[44] The Chamber has also considered whether there are any aggravating and mitigating circumstances.

## C. Findings

37. The Chamber finds that the deliberate way in which the protective measure decisions issued by the *Šešelj* Trial Chamber were defied amounts to a serious interference with the administration of justice. In particular, the Chamber takes into consideration the potentially adverse impact of the Accused's conduct upon the witnesses' confidence in the Tribunal's ability to guarantee that

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40 T. 84 (29 May 2009).

41 T. 85 (29 May 2009). The *Amicus* Prosecutor submitted that he had reviewed "virtually all of the contempt cases from 1999 to 2008, and in some instances a monetary penalty was imposed, in other instances a term of imprisonment, anywhere between 3, 4, and 5 months has been imposed by the Chamber." T. 84 (29 May 2009).

42 T. 94 (29 May 2009) ("What do I care about the sanctions that you can impose against me?").

43 *See*, *e.g.*, *Haraqija and Morina* Judgement, para. 103; *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Judgement, 19 April 2004, paras 241-242.

44 *See*, *e.g.*, *Haraqija and Morina* Judgement, para. 103; *Prosecutor v. Domagoj Margetić*, IT-95-14-77.6, Judgement on Allegations of Contempt, 7 February 2007, para. 84.

protective measures will be effective in the future. Public confidence in the effectiveness of protective measure orders and decisions is absolutely vital to the success of the work of the Tribunal.[45] Furthermore, the Chamber recognises the need to discourage this type of behaviour, and to take such steps as it can to ensure that there is no repetition of such conduct on the part of the Accused or any other person.

38. The Chamber, therefore, imposes a penalty which recognises the gravity of the breach and the need for deterrence.

39. In the instant case, taking due account of the gravity of the offences and the other factors referred to above, the Chamber considers that a single term of imprisonment of fifteen months is appropriate in this case.

## VII. DISPOSITION

40. For the foregoing reasons, having considered all the evidence and arguments presented by the parties, pursuant to Rules 54 and 77 of the Rules, the Chamber:

1. **FINDS** the Accused, Vojislav Šešelj, **GUILTY** of one count of contempt of the Tribunal, punishable under Rule 77(A)(ii) of the Rules;

2. **SENTENCES** the Accused to a single term of imprisonment of fifteen months; and

3. **ORDERS** the Accused to secure the withdrawal of the Book from his internet website and to file a report with the Registrar on the actions taken to this effect by 7 August 2009.

[45] *Marijačić and Rebić* Judgement, para. 50.

A confidential and public version of this Judgement is issued in English and French, the confidential English text being authoritative.

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Judge O-Gon Kwon, Presiding

_____ _____
Judge Kevin Parker Judge Iain Bonomy

Dated this twenty-fourth day of July 2009
At The Hague
The Netherlands

**[Seal of the Tribunal]**