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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: 24 November 2009

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IN TRIAL CHAMBER III

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

Registrar: **Mr John Hocking**

Decision of: **24 November 2009**

THE PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC

PUBLIC VERSION OF THE "CONSOLIDATED DECISION ON ASSIGNMENT OF COUNSEL, ADJOURNMENT AND PROSECUTION MOTION FOR ADDITIONAL TIME WITH SEPARATE OPINION OF PRESIDING JUDGE ANTONETTI IN ANNEX"

The Office of the Prosecutor

Mr. Mathias Marcussen

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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 a motion filed confidentially and *ex parte* by the Office of the Prosecutor ("Prosecution") on 29 July 2008 for the assignment of counsel ("Motion for Assignment of Counsel"),[1] of an *Addendum* to the Motion filed confidentially on 14 November 2008 ("*Addendum*"),[2] and a Supplement to the Motion filed confidentially and *ex parte* on 28 August 2009 ("Supplement").[3] The Chamber is also seized of a Motion filed confidentially by the Prosecution on 12 February 2009, in which the Prosecution requests additional time to complete the presentation of its case ("Motion for Additional Time").[4] The Chamber is also seized of an oral request from Vojislav Šešelj ("Accused") for reconsideration of the Decision on the adjournment of proceedings rendered at the hearing of 18 August 2009 ("Request for Reconsideration of Adjournment"),[5] repeated during the hearing of 20 October 2009.[6]

I. PRELIMINARY OBSERVATIONS

2. The Chamber recalls that at the hearing of 20 October 2009 it had already expounded on part of the disposition of this Decision on the Motion for Assignment of Counsel, by referring to the written statement of the reasons and announcing the adoption of alternative measures.[7]

3. The Chamber agrees with the Prosecution's argument according to which the Chamber should rule on all the aforementioned Motions prior to the resumption of the

[1] "Prosecution's Motion to Terminate the Accused's Self-Representation" and Annexes, confidential and *ex parte*, 29 July 2008; confidential *inter partes* version filed on 30 July 2008 and Annexes filed on 1 August 2008; public version filed on 8 August 2008 ("Motion for Assignment of Counsel"). *See* also the *corrigendum* filed confidentially and *ex parte* on 8 September 2008, in which the Prosecution makes some corrections to paragraph 24 of the Motion for Assignment of Counsel.
[2] "Prosecution's Urgent *Addendum* to Motion to Terminate the Accused's Self-Representation; Request for an Order for the Immediate Cessation of Violations of Protective Measures for Witnesses; and Notification of Intent to Invoke Rule 68 (iv)", confidential, 14 November 2008 ("*Addendum*"); *see* also "Annexes in Support of Prosecution's Urgent *Addendum* to Motion to Terminate the Accused's Self-representation", confidential, 17 November 2008.
[3] "Prosecution's Supplement to its Motion to Terminate the Accused's Self-Representation", public with confidential and *ex parte* Annexes, 28 August 2009 ("Supplement").
[4] "Prosecution's Motion for Sufficient Time to Complete the Presentation of the Evidence", confidential, 12 February 2009 ("Motion for Additional Time").
[5] Hearing of 18 August 2009, T (F) pp. 14704-14709.
[6] Hearing of 20 October 2009, T (F) pp. 14771-14774.
[7] Hearing of 20 October 2009, T (F) pp. 14751-14752.

trial.[8] It notes, moreover, that the arguments submitted by the parties in these Motions are closely interrelated and consequently finds it necessary to assess them simultaneously and to provide a reply within the framework of a consolidated decision, bringing together all the issues regarding the resumption of the hearing of the remaining witnesses.

4. The Chamber also points out that in its consideration of these Motions it was necessary to review not only the procedural history of the case before the Chamber, but also take into account the allegations of contempt pending before the Appeals Chamber. [redacted]

5. The Chamber specifies finally that it will provide a public version of this Decision as soon as possible.

II. PROCEDURAL BACKGROUND

A. Regarding the assignment of counsel

6. The Motion for Assignment of Counsel was filed confidentially and *ex parte* on 29 July 2008, in which the Prosecution requested that the Accused be assigned counsel for the remainder of the proceedings,[9] due to the alleged existence of a campaign of intimidating witnesses and that allowing the hearings of the remaining witnesses to continue under these circumstances would damage the integrity of the proceedings.[10] A confidential *inter partes* version of this Motion was filed on 30 July 2008 and a public version was filed on 8 August 2008.

7. On 11 November 2008, the Accused confidentially filed a response to the Motion for the Assignment of Counsel ("Response to the Motion for Assignment of Counsel"),[11] following the oral Decision rendered publicly by the Chamber on the

[8] See Submission of 18 August 2009, paras 8-9.
[9] Motion for Assignment of Counsel, para. 1.
[10] Motion for Assignment of Counsel, paras 135, 137(a).
[11] Submission No. 401 – "Response by Professor Vojislav Šešelj to the Prosecution's Motion to Terminate the Accused's Self-representation", submitted on 25 September 2008 and filed confidentially on 11 November 2008 (" Response to Motion for Assignment of Counsel").

same day which stated that only the first part of the response containing 31,256 words would be filed.[12]

8. On 14 November 2008, the Prosecution submitted an *Addendum* to the Motion for Assignment of Counsel, only filed confidentially, in which it referred to the publication of four books by the Accused, [redacted] ("Books").[13] The Prosecution submitted that the publication of these books in itself warranted the immediate assignment of counsel.[14]

9. On 25 November 2008, the Chamber decided to stay its decision on the Motion for Assignment of Counsel [redacted], ("Decision of 25 November 2008").[15] At the same time, it stayed its decision on the *Addendum* pending the written response of the Accused to the *Addendum.*[16] A confidential *inter partes* version of this Decision was filed on 25 November 2008 and a public version was filed on 27 November 2008.

10. On 13 January 2009, the Accused confidentially filed his response to the *Addendum* ("Response to the *Addendum*").[17]

11. On 14 January 2009, [redacted], the Prosecution reiterated its request that the Accused be assigned counsel ("Oral Request of 14 January 2009").[18]

12. On 24 March 2009, the Chamber dismissed, by way of a confidential decision, the Motion for Assignment of Counsel and the *Addendum* with regard to the behaviour of the Accused in court, and by a majority, Presiding Judge Antonetti of the Chamber dissenting, deferred its decision on the Oral Request of 14 January 2009 and

[12] Hearing of 11 November 2008, T (F) pp. 11552-11553.
[13] *Addendum*, para. 2, [redacted], *see* Annex B of the *Addendum*; [redacted], *see* Annex G of the *Addendum*; [redacted], *see* Annex H of the *Addendum* [redacted], see Annex I of the *Addendum*.). [redacted]
[14] *Addendum*, para. 4.
[15] "Decision on Prosecution Motion to Terminate the Accused's Self-representation"; confidential and *ex parte* version filed on 25 November 2008; confidential *inter partes* version filed on 25 November 2008; public version filed on 27 November 2008 ("Decision of 25 November 2008"), para. 27.
[16] Decision of 25 November 2008, paras 17, 27.
[17] "Submission No. 410 - Response by Professor Vojislav Šešelj to the Prosecution's Urgent *Addendum* to Motion to Terminate the Accused's Self-Representation" ("Response to the *Addendum*"), submitted on 16 December 2008 and filed confidentially on 13 January 2009. The Chamber had granted the Accused an extension on the time-limit to file his response at the hearing of 9 December 2008 (*see* Hearing of 9 December 2008, T (F) p. 12705).
[18] Hearing of 14 January 2009, T (F) pp. 13357-13358 (closed session).

on the *Addendum* with regard to the Accused's behaviour outside the courtroom, [redacted].[19]

B. Regarding reconsideration of adjournment

13. During the hearing of 15 January 2009, the Prosecution seized the Chamber of an oral request presented in private session, repeated as a written motion that added no further information and filed confidentially on 16 January 2009, in which the Prosecution submitted that the Chamber should adjourn the present proceedings [redacted] and that failing to do so would endanger the integrity of the proceedings ("Motion for Adjournment").[20] The Accused objected to this Motion during this hearing.[21]

14. By way of a confidential decision dated 22 January 2009 regarding the Motion for Adjournment ("Decision of 22 January 2009"), the Chamber ordered a stay on decisions[22] [redacted].[23]

15. By way of its Decision of 11 February 2009 with regard to the Motion for Adjournment, the Chamber, by a majority, with Judge Antonetti dissenting, decided to adjourn the hearing of the remaining witnesses of the Prosecution, [redacted] until the Chamber orders otherwise ("Decision on Adjournment").[24]

16. During the hearing of 18 August 2009, the Accused presented an oral request for reconsideration of the Decision on Adjournment, in which he requested that the hearing of the remaining Prosecution witnesses be continued ("Request for

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[19] "Decision regarding Prosecution's Urgent *Addendum* and Oral Application of 14 January 2009" ("Decision on the *Addendum*"); confidential and *ex parte* version, filed on 24 March 2009; confidential *inter partes* version filed on 24 March 2009, para. 22.
[20] Hearing of 15 January 2009, T (F) pp. 13591, 13593-13595 (private session). *See* also "Urgent Prosecution Motion for Adjournment", confidential and *ex parte*, 16 January 2009; confidential version filed on 16 January 2009 ("Motion for Adjournment"), para. 17.
[21] Hearing of 15 January 2009, T (F) pp. 13596-13598 (private session).
[22] The Accused objected orally to the adjournment of his trial during the hearing of 15 January 2009 (*see* Hearing of 15 January 2009, T (F) pp. 13596-13598, closed session).
[23] "Decision on Prosecution Motion for Adjournment", confidential, 22 January 2009 ("Decision of 22 January 2009"), referring to: Hearing of 13 January 2009, T (F) pp. 13266-13270 (closed session). Hearing of 14 January 2009, T (F) pp. 13352-13361 (closed session).
[24] "Decision on Prosecution Motion for Adjournment with Dissenting Opinion of Judge Antonetti in Annex", confidential, 11 February 2009; public version filed on 11 February 2009 ("Decision on Adjournment").

Reconsideration of Adjournment"),[25] and which he repeated during the hearing of 20 October 2009.[26]

17. By way of written submissions filed on 18 and 21 August 2009, the Prosecution opposed the request for reconsideration of adjournment ("Response to Oral Request for Reconsideration of Decision to Adjourn Trial")[27]. The Prosecution repeated its position at the public hearing on 20 October 2009.[28]

C. Regarding additional time

18. On 12 February 2009, the Prosecution filed a motion requesting a further 19 hours in order to complete the presentation of its evidence ("Motion for Additional Time").[29]

19. At the hearing of 7 May 2009, the Accused opposed this Motion.[30]

D. [redacted]

20. [redacted]

21. [redacted]

22. On 24 July 2009, Trial Chamber II rendered a Judgement sentencing the Accused to 15 months of imprisonment for having disclosed confidential information, concerning three protected Prosecution witnesses, in his book on the Hrtkovci Affair published in November 2007, and ordered that the Accused remove this information

[25] Hearing of 18 August 2009, T (F) pp. 14705-14709.
[26] Hearing of 20 October 2009, T (F) pp. 14771-14774.
[27] *See* "Prosecution's Submissions on the Continuation of Trial", confidential and *ex parte*, 18 August 2009 ("Submission of 18 August 2009"). *See* also "Prosecution's Response to Oral Request for Reconsideration of Decision to Adjourn Trial", confidential and *ex parte*, 21 August 2009; confidential version filed on 21 August 2009 ("Response to Request for Reconsideration of Adjournment").
[28] Hearing of 20 October 2009, T (F) p. 14778.
[29] "Prosecution's Motion for Sufficient Time to Complete the Presentation of the Evidence", confidential, 12 February 2009 ("Motion for Additional Time"), para. 11.
[30] Hearing of 7 May 2009, T (F) pp. 14508-14514.

from his website ("Judgement of 24 July 2009").[31] The Accused has appealed this decision.[32]

23. [redacted]

24. [redacted]

III. ASSIGNMENT OF COUNSEL

A. Arguments of the parties

1. Arguments of the Prosecution

25. In the Motion for Assignment of Counsel, the Prosecution seeks in essence the immediate termination of the Accused's right to self-representation and, as a consequence, the removal of his privileged associates from the case and the assignment of counsel to the Accused for the remainder of the proceedings.[33]

26. The Prosecution submits that counsel must be assigned to the Accused in light of a comprehensive campaign of general obstruction, a campaign which depends entirely on the Accused's right to represent himself. The Prosecution submits that since the start of the proceedings the Accused's continually disruptive and filibustering actions have substantially and persistently obstructed the proper conduct of the proceedings, both in and out of the courtroom.[34]

27. [redacted]

28. [redacted]

29. [redacted]

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[31] "Judgement on Allegations of Contempt", confidential, 24 July 2009; redacted public version filed on 24 July 2009 ("Judgement of 24 July 2009"), paras 50, 59. [redacted].
[32] *See* "Notice of Appeal Against the Judgement on Allegations of Contempt of 24 July 2009", submitted on 18 August 2009 and filed on 25 August 2009.
[33] Motion for Assignment of Counsel, para. 1.
[34] *Id.*, para. 29. The Chamber notes that the arguments concerning the conduct of the Accused inside the courtroom were already the subject of a dismissed motion (*see infra* para. 59). It is for this reason that the Chamber does not go into detail with regard to the allegations of the Prosecution on the conduct of the Accused in the courtroom in this Decision.

30. The Prosecution submits furthermore that [redacted] it is therefore incumbent upon the Chamber to require that all the Accused's future publications obtain pre-publication clearance by the Chamber or the Registry, [redacted][35]

31. The Prosecution also requests that members of the Accused's defence team, allegedly involved in publishing these Books, be immediately suspended from the case and barred from having privileged contact with the Accused and from access to any confidential information.[36]

32. The Prosecution also informs the Chamber of its intention to invoke Rule 68 (iv) of the Rules with respect to the disclosure of documents regarding protected witnesses.[37]

33. In its Oral Request of 14 January 2009, [redacted], the Prosecution repeated its request for the assignment of counsel to the Accused [redacted].[38]

34. The Prosecution notes that the right of an accused to self-representation is not absolute and that Tribunal jurisprudence has found, following the example of other international criminal courts and the European Court of Human Rights, that a decision for the assignment of counsel may be taken where it is in the interests of justice.[39]

35. In its Supplement, the Prosecution submits that counsel must be assigned to the Accused, in the interests of justice, pursuant to Rule 45 *ter* of the Rules, due to the Accused's conviction for contempt in the Judgement of 24 July 2009.[40] According to the Prosecution, the assignment of counsel as provided by this Rule must be considered even in the case of a single act resulting in a conviction for contempt.[41] The Prosecution submits, therefore, that the Accused's conviction of contempt in the

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[35] *Id.*, para. 47.
[36] *Id.*, paras 46, 50; *see* also paras 18-2, 29-30, 32 concerning the participation of members of the Defence team in the publication of the Hrtkovci Affair; paras 34, 36 concerning the participation of members of the Defence team in the publication of the Book on Ms Dahl; paras 37-40 concerning the participation of members of the Defence team in the publication of the Book on Ms Del Ponte; paras 43-45 concerning the participation of members of the Defence team in the publication of the Instrumentalization of The Hague.
[37] *Addendum*, paras 1, 48.
[38] Hearing of 14 January 2009, T (F) pp. 13357-13358.
[39] Supplement, paras 13-14.
[40] Supplement, paras 2, 12.
[41] Supplement, para. 15.

Judgement of 24 July 2009 is in itself sufficient to warrant the assignment of counsel.[42]

36. The Prosecution argues moreover that the assignment of counsel may be justified for conduct considerably less serious than that for which the Accused was sentenced and cites in support of this argument the Decision rendered by a Trial Chamber[43] in the *Kunarac et al.* Case on 14 March 2000, as well as a Decision rendered in *The Prosecutor v. Janković and Stanković* Case ("*Janković* Decision"), which dealt specifically with an incidence of a violation of an order on witness protection measures.[44]

37. The Prosecution also claims that the need to protect victims and witnesses has a direct bearing on a Chamber's ability to ensure a fair trial in the interests of justice.[45]

38. The Prosecution also compares the situation to that of a defence counsel and notes that conduct such as that for which the Accused was sentenced could result in the disqualification of the counsel under Rule 44 of the Rules,[46] and that under Rule 77 (I) of the Rules, a Chamber may determine that a defence counsel is no longer eligible to represent an accused.[47]

39. The Prosecution notes furthermore that the Accused's conviction for contempt coupled with his previous conduct demonstrate that his interference in the conduct of the proceedings is both substantial and persistent.[48]

40. The Prosecution observes in this respect that on two prior occasions, in 2005 and 2006, the Accused disclosed confidential information concerning witnesses in breach of orders on protective measures.[49] The Prosecution adds that Trial Chamber I,

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[42] Supplement, paras 6, 7-26.
[43] Supplement, para. 23 citing the Janković Decision and *The Prosecutor v. Kunarac et al.*, Case No. IT-96-23 and 23/1, "Decision on the Request of the Accused Radomir Kovać to Allow Mr. Milan Vujin to Appear as co-counsel acting *pro bono*", 14 March 2000, paras 14 and 17.
[44] Supplement, para. 16, citing *The Prosecutor v. Janković and Stanković*, Case No. IT-96-23/2-PT, "Reasons for Decision on Assignment of Defence Counsel" ("*Janković* Decision"), 19 August 2005, paras 10, 24; *see* also Supplement, para. 17.
[45] Supplement, para. 20.
[46] Supplement, para. 22.
[47] Supplement, para. 23.
[48] Supplement, paras 6, 28.
[49] Supplement, para. 29. Referring to the "Decision on Assignment of Counsel", rendered by Trial Chamber I on 21 August 2006, paras 54 and 63, in which the Chamber notes that the Accused disclosed

seized of the matter at the time, considered in August 2006 that a violation of that kind compromised the integrity and fairness of the proceedings and warranted the assignment of counsel, which was upheld by the Appeals Chamber.[50] [redacted]

41. The Prosecution also submits that the Accused did not comply with the order of Trial Chamber II to remove the book containing confidential information from his website and to report on the actions taken to this effect to the Registry by 7 August 2009.[51]

42. The Prosecution argues that the publication of the book on the Hrtkovci Affair took place after the Appeals Chamber found that the Accused's conduct warranted the assignment of counsel and that the Accused had been duly warned in 2006 by Trial Chamber I and the Appeals Chamber that he could be assigned counsel for having breached witness protection measures.[52] The Prosecution argues consequently that a further warning that a conviction for contempt could lead to the assignment of counsel is not required, insofar as the Accused's conduct is undeniably criminal and in violation of the Chamber's orders.[53]

2. Arguments of the Accused

43. The Accused opposes the Motion for Assignment of Counsel, submitting that it is the Prosecution who is obstructing the trial.[54] Furthermore, according to him, he cannot be deprived of the right to represent himself. Even should he feel that he is not qualified to represent himself, he may engage counsel of his own choosing.[55]

44. The Accused submits that the allegations of obstruction outside the courtroom are unfounded since he is not in a position that would allow him to wage a campaign

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confidential documents to members of his expert team despite the fact that they were not authorised to have access to them and that the Accused revealed the name of a protected witness during a telephone conversation with a person not entitled to have access to confidential information.
[50] Supplement, para. 29.
[51] Supplement, paras 5, 31.
[52] Supplement, paras 5, 9-10.
[53] Supplement, para. 9, footnote 9.
[54] Response to the Motion for Assignment of Counsel, pp. 11-24.
[55] *Id.*, p. 56.

of intimidation as alleged by the Prosecution.[56] The Accused dismisses furthermore all the allegations of interference with witnesses [redacted].[57]

45. The Accused concludes his Response to the Motion for Assignment of Counsel with a detailed presentation of the violations of his fundamental rights he experienced as an accused before his transfer to The Hague and during the proceedings before the Tribunal.[58] The Accused notably cites the political reasons motivating his indictment, [59] the length of the proceedings,[60] the legal insecurity due to the frequent amendments of the Rules,[61] the political nature of the Tribunal, [62] and more generally the questioning of his right to self-representation.[63]

46. In his Response to the *Addendum*, the Accused, giving the same reasons he submitted with regard to the Motion for Assignment of Counsel, requests that the Chamber dismiss the *Addendum*[64] and claims that by filing the *Addendum* the Prosecution is trying to exploit the fact that a new Rule 45 *ter* was introduced into the Rules on 4 November 2008.[65]

47. The Accused also states that the Prosecution resorts to contempt proceedings in order to conceal the violations it has committed against him,[66] and that at any rate, under Rule 77 of the Rules, there is no provision that the penalty for contempt of the Tribunal is the assignment of counsel.[67]

48. The Accused adds that the Prosecution is committing an abuse of procedure and attempting to intimidate him by invoking arguments that it has repeated time and again with the intention of imposing counsel on him, and by manipulating witnesses who are not even aware that they will be called as Prosecution witnesses.[68] He affirms moreover his commitment to the principle of the public nature of the trial and

[56] *Id.*, pp. 41-50.
[57] *Id.*, pp. 50-56.
[58] *Id.*, pp. 57-86.
[59] *Id.*, pp. 57-62.
[60] *Id.*, pp. 62-65.
[61] *Id.*, p. 65.
[62] *Id.*, pp. 65-66.
[63] *Id.*, pp. 69-86.
[64] Response to the *Addendum*, pp. 2 and 3, 10.
[65] *Id.*, pp. 3, 8.
[66] *Id.*, pp. 8-9, 14.
[67] *Id.*, p. 9.

suggests that it is possible that some information was never disclosed to him[69] and that the Prosecution, by imposing certain procedures *ex parte*, is attempting to conceal it own lies and falsifications.[70]

49. The Accused submits furthermore that he is perfectly capable of representing himself and that any interference with his right to defend himself would constitute a violation of the principles of a fair trial and equality of arms.[71] He adds that the Prosecution's arguments regarding members of his defence team are unfounded[72] and argues that the preparation of his defence is affected by the numerous bans and limitations imposed with regard to his communication with members of his defence team.[73] He also submits that the Prosecution has repeatedly violated the disclosure requirements set forth in Rules 66 and 68 of the Rules.[74]

50. At the hearing of 10 September 2009, the Accused claimed that the Supplement could not rely on the Judgement of 24 July 2009 as he had filed an appeal against the Judgement on 25 August 2009.[75] The Accused added that he refused in any event to respond to this request due to the fact that it contains *ex parte* sections.[76]

B. APPLICABLE LAW

51. Under Article 21 (4) of the Statute, all accused persons are entitled to certain guarantees, among which the right for self-representation or to have legal assistance of their own choosing, pursuant to Article 21 (4) (d) of the Statute.

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[68] *Id.*, pp. 3, 8, 15-17.
[69] *Id.*, p. 14.
[70] *Id.*, p. 16.
[71] *Id.*, pp. 3, 8, 16.
[72] *Id.*, p. 13.
[73] *Id.*, p. 16.
[74] *Id.*
[75] Hearing of 10 September 2009, T (F) p. 14727. *See* also "Submission No. 422 – Notice of Appeal Against the Judgement on Allegations of Contempt of 24 July 2009", Appeal of 25 August 2009.
[76] Hearing of 10 September 2009, T (F) pp. 14731, 14735.

52. However, the Appeals Chamber, notably in this case, found that although this right is indisputable, it is not absolute and may be subject to certain limitations when five successive conditions have been met.[77]

53. A Trial Chamber may, if circumstances so require, restrict the right of an accused to self-representation if it finds firstly that the accused is acting in an obstructionist fashion, namely repetitive disruptive behaviour that substantially and persistently obstructs the proper and expeditious conduct of the trial. Nevertheless, "it cannot be that the only kind of disruption legitimately cognizable by a Trial Chamber is the intentional variety".[78]

54. The Appeals Chamber further specifies that, in such cases, the Chamber must issue the accused with a prior warning clearly stating that if he persists with this conduct, counsel will be assigned to ensure his defence. In this way, an accused is fully and fairly informed and may, therefore, change his behaviour.[79] A warning with regard to possible assignment of counsel must be explicit, be it in the form of a written or an oral statement which must clearly explain the behaviour in question and specify that should it persist, the consequence will be a restriction on the accused's right to self-representation.[80]

55. In its Decision of 8 December 2006, the Appeals Chamber further specifies that, to assess the behaviour of the Accused, the Trial Chamber must apply the "clean slate principle", that is to say that after issuing a warning to the Accused, it may not assign counsel "without first establishing additional obstructionist behaviour on the part of Šešelj warranting that imposition".[81] The Appeals Chamber also specifies that

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[77] *See The Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.7 "Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defence Counsel", 1 November 2004 ("*Milošević* Decision"); *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR73.3, "Decision on Appeal against the Trial Chamber's Decision on Assignment of Counsel", 20 October 2006 (" Decision of 20 October 2006"); *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR73.4, "Decision on Appeal against the Trial Chamber's Decision (N°2) on Assignment of Counsel", 8 December 2006 ("Decision of 8 December 2006").

[78] *See* Decision of 8 December 2006, paras 19 and 25, citing the *Milošević* Decision paras 12-14. *See* also the Decision of 20 October 2006, paras 8, 26 (on determining obstructionist behaviour). *See* also the Decision of 8 December 2006, paras 20 (on the need for persistent behaviour), 28 (on determining obstructionist behaviour).

[79] Decision of 20 October 2006, para. 23.

[80] Decision of 20 October 2006, para. 26.

[81] Decision of 8 December 2006, paras 24-27.

the decision whether or not to assign counsel must be taken on a case by case basis, taking into consideration all the particular facts of the case in point.[82]

56. In addition, as upheld by the Appeals Chamber, where a Trial Chamber restricts an accused's right to represent himself, it must be guided by the proportionality principle such that the restrictions imposed "must be limited to the minimum extent necessary to protect the Tribunal's interest in assuring a reasonably expeditious trial."[83] Such a restriction is only acceptable if it is suitable, necessary and when its degree and scope remain in a reasonable relationship to the envisaged target[84] and, as confirmed by the Human Rights Committee, it must be the least intrusive instrument amongst those which might achieve the desired result and it must be proportionate to the interest to be protected.[85]

57. Finally, the Appeals Chamber considers that prior to deciding to restrict a fundamental right such as that of self-representation, the Trial Chamber is under obligation to ensure that the accused is heard.[86]

58. Rule 45 *ter* of the Rules, adopted on 4 November 2008 — after the aforementioned Decisions of the Appeals Chamber and one year after the start of these proceedings — sets forth moreover that a Trial Chamber may, if it decides it is in the interest of justice, instruct the Registrar to assign counsel to represent the interests of the accused.

C. DISCUSSION

1. Preliminary Observations

59. The Chamber notes, *in limine*, that it has already ruled on the Accused's behaviour in the courtroom in its Decision of 25 November 2008 and in its Decision on the *Addendum*, and considered:

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[82] Decision of 20 October 2006, para. 20.
[83] *Milošević* Decision, para. 17; Decision of 20 October 2006, para. 48.
[84] *The Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66-AR65, 31 October 2003, para. 13.
[85] *Milošević* Decision, para. 17, citing the Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6, 12 May 2003, pp. 186 and 187.
[86] Decision of 20 October 2006, para. 52, footnote page 136.

> As regards the first category of allegations, the Chamber considers that with respect to the Accused's behaviour in the courtroom, the Chamber itself has exercised control which on numerous occasions has led it, on the one hand, to redact from the public version of the trial transcript the erroneous assertions the Accused has made against witnesses in cross-examination or against the Prosecutor and, on the other hand, to order the Accused to stop making his often overly aggressive statements. The Chamber considers therefore that in the Motion the Prosecution has failed to provide the Chamber with sufficient evidence of the Accused's behaviour inside the courtroom that would enable it to conclude, at this stage and on this basis alone, that the Accused is unable to continue to represent himself and, consequently, to deprive him of his right that has recognized by the Appeals Chamber. Furthermore, the Chamber notes that, on several occasions, it has had the opportunity to observe that the Accused is capable of successfully conducting a cross-examination.[87]

> The Chamber recalls that in its Decision on the Motion to Assign Counsel, it considered, with respect to the conduct of the Accused *inside* the courtroom, that it had had an opportunity to observe that the Accused was able to conduct a cross-examination successfully and that the Prosecution had failed to provide sufficient evidence enabling it to conclude, at that stage and on that basis alone, that the Accused was unable to continue to represent himself, or to deprive him of a right that had been recognized by the Appeals Chamber. In this connection, the Chamber considers that the Prosecution has failed to provide any additional information in the Addendum enabling it to arrive at a different conclusion at this stage, and that this argument is without foundation.[88]

60. Finally, with regard to the Accused's behaviour outside the courtroom, the Chamber decided, in its Decision of 25 November 2008 and the Decision on the *Addendum,* to stay its decision on the Motion for Assignment of Counsel and the *Addendum*, [redacted].[89] [redacted] the Chamber considers nevertheless that in light of the procedural developments outlined above, namely, [redacted] the Judgement of 24 July 2009 [redacted] it has some new information which allows it to rule on the issue of the assignment of counsel to the Accused, as it did at the hearing of 20 October 2009, [redacted].

2. Regarding the Scope of Rule 45 *ter* of the Rules

61. According to the Prosecution's interpretation, Rule 45 *ter* of the Rules permits, following a single act of contempt, the circumvention of jurisprudence established by the Appeals Chamber and the assignation of counsel. In support of this opinion, the

[87] Decision of 25 November 2008, paras 23-24 (without the footnotes).
[88] Decision on the *Addendum*, para. 16 (without the footnotes), referring to the Decision of 25 November 2008, paras 23-24.

Prosecution only provides one example, the *Janković* Decision,[90] which was rendered in August 2005.

62. The Chamber notes firstly that the *Janković* Decision was rendered by a Trial Chamber during the pre-trial stage and prior to the Appeals Chamber's ruling in October and November 2006 on the need for verification that the above-mentioned five cumulative conditions, of which notably the requirement of persistent and sufficiently serious disruptive behaviour, have been met prior to assigning counsel in this case.

63. Finally, the Chamber does not share the Prosecution's interpretation of Rule 45 *ter* of the Rules. According to the Chamber, the clear terms of Rule 45 *ter* of the Rules indicate that the objective pursued by the adoption of this provision was to codify, and not modify, case-law by specifically recognising the discretionary power of a Chamber to assign counsel in the interests of justice. The Chamber considers moreover that the Appeals Chamber's jurisprudence continues to have effect since it defines the conditions under which counsel may be assigned without in any way contradicting the terms of Rule 45 *ter* of the Rules. The Prosecution's interpretation is moreover unreasonable in that it tends to ignore the principles of proportionality and the proper administration of justice, which underlie the *Milošević* Decision, as well as the Decisions of 20 October 2006 and of 8 December 2006 in this case.[91] This provision must therefore be interpreted in the light of the Appeals Chamber's pre-existing jurisprudence.[92]

64. In this respect, the Chamber wishes to point out that the Trial Chamber seized of *The Prosecutor v. Radovan Karadžić* case ("*Karadžić* Case") complied with this jurisprudence in the decision it rendered on 5 November 2009: after having described the behaviour of the Accused Karadžić as obstructionist in the light of his failure to attend proceedings, the Chamber recalled the several warnings that it had issued to him that the consequence of persisting with that behaviour would be the assignment of

[89] Decision of 25 November 2008, paras 17, 27; Decision on the *Addendum*, para. 22.
[90] Supplement, paras 15 and 16 citing *The Prosecutor v. Gojko Janković and Radovan Stanković*, Case No. IT-96-23/2-PT, "Decision Following Registrar's Notification of Radovan Stanković's Request for Self-representation", 19 August 2005 ("*Janković* Decision"), paras 10 and 24.
[91] *Milošević* Decision, para. 17; Decision of 20 October 2006, para. 23.

an appointed counsel.[93] Furthermore, the Chamber decided that an appointed counsel would be assigned to start preparations should the accused Karadžić fail to attend hearings or should he engage in conduct deemed by the Chamber as continually disruptive so as to substantially and persistently obstruct the proper and expeditious conduct of the trial, and not on the basis of a single act of the accused.

65. The Chamber notes moreover that although the Prosecution's interpretation of Rule 45 *ter* of the Rules was admitted, Rule 6 (D) of the Rules would prevent, in any event, the application of Rule 45 *ter* of the Rules. This provision was introduced on 4 November 2008, that is to say several months after the Motion for Assignment of Counsel was filed,[94] and its consequent application according to this interpretation would unquestionably prejudice the rights of the Accused, given that the presentation of the Prosecution evidence has almost concluded and that the crucial part of this measure would weigh, if need be, on the Defence's presentation of evidence.

3. Have the conditions to assign counsel to the Accused been met?

(a) Preliminary Observations

66. The Chamber will examine the conditions set out in the Appeals Chamber's jurisprudence all the while upholding its discretionary power in the matter, thereby guaranteeing its independence pursuant to Article 12 of the Statute of the Tribunal ("Statute").

67. The Chamber notes firstly that the analogy the Prosecution makes between the sanctions that may be imposed on the Accused and those that may be applied against a defence counsel pursuant to Rule 46 (A) of the Rules does not lead to the conclusion that assigning counsel would be justified on the grounds of the violations of which the Accused was found guilty in the Judgement of 24 July 2009, which the Accused appealed.[95] The Chamber recalls that Article 20 (C) (iii) of the Directive on Assignment of Defence Counsel provides for the withdrawal of assignment of counsel

[92] *See* also, *The Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, "Decision on Appointment of Counsel and Order on Further Trial Proceedings", 5 November 2009.
[93] "Decision on Appointment of Counsel and Order on Further Trial Proceedings", 5 November 2009.
[94] *See supra*, footnote page 1.
[95] *See* Appeal of 25 August 2009.

found guilty of contempt "*unless the Chamber decides otherwise*".[96] It is therefore clear that, notwithstanding the general principle according to which a sentence for contempt leads to the withdrawal of assignment of counsel, the Directive expressly provides that the Chamber has discretionary powers to retain an appointed counsel despite such a sentence, and that by analogy, this discretionary power exists in the same terms with regard to the right of an accused found guilty of contempt to continue defending himself.

(b) Regarding the behaviour of the Accused

68. The second question that the Chamber must answer is whether the Accused's alleged behaviour outside the courtroom is obstructive, namely continually disruptive and substantially and persistently obstructive to the proper and expeditious conduct of the trial.

69. [redacted]

70. [redacted]

71. The contempt allegation regarding the book *The Hrtkovci Affair*, which was deemed to be well-founded, led to the Judgement of 24 July 2009, which sentenced the Accused to 15 months of imprisonment and to the withdrawal of this publication from his website by 7 August 2009. The Chamber also notes the Prosecution's allegation that the Accused did not remove his book on the *Hrtkovci Case* from his website and deems that it cannot interfere with this issue as it is still pending before the Appeals Chamber.[97]

72. In that regard, the judges of the present Chamber point out that they cannot make any assessments on the facts of these allegations, and must limit themselves to a simple reading of the decision rendered by the judges of another Chamber on the basis of facts submitted solely to them for their assessment.[98]

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[96] Directive on the Assignment of Defence Counsel (No. 1/94), (IT/73/RÉV.11).
[97] *See* notably "Urgent Motion to Remove Protected Witness Information from the Internet", public with confidential annexes, 6 October 2009; *see* also "Submission number 432 to the Appeals Chamber", 3 November 2009.
[98] In this sense, *The Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-A, Judgement, 24 March 2000, para. 114.

73. Consequently, the Chamber deems that the violation of which the Accused was found guilty, even though serious and grave, is nevertheless an isolated act that cannot legitimately be considered as continually disruptive and such that it would substantially and persistently obstruct the proper and expeditious conduct of the trial. The Chamber therefore concludes that the Accused's conduct that led to his conviction by Trial Chamber II does not in itself justify the assignment of counsel.

(c) Regarding the existence of a specific warning

74. With regard to the condition set out by the Appeals Chamber that the Accused was duly warned that his conduct could lead to the assignment of counsel, the Prosecution argues that such a warning had previously been issued to the Accused, namely by the Appeals Chamber itself in its Decision of 20 October 2006.[99]

75. The Chamber notes that it is true that in its Decision of 20 October 2006, the Appeals Chamber addressed a solemn and specific warning to the Accused, indicating that assignment of counsel would be well-founded "should his self-representation subsequent to this Decision substantially obstruct the proper and expeditious proceedings in his case [...]".[100] A similar warning was subsequently issued by Trial Chamber I to the Accused during a status conference held on 8 November 2006.[101] Nevertheless, the Chamber notes that these warnings were not issued to the Accused for the same conduct that led to his conviction in the Judgement of 24 July 2009.[102] Consequently, even if we were to admit that the conduct of the Accused was once

[99] Supplement, paras 5, 9-10; *see* also "Motion to Terminate the Accused's Self-Representation", para. 11, 29.
[100] Decision of 20 October 2006, para. 52.
[101] Hearing of 8 November 2006, T(F). 766 (closed session).
[102] *See* Decision of 20 October 2006, para. 29, recalling the abusive nature of the majority of the 191 motions that the Accused had filed prior to the start of his trial, his deliberate and repeated refusal during the proceedings to comply with the rules set out in the Rules, the practical directives of the Tribunal and the orders issued by the Trial Chamber, the continual use of offensive terms in his written submissions and in the courtroom, the revealing of the name of a protected witness, intimidation of prospective witnesses and unauthorised disclosure of confidential documents. With regard to the revealing of the name of a protected witness and the unauthorised disclosure of confidential documents, the Chamber notes that in the Decision on Assignment of Counsel, rendered on 21 August 2006, Trial Chamber I referred to the fact that the Accused disclosed confidential documents to members of his expert team when they were not authorised to know this information and that the Accused had revealed the name of a protected witness during a telephone conversation with a person not authorised to receive confidential information. *See* also the Decision of 8 December 2006, para. 25.

again obstructive to the proceedings, which is not the case here, the previous warnings issued in 2006 for other types of conduct could not serve as a valid excuse for the present Chamber to issue a new specific warning to the Accused.

(d) Regarding the principle of proportionality of assignment of counsel:

76. The Prosecution does not bring up in its various written submissions the question of the proportionality of the assignment of counsel. The Chamber nevertheless had to ask itself this question in accordance with the jurisprudence of the Appeals Chamber, which brought up the question of proportionality as a prerequisite for the assignment of counsel.

77. The Chamber recalls that any restriction of a fundamental right must be limited to the minimum extent necessary to protect the Tribunal's interest in assuring a reasonably expeditious trial.[103] Jurisprudence does not allow for the assignment of counsel to an accused unless this measure is suitable, necessary and that its degree and scope remain in a reasonable relationship to the envisaged target.[104] [redacted]

78. The Chamber subsequently notes that the question of proportionality must also be examined with regard to the stage in the proceedings at which the assignment of counsel occurs. In this case, the Prosecution case has almost concluded. Consequently, if the Chamber decides to grant the Prosecution's motion to assign counsel to the Accused, the effect of this measure would be felt by the Accused primarily at the Defence stage of the case.

79. The Chamber also notes that instead of speeding up proceedings, the assignment of counsel would result in a significant delay of several months in the advancement of the proceedings, as the counsel who would be appointed would need adequate time to familiarise himself with this very procedurally-complex case before actually being able to start working. The risk of the Accused being opposed to such a measure and not co-operating with the appointed counsel should be kept in mind, as

[103] *Milošević* Decision, para. 17.
[104] *The Prosecutor v. Fatmir Limaj et al.*, Case No. IT-03-66-AR65, 31 October 2003, para. 13.

this could make the counsel's work more difficult in terms of cross-examination of witnesses on the facts.

80. In this regard, the Chamber wishes to note that assigning a standby counsel in the Karadžić Case when no witnesses had yet testified resulted in a delay of proceedings by several months, which were necessary for the appointed counsel to familiarise himself with the case. Consequently, it is almost certain that appointing counsel in this case, which began in November 2007, would delay the new start of the hearings by at least six months, taking into account the need for the counsel to familiarise himself with the testimony of the 73 witnesses who have to date appeared before the Chamber, the numerous exhibits that have been admitted thus far (885), the numerous motions filed by the Accused (425) and the Prosecution, and the decisions relating to them and to the proceedings as a whole. Such a consequence does not at all seem proportional to the conduct for which the Accused is charged in the Judgement of 24 July 2009.[105]

81. The Chamber also asked itself *ad abundantiam* about the efficiency of the measure to assign counsel with a view to preventing future conduct by the Accused that could endanger victims and witnesses. Firstly, it appears to the Chamber that such a measure would not prevent the Accused from publishing the confidential information already in his possession. Furthermore, it seems that such a measure could not, in any case, be effective unless the assigned counsel was prevented from disclosing to the Accused the new confidential information he would have knowledge of, which would disproportionately contravene the Accused's fundamental right to communicate with his counsel as provided for under Article 21 (4) (b) of the Statute. Even if restrictions may be applied to the right to self-representation, these restrictions abolish the other fundamental guarantees provided for in Article 14 of the International Covenant on Civil and Political Rights and re-transcribed to Article 21 of the Statute.

[105] *See* a *contrario The Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Judgement (original in English), 17 March 2009, para. 118. In its Judgement, the Appeals Chamber considers that the Trial Chamber could have reasonably refused Krajišnik the right to self-representation, taking into account the delay that this change would cause at such an advanced stage in the proceedings.

82. With regard to the sentence handed down to the Accused for having revealed confidential information in his publications, the Chamber considers it to be more efficient to take measures that could prevent these events from occurring again in order to ensure that the protection and security of witnesses is efficiently respected. With this goal in mind, it took into consideration the Prosecution's motion to have all of the Accused's future publications submitted for prior approval.

83. The Chamber deems in this regard that it is therefore appropriate to order the Accused to disclose to the Chamber a paper copy, and an electronic copy if possible, of all future publications in his name that contain, in whole or in part, references to the present case so that the Chamber may transmit them to the Registry, where they will then be examined in order to determine whether the publication in question contains confidential information that might identify any protected Prosecution witnesses in this case.[106]

(e) Regarding the clean slate principle

84. The Prosecution also argues that the Chamber should take into consideration the overall conduct of the Accused since the start of the case, during the pre-trial stage and when the case was entrusted to another Chamber.

85. The Chamber notes that, even though the Accused admittedly received a specific warning in this sense from other Chambers with regard to his conduct prior to the trial, an application of the clean slate principle set out in the Decision of 8 December 2006 does not enable the Chamber to agree entirely with the Prosecution on this issue. Moreover, the Chamber should indeed note from the start that the new conduct of the Accused can be qualified as obstructive and justifies the appointment of counsel. The Chamber does note that since it has been in charge of the present case and even before the start of the case in November 2007, the Accused has considerably improved his conduct in court. The Chamber recalls in this regard that it rejected the

[106] The Chamber may, of course, come back to these measures if the Judgement of 24 July 2009 is not affirmed on appeal.

Prosecution's allegations regarding the Accused's behaviour *inside* the courtroom [redacted].

86. The Chamber further points out that more appropriate measures were adopted to deal with the Accused's occasional use in court of certain terms that constitute an unjustified attack on witnesses. The Chamber issued a general order regarding this issue on 18 June 2008 in response to the Accused's use of the terms "false witness", "liar" and "criminal" to describe witnesses, in which the Chamber decided that in the future, any term that the Chamber considered might jeopardise the integrity of the proceedings would be expunged from the record and the video recording of the hearing.[107] The Chamber also reacted on a case-by-case basis when necessary in order to ensure the protection of the victims and witnesses and to ensure the integrity of the proceedings.

87. Equally for these reasons, the Chamber considers it inappropriate at this stage of the proceedings to assign counsel, and deems it more efficient with regard to the protection of witnesses and less disruptive with regard to the proper conduct of the trial, to implement the above-mentioned alternative measure.[108]

4. Regarding the Prosecution's other motions

88. [redacted]

89. The Chamber further recalls that the Registrar has already taken measures regarding the Accused's privileged associates [redacted]. On 28 November 2008, the Registrar suspended the confidentiality agreements made in December 2006 with Mr Zoran Krasić and Slavko Jerković.[109] On 10 September 2009, the Registry refused to

[107] *See* Order on Protecting the Integrity of the Proceedings, 18 June 2008.
[108] *See supra*, para. 83.
[109] This suspension was done in an email dated 28 November 2008.

reconsider this decision,[110] which was confirmed on 21 October 2009 by a decision from the Tribunal President on the Accused's appeal.[111]

90. Finally, with regard to the Prosecution's wish to refer to Rule 68 (iv) of the Rules, the Chamber will examine the specific motions submitted to it on a case-by-case basis.

IV. RECONSIDERATION OF ADJOURNMENT

A. Arguments of the Parties

1. Arguments of the Accused

91. After recalling the foundations of the Decision for Adjournment, the Accused bases his Motion for Reconsideration of Adjournment on three reasons.[112]

92. He argues firstly that no contempt proceedings for witness intimidation have been initiated against him thus far.[113]

93. [redacted]

94. The Accused finally argues that if the Decision on Adjournment is not reconsidered and an order to resume the trial issued, it will constitute a violation of his right to be judged expeditiously.[114]

[110] Notice of this refusal was made in an email from the Registrar dated 10 September 2009. The status of a privileged associate is dependent on the signing of a confidentiality agreement with the Registry.
[111] "Decision on Vojislav Šešelj's Request for Review of Registrar's Decision of 10 September 2009", 21 October 2009. This decision was rendered by Judge Güney acting as interim President of the Tribunal.
[112] Hearing of 18 August 2009, T(F). 14705-14709.
[113] Hearing of 18 August 2009, T(F). 14705. The Chamber notes that the Accused is not informed of all the contempt allegations that Trial Chamber II was seized of since all were subject to *ex parte* decisions, except for the allegation concerning the Hrtkovci affair.
[114] Hearing of 18 August 2009, T(F). 14708.

2. Arguments of the Prosecution

95. The Prosecution responds that the Decision on Adjournment cannot be reconsidered [redacted].[115]

96. [redacted]

97. The Prosecution also notes that in contravention of the order issued to the Accused to remove his book on the Hrtkovci Affair from his website by 7 August 2009, the book was still available on his website on 20 August 2009.[116]

98. The Prosecution finally states that prior to resuming the case, the Chamber must first rule on a number of pending issues, namely the Motion for Additional Time and the Motion for Assignment of Counsel.[117]

B. Applicable Law

99. A Trial Chamber has the inherent power to reconsider its own decisions and may grant a request for reconsideration if the requesting party demonstrates to the Chamber the existence of a clear error of reasoning in the impugned decision or of particular circumstances, which may be new facts or new arguments, justifying its reconsideration in order to avoid an injustice.[118]

[115] "Prosecution's Response to Oral Request for Reconsideration of Decision to Adjourn Trial", paras 5-6.
[116] "Prosecution's Response to Oral Request for Reconsideration of Decision to Adjourn Trial", para. 10.
[117] Submission of 18 August 2009, paras. 8-9.
[118] *The Prosecutor v. Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić and Borislav Pusić*, Case No. IT-04-74-T, Decision on the Stojić Defence Request for Reconsideration", 4 November 2008, p. 2, citing *The Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, "Decision on Defence's Request for Reconsideration", 16 July 2004, pp. 3-4, citing notably *The Prosecutor v. Zdravko Mucić et al.*, Case No. IT-96-21A*bis*, "Judgement on Sentence Appeal", 8 April 2003, para. 49; *The Prosecutor v. Popović et al*, Case No. IT-05-88-T, "Decision on Defence Motion for Certification to Appeal Decision Admitting Written Evidence pursuant to Rule 92 *bis*", 19 October 2006, p. 4.

C. Discussion

100. The Chamber recalls firstly that the Decision on Adjournment was based on two considerations: the allegations of witness intimidation by the Accused and his associates [redacted].

101. The Chamber also recalls that in the Decision on Adjournment, it expressly provided for the possibility of resuming hearings of the remaining witnesses [redacted] on the basis of a new contrary order issued by the Chamber.

102. The Chamber subsequently notes that since the Decision on Adjournment was rendered, namely since 11 February 2009, new facts have emerged that should now be taken into consideration when deciding whether or not to reconsider this decision.

103. [redacted]

104. [redacted]

105. Moreover, the Chamber must also consider the period of time that has elapsed since the Decision on Adjournment was rendered and the absence of a short-term or possibly medium-term time frame within which to resolve the issue of allegations of witness interference by the Accused. This has considerably extended the amount of time spent in detention and there is a risk, notwithstanding the particular circumstances of the case and its complexity, that the reasonable limit will be exceeded in light of the jurisprudence of the European Court of Human Rights.[119] Furthermore, due to the fact that the Accused indicated during the hearing of 7 July

[119] According to the European Court of Human Rights, "the persistence of reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the validity of the continued detention, but, after a certain lapse of time, it no longer suffices: the Court must then establish whether the other grounds cited by the judicial authorities continue to justify the deprivation of liberty" (Judgement *Case of I.A. v. France*, 23 September 1998, para. 102; *See* also, ECHR, Judgement *Case of Tomasi v. France*, 27 August 1992, para. 102 where the Court found that Article 5(3) of the European Convention on Human Rights was violated as the length of detention (five years and seven months) could not be attributed to either the complexity of the trial or to the conduct of the Accused; ECHR, Judgement *Case of Adamiak v. Poland*, 16 December 2006, para 36, where the Court recalls that the existence of a strong suspicion of participation in serious infractions and the prospect of a lengthy sentence would not in themselves suffice to justify a long detention; in that case the detention lasted five years).

2009 that he is unable to provide the guarantees to reappear required for a motion for provisional release pursuant to Rule 65 of the Rules,[120] the provisional release is equally difficult for the Chamber to envisage, irrespective of the fact that he was sentenced to fifteen months of imprisonment for contempt.

D. Conclusion

106. In light of all the new facts that the Chamber has at its disposal at this stage, namely [redacted] [redacted], and the long time that has elapsed since the Decision on Adjournment was rendered, the Chamber considers that it is appropriate to end adjournment of the hearings of the remaining witnesses on the 65 *ter* list of potential Prosecution witnesses and to issue an order to resume their examination.

107. The Chamber notes nevertheless that the contempt allegations against the Accused are still pending, [redacted] and that moreover, both sides are laying a claim to certain remaining witnesses. For these reasons, the Chamber considers it necessary to adopt measures other than the continued adjournment of the hearings of these witnesses. As these measures relate to the examination of the Motion for Additional Time, they will be determined within that context.

V. ADDITIONAL TIME

A. Arguments of the Parties

108. The Prosecution submits that the Chamber must grant it additional time[121] to hear the remaining eleven witnesses listed in Annex A of the Motion for Additional Time,[122] namely Witnesses 1 (VS-067), 2 (VS-027), 3 (VS-037), 4 (VS-1033), 5 (VS-1067), 6 (VS-1058), 7 (VS-026), 8 (VS-032), 9 (VS-017), 10 (VS-029) and 11 (VS-050), ("Remaining Witnesses").

[120] Hearing of 7 July 2009, T(F). 14565-14567.
[121] It requests an additional 19 hours to be added the remaining time left to present its case.
[122] Annex A of the Motion for Additional Time, titled "Remaining Witnesses", confidential.

109. The Prosecution alleges further that it is appropriate to grant its Motion for Additional Time, considering that in January 2008, the Chamber decided to hear these witnesses *viva voce* instead of as 92 *ter* witnesses ("Decision of 7 January 2008"), once the Prosecution had provided a time estimate before the start of the trial of the hours it would need for each witness, taking into account their status (*viva voce* or 92 *ter* witness).[123]

110. The Prosecution further recalls that, in its Decision of 22 January 2009, the Chamber ordered the Prosecution to continue with the examination of five witnesses within a total net period of 7 hours and 30 minutes "without prejudice to any further time that the Prosecution may be granted to call the other witnesses".[124] According to the Prosecution, fairness requires that it be given adequate time to examine the Remaining Witnesses, who are crucial for its case, so that the Chamber has before it all the relevant evidence[125] before the start of the 98 *bis* proceedings.[126]

111. The Accused submits that the Prosecution's Motion is unreasonable because it does not rest on a single valid argument, and he alleges that the Prosecution did not use the time allotted to it in a rational way.[127]

112. The Accused furthermore gives his detailed opinion on each witness. Firstly, with regard to Witnesses 3 (VS-037), 6 (VS-1058), 7 (VS-026), 8 (VS-32) and 10 (VS-029), who appear to have confirmed that they wanted to testify as Defence witnesses, he states that he is not opposed to them appearing as Prosecution witnesses.[128] Subsequently, with regard to Witness 5 (VS-1067), he states that he has disappeared.[129] Finally, with regard to Witnesses 1 (VS-067), 2 (VS-027), 4 (VS-1033), 9 (VS-017) and 11 (VS-050), he submits that they are unnecessary, notably

[123] Motion for Additional Time, paras. 6-7, citing the "Decision on the Prosecution's Consolidated Motion Pursuant to Rules 89 (F), 92 *bis*, 92 *ter* and 92 *quater* of the Rules of Procedure and Evidence", 7 January 2008, confidential ("Decision of 7 January 2008"), para. 40. A public redacted version of this decision was filed on 21 February 2008.
[124] Motion on Additional Time, para. 8 referring to the Decision of 22 January 2009, p. 3, recalling Witnesses VS-1035, VS-1066, VS-1010, VS-1104 [redacted] and VS-1029.
[125] Motion for Additional Time, para. 10.
[126] Motion for Additional Time, paras. 2-3.
[127] Hearing of 7 May 2009, T(F). 14508-14509.
[128] Hearing of 7 May 2009, 14510-14512.
[129] Hearing of 7 May 2009, 14510-14511.

because three of them – 1 (VS-067), 4 (1033) and 11 (VS-050) – are witnesses regarding municipalities that have been withdrawn from the Indictment.[130]

B. Applicable Law

113. Pursuant to Rule 90 (F) of the Rules, the Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence in order to avoid the needless consumption of time.

C. Discussion

114. As a preliminary matter, the Chamber considers that the Motion for additional time is not *prima facie* unreasonable, taking into account notably the Decision of 7 January 2008 denying a significant portion of the Prosecution's motion pursuant to Rules 92 *ter* and 92 *quater* of the Rules.

115. The Chamber subsequently recalls that Witness 2 (VS-027) was called directly by the Chamber and testified on 7 and 8 July 2009. Consequently, the Motion for Additional Time is moot as it relates to this witness.

116. The Chamber next notes that the Defence no longer lays a claim to Witness 3 (VS-037) [redacted]. The Chamber therefore deems that, also with regard to the Decision to Reconsider Adjournment, there is no objection to the Prosecution calling this witness to testify in January 2010.

117. The Chamber further recalls that Witness 1 (VS-067), [redacted], [redacted]. Witnesses 7 (VS-026), 8 (VS-032), 9 (VS-017) and 10 (VS-029) are witnesses who appear to have indicated that they no longer wish to testify for the Prosecution, but rather for the Defence. [redacted]. Consequently, bearing in mind the reconsideration of the Decision on Adjournment [redacted] and the fact that certain witnesses appear

[130] Hearing of 7 May 2009, 14509-14510, 14512. The Chamber points out that these witnesses fall under the consistent pattern of conduct (*See* "Decision on the Application on Rule 73 *bis* of the Rules", 8 November 2006).

to no longer want to testify for the Prosecution, the Chamber, in the interest of justice and in particular to ensure respect of the integrity of the proceedings and reconcile them with the full respect of the Accused's rights, the protection of the victims and witnesses and the fairness and expeditiousness of the trial, considers it to be more prudent that Witnesses 1 (VS-067), 5 (VS-1067), 7 (VS-026), 8 (VS-032), 9 (VS-017) and 10 (VS-029) be examined directly by the Chamber, with the two parties having the right to cross-examination. For these reasons, the Chamber also considers it more prudent from now on to ban any contact by the parties with these witnesses without the express authorisation of the Chamber.

118. With regard to Witnesses 4 (VS-1033),[131] 6 (VS-1058)[132] and 11 (VS-050),[133] the Chamber points out that these witnesses will be called to testify on the municipalities regarding the consistent pattern of conduct. The Chamber has already heard four witnesses on facts regarding the municipality of Voćin,[134] three witnesses on the municipalities of Brčko and Bijeljina[135] and three witnesses on the municipality of Bosanski Šamac.[136] Furthermore, on 19 January 2009 the Prosecution raised the possibility of not calling Witness VS-050.[137] Consequently, the Chamber invites the Prosecution to reconsider the appearance of Witnesses 4 (VS-1033), 6 (VS-1058) and 11 (VS-050) in the present case and to give its final opinion on these witnesses within eight days. The Chamber points out that should the Prosecution nevertheless wish that these witnesses appear, [redacted], they will be called to testify directly by the Chamber and the above-mentioned ban will also apply in their case.

119. Consequently, the Chamber concludes that the time remaining for the Prosecution, namely seven hours and thirty-two minutes,[138] is more than sufficient to

[131] This witness will testify about events that occurred in Brčko.
[132] This witness will testify about events that occurred in Bosanski Šamac.
[133] This witness will testify about events that occurred in Voćin.
[134] These are Witnesses VS-018, VS-033, VS-119 and VS-1120.
[135] These are Witnesses VS-1028, VS-1029, VS-1035.
[136] These are Witnesses VS-1000, VS-1007 and VS-1010.
[137] *See* "Confidential Witness List (updated 19 January 2009)" disclosed by the Prosecution ("Witness List of 19 January 2009").
[138] *See* Registry document titled "All Witness Testimony SES IT-03-67" circulated on 25 August 2009, indicating that out of the 120 hours allocated to the Prosecution to present its case, it used 112 hours and 25 minutes for the examination-in-chief of Prosecution witnesses who have testified thus far. *See* also "Order on Time Allocated to the Prosecution pursuant to Rule 73 *bis* of the Rules of Procedure and Evidence", 13 November 2007, p. 2, in which the Chamber indicated that "The Prosecution shall have

conduct the examination-in-chief of Witness 3 (VS-037),[139] even if the Prosecution does not comply with the Chamber's invitation to withdraw Witnesses 4 (VS-1033), 6 (VS-1058) and 11 (VS-050), as in that case, these three witnesses will be called directly by the Chamber.

120. The Chamber points out that, notwithstanding the fact that it is not granting additional time to the Prosecution, the latter will not suffer any prejudice as the Prosecution will in actual fact have virtually the same time available as it had requested to proceed with its examination-in-chief of the witnesses called to testify directly by the Chamber.

121. Furthermore, the Chamber points out that Witnesses VS-014, VS-031 and VS-034 are not affected by the Motion for Additional Time, [redacted]. With regard to Witnesses VS-014 and VS-031, the Chamber notes that the Prosecution indicated on 19 January 2009 that it would not call them.[140] The Chamber deems consequently that it is not useful at this stage to call these witnesses to testify. The Chamber further recalls that Witness VS-034 was already called to testify by the Chamber in the summons to appear sent to him on 24 November 2008.[141] Consequently, the ban on all contact with witnesses called by the Chamber without the express authorisation of the Chamber, as set out above, is now also applicable to this witness.

VI. DISPOSITION

122. For the foregoing reasons, pursuant to Articles 12, 21 and 22 of the Statute and Rules 45 *ter*, 54, 65, 85, 90 and 98 of the Rules,

Judge Antonetti, Presiding, attaching a separate opinion to this decision,

ORDERS the joinder of the proceedings on the assignment of counsel, adjournment and additional time.

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a total of 120 hours for presenting the evidence in this specific case, covering only the examinations-in-chief".

[139] *See* Annex A of the Motion for Additional Time.

[140] See Witness List of 19 January 2009.

ORDERS the Accused to disclose to the Chamber a paper copy, and an electronic copy if possible, of all future publications in his name that contain, in whole or in part, references to the present case so that the Chamber may transmit them to the Registry, where they will then be examined to determine whether the publication in question contains confidential information that would identify a protected Prosecution witness in this case.

AFFIRMS in all other respects the rejection of the Motion for Assignment of Counsel and the *Addendum* as they relate to the Accused's conduct outside of the courtroom, the oral Motion of 14 January 2009 and the Supplement.

GRANTS the Motion for Reconsideration of Adjournment.

ORDERS the resumption of the hearing of the remaining witness.

DENIES the Motion for Additional Time.

DECIDES it will call Witnesses VS-017, VS-026, VS-029, VS-032, VS-067 and VS-1067.

AFFIRMS that Witness VS-034 will be directly examined by the Chamber.

BANS the parties from having any contact with the witnesses called directly by the Chamber, namely Witnesses VS-017, VS-026, VS-029, VS-032, VS-034, VS-067 and VS-1067 without the express authorisation of the Chamber.

INVITES the Prosecution to withdraw Witnesses VS-050, VS-1033 and VS-1058 with regard to the consistent pattern of conduct and to **INFORM** the Chamber within eight days of its position regarding these witnesses.

DECIDES that Witness VS-037 will be the first to appear before the Chamber and **INVITES** the Prosecution to organise this witness's testimony for 12 January 2010.

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[141] Summons for Witness VS-034 to appear as a Chamber witness, confidential with confidential and *ex parte* annex, 24 November 2008.

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

/signed/

Jean-Claude Antonetti
Presiding

Done this twenty-fourth day of November 2009

At The Hague
The Netherlands

[Seal of the Tribunal]

SEPARATE OPINION OF PRESIDING JUDGE,

JEAN-CLAUDE ANTONETTI

The Trial Chamber has issued a consolidated decision regarding the adjournment of the trial, the assignment of counsel and the motion for additional time.

My separate opinion will only relate to the part concerning the assignment of counsel.

In limine, I wish to point out the difficulty encountered by the Trial Chamber in rendering its **confidential and *ex parte* decision** before rendering a public and redacted version.

The **practice** followed by the Trial Chambers, and upheld by the Appeals Chamber, of rendering *ex parte* or confidential decisions pursuant to Rules 70, 75 and 77 of the Rules results in the rendering of justice in an opaque and even secret manner, which is not acceptable for an International Tribunal worthy of that title.

It is appropriate to point out that nothing in the Statute provides for such a "concealment" of decisions.

It seems to me that it would have been possible to proceed otherwise by rendering all the **decisions publicly** by redacting the names of protected persons or any information that might identify them, which would have allowed justice to be rendered transparently and irreproachably.

It is distressing to note that the Accused will not have access to certain particulars of this decision, which I personally find deeply concerning.

The Chamber **unanimously** decided to deny the motion to assign counsel to the Accused.

Irrespective of the reasons set out in the decision justifying the rejection of the motion, and in addition to my previous personal opinions on the issue of assigning counsel to the accused, I would like to indicate clearly that this assignment would place the Trial Chamber in the situation previously experienced by Trial Chamber II during the assignment of a *stand by* counsel, and by Trial Chamber I at the start of the trial, before the hunger strike.

The obvious **failure** that resulted from these forced assignments should not be repeated by a Trial Chamber that is informed of **all** the aspects of the case.

With regard to the assignment of counsel due to the alleged intimidation of witnesses, it will not suffice in itself to prevent the intimidation of witnesses by the Accused if he so wishes.

What is appropriate to consider with regard to witness intimidation is whether the Accused can now, in the current situation, intimidate or interfere with witnesses, based on the hypothesis that he had previously intimidated witnesses, something which remains to be proven.

In order to deal with possible future intimidation, the Trial Chamber has the technical possibility of **banning** all contact by the Accused and his associates with the eleven witnesses left to testify, which would naturally prevent any new interference.

Nevertheless, I notice that the majority of these witnesses have declared themselves to be "**Defence witnesses**", therefore what would be the interest of intimidating them or interfering with them?

I find it necessary to point out that if counsel were appointed, he would have the right to request to be given several months to familiarise himself with the case, consisting of several thousand pages of transcript, which would only additionally prolong the duration of this trial that is already excessively long.

It is appropriate to bear in mind that the **Statute** imposes on everyone, including the judges, the need for an **expeditious trial**. It must be noted that this obligation is far from being complied with if we consider that the Accused has been in detention for over six years without a final judgement.

As an advocate of irreproachable international justice that demands a transparent and efficient procedure, I cannot participate in a trial where an Accused will be hostile to his assigned counsel, when thus far the trial has proceeded under conditions that allowed for proper ***inter partes*** hearings on the Prosecution evidence by the self-represented Accused, who is himself present in the courtroom and who has accepted the current procedural rules imposed by the Rules and under the authority of the Judges of the Trial Chamber.

Destroying this equilibrium, which took the Trial Chamber considerable effort to achieve, for reasons relating to a conviction for publishing a book two years after the start of the trial would be irresponsible.

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

/signed/

Jean-Claude Antonetti
Presiding

Done this twenty-fourth day of November 2009

At The Hague
The Netherlands

[Seal of the Tribunal]