UNITED
NATIONS

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: 11 February 2009

Original: ENGLISH
French

IN TRIAL CHAMBER III

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

Acting Registrar: **Mr John Hocking**

Decision of: **11 February 2009**

THE PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC DOCUMENT

DECISION ON PROSECUTION MOTION FOR ADJOURNMENT WITH DISSENTING OPINION OF JUDGE ANTONETTI IN ANNEX

The Office of the Prosecutor

Mr Daryl Mundis
Ms Christine Dahl

The Accused

Mr Vojislav Šešelj

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");

SEIZED of the Prosecution's oral motion, presented [redacted] the hearing of 15 January 2009, [redacted] ("Oral Motion" [redacted] [redacted]), in which the Prosecution submits that the Chamber must adjourn these proceedings [redacted] and that, failing an adjournment, the integrity of the proceedings would be jeopardized;[1]

NOTING that the Prosecution submits that the present case cannot continue [redacted];[2]

NOTING that, according to the Prosecution, [redacted];[3]

NOTING the decision rendered on 16 September 2008, in which the Appeals Chamber considered that the Chamber did not err in its determination that there was an alternative solution to the adjournment of the trial, namely, the calling of prosecution witnesses not identified by the Prosecution as being part of the campaign of witness intimidation that it alleges;[4]

[redacted];[5]

[redacted];[6]

CONSIDERING that pursuant to Article 20 (1) of the Statute the Chamber shall ensure that the trial is fair and expeditious, with full respect for the rights of the accused and due regard for the protection of victims and witnesses;

CONSIDERING that pursuant to Article 21 (4) (c) of the Statute all accused are entitled to be tried without undue delay;

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[1] For the oral motion, *see* hearing of 15 January 2009, Transcript in French ("T(F)") 13591, [redacted].
[2] [redacted].
[3] [redacted].
[4] *The Prosecutor v. Vojislav Šešelj,* Case No. IT-03-67-AR73.8, Decision on the Prosecution's Appeal Against the Trial Chamber's Order Regarding the Resumption of Proceedings", 16 September 2008, para. 24.
[5] [redacted].
[6] [redacted].

CONSIDERING consequently that the Chamber must ensure that any interruptions of the present trial are limited to what is strictly necessary;

CONSIDERING that in the view of the majority[7] the hearing of witnesses [redacted],[8] would jeopardize the integrity of the proceedings before the Chamber, as well as the security of witnesses and the integrity of their testimony, even though it is inconceivable not to hear them in view of the importance of their testimony;

CONSIDERING that [redacted] the hearing of these same witnesses could, in the view of the majority,[9] jeopardize the integrity of the proceedings pending before the Chamber;

[redacted];[10]

CONSIDERING that the Chamber is aware of the impact that an adjournment of the hearing of the last witnesses will have on its ability to try the Accused within a reasonable time, but the majority holds that its duty to preserve the integrity and fairness of the proceedings must prevail over time considerations in light of the exceptional circumstances of this case;

CONSIDERING that after hearing Witnesses VS-1035, VS-1066, VS-1010, VS-1044 and VS-1029, a majority of the Chamber[11] considers, in light of these circumstances, that the hearing of the Other Witnesses would run counter to the interests of justice, as it would not be possible to guarantee that their testimony was being given freely, or to safeguard their security or even the integrity of the proceedings [redacted];

CONSIDERING that a majority of the Chamber[12] further considers that it is inconceivable to close the prosecution case before giving the Prosecution the opportunity to call all of its witnesses and the Accused the opportunity to cross-examine them;

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[7] Judge Antonetti appends a dissenting opinion to this decision on this issue.
[8] [redacted].
[9] Judge Antonetti appends a dissenting opinion to this decision on this issue.
[10] [redacted].
[11] Judge Antonetti appends a dissenting opinion to this decision on this issue.
[12] Judge Antonetti appends a dissenting opinion to this decision on this issue.

CONSIDERING that a majority of the Chamber is satisfied that, according to the Prosecution, the Other Witnesses hold an important place in its case and that the adjournment of the proceedings may allow them to be heard *viva voce*, under circumstances where they may testify freely and without duress, [redacted];

FOR THESE REASONS

IN ACCORDANCE WITH Articles 20 (1) and 21 (4) (c) of the Statute of the Tribunal and Rule 54 of the Rules of Procedure and Evidence,

By a majority, Judge Antonetti dissenting, **ADJOURNS** the hearing of the remaining prosecution witnesses [redacted], or until the Chamber orders otherwise. The Presiding Judge's dissenting opinion is filed this day concurrently with the present decision.

DECIDES to hold hearings on a regular basis during the adjournment in order to deal with administrative issues.

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

/signed/

Jean-Claude Antonetti
Presiding Judge

Done this eleventh day of February 2009
At The Hague
The Netherlands

[Seal of the Tribunal]

DISSENTING OPINION OF PRESIDING JUDGE JEAN-CLAUDE ANTONETTI

The **majority** of the Trial Chamber has decided to adjourn *sine die* the hearing of fewer than ten witnesses, pending a decision [redacted] on allegations of witness intimidation.

Considering the impact of this decision on the present trial and the image it presents of the functioning of International Justice, I must set out my **dissenting opinion**.

The decision taken by the majority of the Judges will have a significant impact upon the duration of the **provisional detention** of the Accused.

The Statute is particularly clear on the Tribunal's obligation to ensure the expeditious trial of the perpetrators of the offences set out in Articles 2, 3, 4 and 5 of the Statute.

Article 20 of the Statute is unambiguous:

> "The Trial Chambers shall ensure that a trial is fair and **expeditious**..."

Article 21 of the Statute is also very clear in respect of the rights of the Accused:

> "In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:
>
> (c) **to be tried without undue delay**".

The fact that, six years after of the arrival of the Accused to The Hague, his trial in the first instance has not been completed constitutes a real problem calling for a solution which best serves the interests of the Accused and the Prosecution.

In this type of situation, priority must be given to the trial on the merits and to the ascertainment of the truth, by giving the Prosecution the ability to offer evidence of its allegations, but on condition it works diligently and competently.

Article 16 of the Statute entrusts the Prosecution with **responsibilities** in this regard since it indicates that:

> "The Prosecutor shall be **responsible** for the investigation and prosecution"
> (emphasis added)

For this reason the Prosecutor and his trial attorneys must "**possess the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases**".

Professional competence means that delays in the trial must be avoided by carefully managing the trial schedule and making informed choices of prosecution witnesses.

The question at present is as follows: is a period of six to eight years of proceedings before the pronouncement of a judgement warranted in this case?

For me, the answer is no. The **main trial** must be given priority over secondary contingencies.

To me, the evidence available to the Prosecution appears sufficient, since the Prosecution possesses documents from the period of the indictment, testimonies from numerous witnesses not affected by the alleged intimidation and, above all, prior statements from the persons affected by the intimidation; these statements were taken absent any form of intimidation.

In this context, was it necessary to postpone the arrival of just a few witnesses?

Firstly, it should be noted from the outset that by decision of 13 November 2007, the Trial Chamber allocated **120 hours** for the presentation of Prosecution evidence, on the understanding that this Chamber had allocated 50% more time compared to the decision of the Trial Chamber initially assigned to the case, which had granted the Prosecution 81.5 hours to present its evidence.[13] In the fourth "Considering" of its decision, the Trial Chamber specified that this determination of time was made in light of the list of witnesses.

The Prosecution therefore knew that it had 120 hours to present the witnesses on its 65 *ter* list, including those witnesses affected by the present decision whereby the majority of the Chamber has decided to adjourn the proceedings. In accordance with the Chamber's decision of 13 November 2007,[14] the Prosecution has already used more than 113 hours and, as a result, has altogether **less than seven hours** to call the

[13] Pre-trial conference of 27 November 2006, T(F) 832-833.
[14] Order on Time Allocated to the Prosecution Pursuant to Rule 73 *bis* of the Rules of Procedure and Evidence, 13 November 2007.

witnesses affected by allegations of intimidation which possibly constitute contempt of the Tribunal.

The Chamber's majority decision to postpone the arrival of these witnesses has failed to take this factor into account, leaving the impression that the Trial Chamber could allocate additional time to the Prosecution, a position which, in my view, stands no chance of success given the advanced stage of the proceedings. In my view, by postponing the arrival of these witnesses, the majority of the Chamber has committed an error in time management, and could have at least asked the Prosecution how it intended to call the outstanding witnesses in the remaining 7 hours.

Given the Prosecution's interest in calling these witnesses, and their importance for the Prosecution case, the Prosecution had a duty to call these witnesses from the very beginning of the trial. If this proved impossible, as was the case with some witnesses who were subpoenaed by the Chamber, the Prosecution should have immediately instigated contempt proceedings against persons suspected of interfering with witnesses and, where relevant, then requested the adjournment of the proceedings, in view of the importance of the oral testimony of the witnesses the Prosecution had decided to include on its list.

Due to the difficulties in implementing subpoenas issued and the ineffectiveness of certain protective measures, at that moment the Trial Chamber could have rendered decisions allowing for the appearance of these witnesses as quickly as possible, or decided from the outset of the trial in case the Prosecution did not wish for an adjournment of the proceedings, on investigations into such allegations and an effective management of time in order to ensure the greatest protection for the victims and witnesses with due regard for the right to a fair and expeditious trial.

I would like to point out that the Prosecution did not deem it necessary to inform the Trial Chamber of foreseeable difficulties in light of the information at its disposal.

In fact, from early 2007 (and even earlier in the case of some witnesses), and in any case *before* **the commencement of the trial** in November 2007, the Prosecution was already aware of the existence of potential intimidation. [redacted]. Nonetheless, it should be noted that, generally speaking, of the twenty or so witnesses concerned by the alleged campaign of intimidation, the Prosecution received information, **before**

the commencement of the trial, regarding the possible existence of serious problems concerning the arrival of half of them or the existence of various types of interference intended to discourage witnesses from appearing before the Tribunal.

If the Prosecution was aware, prior to the commencement of the trial, of the possibility that ten or so witnesses considered essential to its case might not appear before the Chamber, it had a duty to act from that moment by using every available provision in the Rules, and even to request the adjournment of the trial before it began, as was the case in *Simić et al.*[15] Admittedly, this would not have been the ideal solution, but it would have allowed for quick action under much better conditions compared to these past few months. It must be recognized that the Prosecution took an official position only in summer 2008 in its motion to impose counsel on the Accused and then in the contempt proceedings related to the Accused's failure to comply with the protective measures granted to witnesses in the present case.[16]

The Trial Chamber, therefore, was recently confronted with this problem, even though this matter could have been brought before it at the beginning of the trial, which at that moment would have been a valid justification for the adjournment of the trial. After the summer, the Chamber denied the first request for an adjournment of the proceedings made in the Prosecution motion to impose counsel.[17] On 16 September 2008, the Appeals Chamber confirmed the Chamber's decision by denying a Prosecution appeal on this issue.[18]

It appears that the event triggering the new oral application to adjourn the trial is linked to recent incidents, [redacted].

Curiously, the Trial Chamber found itself in the same situation [redacted].[19] At the time, the Prosecution considered it normal for this person to speak with a witness who had taken the solemn declaration, but it now finds the same situation abnormal with another witness, [redacted]. I consider that there can be no double standard that can be

[15] *Prosecutor v. Blagoje Simić et al.*, Case No. IT-95-9-R77, Judgement in the Matter of Contempt Allegations Against an Accused and His Counsel, 30 June 2000 ("*Simić* Contempt Judgement").
[16] *See* for example "Decision on Allegations of Contempt", public version, Case No. IT-03-67-R77.2, 21 January 2009.
[17] Order Regarding the Resumption of Proceedings, 15 August 2008.
[18] *See* for example "Decision on Prosecution's Appeal Against the Trial Chamber's Order Regarding the Resumption of Proceedings", Case No. IT-03-67-AR73.8, 16 September 2008.
[19] [redacted].

applied to a witness who has taken a solemn declaration before the Chamber. [redacted].

Moreover, I do not share the majority position concerning the postponement of the arrival of the witnesses, because this decision will likely **completely paralyse** the ongoing proceedings due to the investigations [redacted] which, inevitably, are going to take some time.

[redacted].

The precedent from the case of *The Prosecutor v. Blagoje Simić et al.* (IT-95-9-R.77) is of such a nature as to reinforce my feeling that the **utmost prudence** must be exercised when managing this type of case.

In the context of this case, the Trial Chamber had been seized of a motion for contempt on 25 May 1999 and, on 9 June 1999, decided to cancel the date scheduled for the commencement of the trial and adjourned that trial due to allegations of contempt against an accused and a counsel.[20] It its Judgement of 30 June 2000, the Trial Chamber concluded that the allegations of contempt against the two accused had not been proved beyond a reasonable doubt.[21] The trial resumed only on 10 September 2001, and in spite of all this time, *no contempt of court whatsoever had been established.* It is appropriate to cite the statement made by Judge Robinson during a hearing on the subject of the allegations:

> "Thank you very much. We have in fact taken into consideration submissions of the kind that you have made. But these allegations, as I said, are of the gravest nature, affecting the administration of justice, and the Chamber's view is that an orderly procedure is the best way to secure a just result."

Indeed, if witnesses were intimidated, the proper administration of justice suffers. However, in the present case, what precisely is the situation?

The entire discussion revolves around **less than ten witnesses** who could be affected by the investigations. In the event these witnesses are indeed concerned by these

[20] *Simić* Contempt Judgement, para. 4.
[21] *Simić* Contempt Judgement, para. 101.

investigations, it should be noted that these witnesses gave statements to the Prosecution in the years prior to the supposed interference with them.

A priori then, these statements were presumed **sincere** and **truthful**. Later and undeniably, some of them **publicly** stated that they were witnesses for the Defence. This abrupt turnaround prompts the following question: **were they interfered with**? [redacted]. At this stage, the fact remains that their prior statements are in the custody of the Prosecution which, in this trial, has already moved the Chamber to issue subpoenas against certain witnesses that the Prosecution knows may have been interfered with. The Prosecution then confronted the unwilling witness with his own statement, requesting that the Chamber admit the prior statement of this witness into evidence.

I consider that the Chamber did its utmost by deciding, upon the request of the Prosecution, to issue subpoenas and by convicting Mr Petković, one Prosecution witness who had refused to testify, of contempt.

The Prosecution submits that the **probative value** of the testimony of these witnesses (oral or written) might be affected as a result of interference. This theory is highly debatable since the written testimony was given a priori in the absence of any interference, and the oral testimony can be evaluated on the basis of several different factors like the other testimony given to date.

In my view, the Prosecution has made an error by raising the issue of **probative value** now. In fact, probative value is assessed by the Judges **at the end** of the trial and **after** the defence witnesses have been heard.

In reality, the **confusion** stems from the fact that, prior to the judgement phase, there must be a procedural phase related to the application of Rule 98 *bis*. During this procedural phase, the only issue is to ascertain whether there is evidence that, if accepted, may convince a reasonable trier of fact of the Accused's guilt beyond a reasonable doubt.

To allow the Prosecution to present its evidence, the Trial Chamber decided to subpoena witnesses who had stated that they were "witnesses for the Defence" and whom the Accused claimed as such.

The Prosecution, which bears the **burden of proof**, must be able to present its evidence by calling its witnesses. In this regard, the Trial Chamber must do its utmost to allow for the accomplishment of the mission conferred upon the Prosecutor by the Statute.

The argument according to which all **evidence** must necessarily be introduced through a witness should be put into perspective since the Rules allow the admission of evidence in the absence of a witness in court, for example in the case of "unavailability" (Rule 92 *quater)* or pursuant to Rule 89 of the Rules.

Admittedly, the Appeals Chamber jurisprudence under Rule 89 of the Rules, developed in particular in the context of the *Milošević* case, requires the presence of a witness for cross-examination.[22]

Considering the specific circumstances of this case and particularly the claim by the Accused that certain Prosecution witnesses are in fact defence witnesses, could lead the Appeals Chamber to **refine** its jurisprudence in the interests of justice.

In any case, waiting for decisions from the Trial Chamber seized of the allegations of intimidation is unfounded and in my opinion may in no way justify an adjournment, since intermediate solutions were available.

[redacted], is it conceivable that these witnesses, who are either "victims" or "accomplices" in respect of these acts, would have subsequently come to testify freely, in light of the national context which was described by a prosecution witness at length in open session. I consider it important to cite his statements in full.[23]

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[22] *The Prosecutor v. Slobodan Milošević*, Case No.IT-02-54-AR73.4, "Decision on Interlocutory Appeal on the Admissibility of Evidence-in-chief in the Form of Written Statements", 30 September 2003.

[23] Hearing 15 January 2009, T(F) 13545-13549.

"Q. That is primarily because in the Serbian public, it is a shame when someone appears as a Prosecution witness in proceedings in The Hague; objectively, that's the way it is?

A. Well, objectively, that's the way it is.

Q. All right. I'm going to put very brief questions to you, and please give answers as brief as possible so that we use this time efficiently.

JUDGE ANTONETTI: [Interpretation] Witness, the question could not have been put, but it was put, and you answered clearly. If I understand correctly, when a witness comes to testify before this Tribunal, it is shameful to come and testify here, is it?

THE WITNESS: [Interpretation] No, no, I did not say that it was a shameful thing. I said something different. I particularly noted that at the very beginning, as a witness or as an expert, I am duty-bound to tell the truth and nothing but the truth. That's what I said in the oath, too. However, there is this particular notoriety thing that is going about, especially in my setting, that I come here to accuse

Taking into account the statements of this witness about this Tribunal, which were confirmed by other witnesses, I have serious doubts as to the future state of mind of the few witnesses whose appearance is pending.

The Trial Chamber therefore has no future guarantees as to the certainty of true testimony given without duress by the witnesses alleged to have been interfered with or intimidated, according to the Prosecution.

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someone, that I'm a man who has accused someone or is accusing some persons, whereas I came here as a person who conducted autopsies of Muslims in Zvornik, who compiled reports, and I came here to defend those findings and reports. It is not shameful for me to come before this Tribunal. I said that it was actually something that was unpleasant for me because of the way in which witnesses or experts of the Prosecution are being depicted in the setting where I live and work. That is the case. However, had I been ashamed in any way to appear before this Court, I would have found a thousand ways and means of evading that. However, I feel this responsibility that I should act in accordance with the requests made by the persons who are in charge of these proceedings, and that is why I came. That is the core of the matter.

JUDGE ANTONETTI: [Interpretation] Yes. In your country, sir, there are trials also, and the witnesses come to testify at the request of the Belgrade prosecutor or from other towns. But when the witnesses come and testify before your tribunals, do they have a problem, or do they say to themselves, "I have been called by the prosecutor, and I shall go and testify"? What difference is there between this Tribunal and the tribunal in Belgrade, from a witness's standpoint? If this is a delicate question, you may say, "I had rather not answer." You don't have to answer. You can only answer if you wish to answer.

THE WITNESS: [Interpretation] No. Judge, in our country, we are very dissatisfied with some of the judgements made by Trial Chambers in The Hague, some Trial Chambers. This primarily has to do with the acquittal of Nasir Oric, and I'm a living witness to that. If you look at my statement that is given and the descriptions of the wounds, and the ways in which these people were killed in Srebrenica and the surrounding villages by Nasir Oric's units, this is a shameful judgement, and I can say that, and I can prove that. When evidence was needed, I provided these reports, but not all of them, because it was stated then we are asking for those reports, but we don't want those other reports. That is the first matter. The second matter: As far as Ramush Haradinaj's judgement is concerned, I carried out the autopsy of a driver, an Albanian from the municipality in Pec who had been killed by those units, and that was registered and that was handed in. The representatives of the International Community were there, and nothing. I was there, and the President Of the Committee for Violations of Humanitarian Law. I talked to Sharif Basuni [phon], Carsten Hoffman, Goldstone, Carla Del Ponte, Louise Arbour, lots of people, and we provided lots and lots of documents, and there were no proceedings before this Court.

As far as Gospic is concerned, we provided the expert findings for 14 bodies, and I went to the Court in Rijeka and explained my findings, and the Court admitted that. However, it is illogical for The Hague Tribunal not to analyse the killing of 24 civilians from Gospic, most of them women and elderly men, and over 100 of them were thrown into pits in Velebit. And General Norac is now getting married and travelling around Croatia. At this mass grave, there were 181 bodies of civilians and soldiers that were killed in that area. That is where General Matijasevic got killed, too, commander of the 6th Guards Brigade from Croatia. That is to say, this is direct participation of one country on the territory of another country. I found 36 old men there who were over 60 years old with the gravest possible injuries. So that is the matter. That is the bitterness that the citizens of my country feel as far as this Tribunal is concerned. This man who is present here, who insulted me like no one ever insulted me in my life and who presented so many untruths about me, but he is being tried here only because of what he said. He is only being tried for verbal offences. That is the feeling of the general public in my country, and that is my feeling. So that's the bitterness that is felt in that environment, and that is how this is viewed. We are not opposed to having all criminals punished, and this is precisely evidence. Had the Military Court carried out the investigation in Vukovar, also in relation to the Muslims in Zvornik, etc.

In this context, **an adjournment** seems to me to be **unjustified** and **ill-suited** in view of the situation.

If the Trial Chamber considers that the allegations [redacted] have not been proven, the following situation will occur in a few months or years prior to the resumption of trial:

- Either the Prosecution will engage in late proceedings based on insufficient evidence, which will cause **serious prejudice** to the Accused due to the delay even though the Statute imposes the obligation of an **expeditious trial** and the right to be tried without **undue delay**.
- Or, because the Trial Chamber would have recognised that the witnesses in question were not intimidated, the Prosecution will have no other solution but to withdraw its Indictment considering the fact that it too has been challenged by a contempt motion currently pending before this Trial Chamber, in which the Accused makes the same complaints against the Prosecution with regard to these witnesses.

This Trial Chamber has the procedural means to call these few witnesses as **Prosecution witnesses** or **witnesses of the Chamber** and to confront them with their initial statements, which were not tainted by **any interference** [redacted] the alleged interference occurred **after** the said statements were made. [redacted]. The present Chamber has the duty only to establish the guilt or the innocence of the Accused for the acts committed in 1991 and 1992 as set out in the Indictment.

It should be pointed out that the Trial Chamber heard witnesses who were in the same situation as these few remaining witnesses, [redacted].

Without any difficulty, the Trial Chamber had the technical ability to allow the examination-in-chief by the Prosecution of the remaining witnesses and the cross-examination by the Accused, with the Judges reserving the possibility of asking their own questions without restriction.

To conclude this **dissenting opinion**, I consider that the Trial Chamber should have, firstly, before ruling on an adjournment whose duration it cannot know or determine,

stayed its ruling on the motion regarding the few remaining affected by the allegations of intimidation and resolved the issues below in the following order:

(1) in accordance with Rule 77 (C) (iii) of the Rules, instigated proceedings relating to certain allegations, [redacted];

[redacted]

(2) **prosecuted and tried,** as quickly as possible, some of the witnesses who have refused to appear.

(3) invited the Prosecution to submit written motions for the **admission** into evidence of the written statements of certain witnesses on the basis of Rules 89 and 92 *quater* of the Rules.

(4) after completion of steps 1 to 3 above, made an **evaluation** as to the final decision to take concerning the Prosecution's written motion for the adjournment of the trial, including the fact that witnesses placed in the same situation have testified before the Chamber.

In any case, should there be a challenge to the present decision, it would be highly desirable for the parties concerned to **appeal** the decision so that the Appeals Chamber may clearly state whether the trial must be adjourned or must continue, notwithstanding the ongoing contempt proceedings, on the understanding that the Accused has been detained since 24 February 2003 and that, in a few days, he will have been in detention in The Hague for **six years** without a definitive judgement, while **less than seven hours** remain for the Prosecution to close its case.

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

/signed/

Jean-Claude Antonetti
Presiding Judge

Done this eleventh day of February 2009

At The Hague
The Netherlands

[Seal of the Tribunal]