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: 25 January 2012

Original: ENGLISH
French

IN TRIAL CHAMBER III

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

Registrar: **Mr John Hocking**

Decision of: **25 January 2012**

THE PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC DOCUMENT
with a Separate Opinion from Presiding Judge Jean-Claude Antonetti and a Separate Opinion from Judge Flavia Lattanzi in public annexes

and with a confidential and *ex parte* annex from the Accused (sensitive filing)

DECISION ON PROSECUTION REQUEST FOR CERTIFICATION TO APPEAL DECISION OF 22 DECEMBER 2011

The Office of the Prosecutor

Mr Mathias Marcussen

The Accused

Mr Vojislav Šešelj

I INTRODUCTION

1. Trial Chamber III 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 ("Chamber" and "Tribunal", respectively), is seized of a request filed by the Office of the Prosecutor ("Prosecution") as a confidential document on 4 January 2012 and as a public document on 9 January 2012[1] ("Request"), in which the Prosecution asks the Chamber to certify the appeal to the "Decision on Vojislav Šešelj's Motion for Contempt Against Carla Del Ponte, Hildegard Uertz-Retzlaff and Daniel Saxon and on the Subsequent Requests of the Prosecution", rendered as a public document on 22 December 2011 ("Decision of 22 December 2011).[2] In particular, the Prosecution intends to lodge an appeal against the Chamber's denial of its request to admit the public redacted version of the report – and/or a confidential version of the said report[3] - rendered on 5 October 2011 by the *Amicus Curiae*[4] following his investigation into the contempt allegations brought by Vojislav Šešelj ("Accused") against the Prosecution[5] ("*Amicus Curiae* Report" and "Public Version of the *Amicus Curiae* Report", respectively).[6]

[1] "Prosecution's Request for Certification of the Trial Chamber's Decision Denying Admission of Inter Partes or Public Version of the Amicus Curiae Report", 4 January 2012 (confidential; public redacted version filed on 9 January 2012).
[2] *See* also "Opinion of Presiding Judge Antonetti on the Decision on Vojislav Šešelj's Motion for Contempt against Carla Del Ponte, Hildegard Uertz-Retzlaff and Daniel Saxon", annexed to the Decision of 22 December 2011 (public; confidential and *ex parte* from the two parties version filed on the same date); "Partially Dissenting Opinion from Judge Lattanzi on the Decision on Vojislav Šešelj's Motion for Contempt against Carla Del Ponte, Hildegard Uertz-Retzlaff and Daniel Saxon", 28 December 2011 (confidential and *ex parte*; public version filed on the same date) ("Partially Dissenting Opinion of Judge Lattanzi").
[3] The Chamber understands that the Prosecution intends to lodge an appeal against the denial of the request for admission into evidence not only of the Public Version of the *Amicus Curiae* Report but also of the confidential *inter partes* version of the said Report, despite the fact that the request concerning the confidential *inter partes* version is not supported by explicit arguments.
[4] The *Amicus Curiae* was appointed by the Registry pursuant to the "Decision in Reconsideration of the Decision of 15 May 2007 on Vojislav Šešelj's Motion for Contempt Against Carla Del Ponte, Hildegard Uertz-Retzlaff and Daniel Saxon", 29 June 2010 (confidential; public redacted version filed on the same date) ("*Amicus Curiae*" and "Decision of 29 June 2010" respectively). *See* also "Decision on New Filing of Public Redacted Version of the *Amicus Curiae* Report", 28 October 2011 (public) ("Decision of 28 October 2011").
[5] "Motion by Professor Vojislav Šešelj for Trial Chamber III to Instigate Proceedings for Contempt of the Tribunal Against Carla Del Ponte, Hildegard Uertz-Retzlaff and Daniel Saxon", 23 March 2007 (confidential). *See* also "Addendum to Professor Vojislav Šešelj's Motion for Trial Chamber III to

II. PROCEDURAL BACKGROUND

2. On 29 June 2010, the Chamber ordered the Tribunal Registry ("Registry") to appoint an *Amicus Curiae* to investigate the allegations brought by the Accused in his Motion for Contempt, and the allegations of six witnesses added *proprio motu* by the Chamber within the investigation, and ordered the *Amicus Curiae* to: i) inform the Chamber whether adequate grounds exist for initiating contempt proceedings towards members of the Prosecution, ii) identify those very persons by name and (iii) submit to the Chamber a report containing his findings.[7]

3. On 5 October 2011, the Registry filed and transmitted the *Amicus Curiae* Report as a confidential and *ex parte* document from the two parties.[8]

4. In the Decision of 28 October 2011, the Chamber ordered the Registry to file the Public Version of the *Amicus Curiae* Report and ordered the parties to file their written observations on this Public Version within 15 days of the filing of the Decision of 28 October 2011 for the Prosecution and, for the Accused, within 15 days of receiving the translation into BCS of the Public Version of the *Amicus Curiae* Report.

5. On 14 November 2011, the Prosecution filed as a public document with a confidential annex its observations on the Public Version of the *Amicus Curiae* Report, in which the Prosecution requested: i) a dismissal of the Motion for Contempt; ii) admission into evidence as an exhibit of the Public Version of the *Amicus Curiae* Report and iii) disclosure of a confidential *inter partes* version of the *Amicus Curiae* Report and its potential admission as an exhibit.[9]

Instigate Proceedings for Contempt of the Tribunal Against Carla Del Ponte, Hildegard Uertz-Retzlaff and Daniel Saxon", 2 July 2007 (confidential) (together "Motion for Contempt").
[6] Request, paras 2 and 26.
[7] Decision of 29 June 2010, para. 36.
[8] "Confidential *ex parte* Report of *Amicus Curiae* Directed by Decision of 29 June 2010 on Vojislav Šešelj's Motion for Contempt", 5 October 2011 (confidentiel and *ex parte* (sensitive filing)).
[9] "Prosecution's Observations on Amicus Report Filed Pursuant to Trial Chamber's 'Decision in Reconsideration of the Decision of 15 May 2007 on Vojislav Šešelj's Motion for Contempt Against Carla Del Ponte, Hildegard Uertz-Retzlaff and Daniel Saxon'", 14 November 2011 (public with confidential annex).

6. The Accused did not file any observations on the Public Version of the *Amicus Curiae* Report within the deadline set by the Decision of 28 October 2011.[10]

7. In the Decision of 22 December 2011, the Chamber unanimously took note of the report filed by the *Amicus Curiae* and decided that there were insufficient grounds to launch contempt proceedings against Carla Del Ponte, Hildegard Uertz-Retzlaff, Daniel Saxon or any other member of the Prosecution.[11] By a majority, with Judge Lattanzi partially dissenting, the Chamber denied the Prosecution's request to admit the Public Version of the *Amicus Curiae* Report as an exhibit into the record and decided that there was no reason to disclose a new confidential *inter partes* version of the *Amicus Curiae* Report to the parties.[12]

8. On 27 December 2011, the Prosecution filed as a confidential document an urgent motion before the Duty Judge for an extension of time to file for certification to appeal the Decision of 22 December 2011.[13] In the "Decision on Prosecution's Urgent Motion for Extension of Time to File for Certification of the Trial Chamber's Decision Filed 22 December 2011", rendered as a confidential document on 28 December 2011, the Duty Judge ordered a suspension of the time-limit to seek certification for the interlocutory appeal planned by the Prosecution against the Decision of 22 December 2011 until the partially dissenting opinion of Judge Lattanzi, which arrived on 28 December 2011, was filed.

III ARGUMENTS OF THE PROSECUTION

9. The Prosecution submits that the two cumulative conditions of Rule 73 (B) of the Rules of Procedure and Evidence of the Tribunal ("Rules") have been met in this case, namely that the denial of the request for admission of the Public Version of the *Amicus Curiae* Report – and/or a confidential version of the said report – touches upon an issue likely to significantly affect the fair and expeditious conduct of the

[10] The Accused received the translation into BCS of the Public Version of the *Amicus Curiae* Report on 30 November 2011 (*see* procès-verbal of reception filed on 2 December 2011) and had, therefore, until 15 December 2011 to respond to it.
[11] Decision of 22 December 2011, paras. 28 to 29.
[12] Decision of 22 December 2011, paras 26 to 27. *See* also Partially Dissenting Opinion of Juge Lattanzi.
[13] "Prosecution's Urgent Motion for Extension of Time to File for Certification of the Trial Chamber's Decision Filed 22 December 2011", 27 December 2011 (confidential).

proceedings or the outcome of the trial[14] and that an immediate resolution by the Appeals Chamber of this issue may materially advance the proceedings.[15]

1. On the fairness and expeditiousness of the proceedings or the outcome of the trial

10. The Prosecution argues that the Decision of 22 December 2011 prejudices its right to a fair trial and the Chamber's ability to fully exercise its truth-finding function since a significant amount of relevant and probative evidence likely to assist the Chamber in resolving problems central to the case is absent from the record and it is thus impossible for the Prosecution to refer to them.[16]

11. The Prosecution submits that one of the defence strategies adopted by the Accused is to claim that the case is based on fabricated evidence.[17] In this respect, the Prosecution submits that some of the Accused's "insider" witnesses recanted in court, alleging that their testimony was erroneously transcribed in a previous statement and/or obtained through intimidation, threats and corruption on the part of members of the Prosecution, and therefore that the Chamber must, on the one hand, rule on the credibility, reliability and probative value of the previous statements and, on the other, on the testimony given in court objecting to the content of these previous statements.[18] The Prosecution submits in this respect that the Chamber cannot rule fairly on this issue without relying on the Public Version of the *Amicus Curiae* Report and/or on a confidential *inter partes* version, which must, consequently, be admitted into evidence as an exhibit.[19]

2. On the immediate resolution of the issue by the Appeals Chamber

12. The Prosecution argues that if the Public Version of the *Amicus Curiae* Report and/or a confidential *inter partes* version is not admitted as an exhibit, the Chamber will be unable to properly assess the credibility of witnesses in question and the

[14] Request, paras 2 (i), 15 to 23.
[15] Request, paras 2 (ii), 24 to 25.
[16] Request, paras 15 and 20.
[17] Request, para. 16.
[18] Request, paras 16 and 21.
[19] Request, paras 16, 20 to 22.

Appeals Chamber will therefore be compelled to re-evaluate the totality of the evidence.[20] The Prosecution argues furthermore that a re-trial may become necessary if the Decision of 22 December 2011 leads to a violation of the right to a fair trial.[21]

IV APPLICABLE LAW

13. Rule 73 (B) of the Rules states that:

> Decisions on all motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

14. The aim of a request for certification to appeal is not to show that an impugned decision has not been properly motivated, but to show that the conditions under Rule 73 (B) have been met. [22]

V DISCUSSION

A. Preliminary Questions

15. *In limine*, the Chamber considers firstly that it has been appropriately seized of the Request pursuant to Rule 73 (B) of the Rules as Rule 77 (J) of the Rules is not applicable in this case.[23]

16. Furthermore, the Chamber does not deem it necessary to wait for the expiry of the deadline for the Accused to respond in order to deal with the Request.[24] The Chamber notes, furthermore, that the Accused had the possibility of seizing the

[20] Request, para. 24.
[21] Request, para. 24.
[22] *See* in this sense *The Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, "Decision on Prosecution Motion for Certification of Trial Chamber Decision on Prosecution Motion for *Voire Dire* Proceedings", 20 June 2005 (public).
[23] *See The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR77.1, "Decision on Vojislav Šešelj's Appeal Against the Trial Chamber's Decision of 19 July 2007", 14 December 2007, p. 2; *The Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR77.2, "Decision on the Prosecution's Appeal Against the Trial Chamber's Decision of 10 June 2008", 25 July 2008 (public redacted version), para. 8.
[24] The Accused received a translation into BCS of the public version of the Request on 16 January 2012 (Procès-verbal of reception filed on 24 January 2012). Consequently, the deadline to respond expires on 30 January 2012.

Chamber of a request for certification to appeal the Decision of 22 December 2011, but did not do so within the deadline issued.[25]

B. Analysis

17. With respect to the first condition of Rule 73 (B) of the Rules, the Chamber recalls that the aim of the *Amicus Curiae* Report was limited to investigating the Motion for Contempt in order to allow the Chamber to determine whether there were sufficient grounds to instigate contempt proceedings against certain members of the Prosecution pursuant to Rule 77 of the Rules.[26] The *Amicus Curiae* concluded that such grounds did not exist, the Chamber took note of these findings and, consequently, rejected the Motion for Contempt.[27] Therefore, the *Amicus Curiae* Report was only a tool to allow the Chamber to rule on the said motion and it was never intended to become evidence relating to the charges alleged against the Accused in this case.

18. Furthermore, the rejection of the allegations of intimidation, threats and corruption are contained in the Public Version of the *Amicus Curiae* Report, annexed to the Decision of 28 October 2011, and in the Decision of 22 December 2011, and therefore these findings are an integral part of the case-file.[28] Consequently, even though the Public Version of the *Amicus Curiae* Report does not have the status of an exhibit admitted pursuant to Rule 89 of the Rules,[29] the parties may refer to it when it suits them, as is the case with all other documents on the record. In this respect, the Chamber recalls that according to the Directive for the Court Management and Support Services Section [for] Judicial Support Service [of the] Registry:

[25] The Accused received a translation into BCS of the Decision of 22 December 2011 on 17 January 2012 (*see* procès-verbal of reception filed on 24 January 2012); consequently, the deadline to file a request for certification to appeal expired on 24 January 2012.
[26] Decision of 22 December 2011, para. 18; Decision of 29 June 2010, para. 32.
[27] Decision of 22 December 2011, para. 24.
[28] *See* Decision of 22 December 2011, para. 20.
[29] Section 3 of Part Six of the Rules defines what may constitute evidence. The Chamber wishes to recall that there is a clear difference between evidence admitted to a case file pursuant to Rule 89 of the Rules and documents (motions, decisions, other submissions, etc.) that make up the case file (or case record) because they have been admitted into it.

> *The Tribunal's Case files shall include* all documents filed by the CMSS Court Records Office in each case brought before a judge, Chamber or the President pursuant to the Rules.[30]

19. Consequently, and as the allegations of contempt likely to affect the credibility of Prosecution witnesses were expressly rejected by the Decision of 22 December 2011, the Prosecution has not suffered any prejudice as a result of the said Decision. In this respect, the Chamber recalls that it will evaluate the credibility of the witnesses in question during deliberations on the basis of evidence admitted in the present case and that it will, of course, bear this in mind during this evaluation, notably because the allegations of intimidation, threats and corruption regarding these witnesses were rejected as being unfounded.

20. With respect to the denial of the request for admission of a confidential *inter partes* version of the *Amicus Curiae* Report, the Chamber decided, by a majority, that there was no reason to transmit a confidential *inter partes* version of the *Amicus Curiae* Report to the parties.[31] The Request does not explicitly seek certification to appeal this finding. Consequently, the Chamber notes that it is unable to rule on the request for admission of a confidential *inter partes* version as it has indeed decided not to disclose such a version which consequently does not exist.

21. In light of the preceding, the Chamber deems, by a majority, that denying the request for admission of the Public Version of the *Amicus Curiae* Report is not likely to significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

22. As the first condition of Rule 73 (B) of the Rules has not been met and the two conditions of the said Rule are cumulative, the Chamber, by a majority, does not deem it necessary to consider the Prosecution's grounds arguing that the second condition under Rule 73 (B) of the Rules has been met.

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[30] "Directive for the Court Management and Support Services Section [for] Judicial Support Services [of] the Registry", 19 January 2011, IT/121/REV.2, Article 10.1 (emphasis added).
[31] Decision of 22 December 2011, para. 26. *See* also Partially Dissenting Opinion of Judge Lattanzi.

VI DISPOSITION

23. For the foregoing reasons,[32] pursuant to Rule 73 (B) of the Rules, **DENIES** the Request. Presiding Judge Antonetti attaches a separate opinion. Judge Lattanzi attaches a separate opinion.

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

/signed/
Jean-Claude Antonetti
Presiding Judge

Done this twenty-fifth day of January 2012
The Hague (The Netherlands)

[Seal of the Tribunal]

[32] Judge Flavia Lattanzi fully agrees with the decision to deny the Request but on different grounds.

ANNEX I:

SEPARATE OPINION OF PRESIDING JUDGE JEAN-CLAUDE ANTONETTI

I am in favour of **denying** the request for certification for the reasons stated below. Before I begin an in-depth consideration of the reasons, I must firstly recall the arguments of the Office of the Prosecutor.

In its Request,[1] the Prosecution objects to the Chamber's refusal to admit the *Amicus Curiae* Report into evidence. Amongst other, the Prosecution submits that the issue of the credibility of the recanting witnesses is crucial to this case, notably because Šešelj's main line of defence, which rests on allegations against members of the Office of the Prosecutor, was proven to be false.[2]

On the merits, the Prosecution insists that the Report is extremely important to the issue of the credibility and reliability of the statements made by the Prosecution witnesses and those witnesses who recanted, notably those called to testify by the Chamber.[3] Firstly, the Prosecution argues that the Chamber had itself deemed that the evidence provided by the recanting witnesses and the evidence that emerged from the statements of Prosecution witnesses were crucial to this case and that their credibility was decisive.[4] The Prosecution then notes that the Chamber stated that the goal of the *Amicus* was to facilitate the Chamber's assessment of all the evidence and the credibility of the witnesses.[5] In this way, the Chamber is alleged to have delegated its power to assess the credibility of the evidence in the main trial to an *Amicus Curiae*,[6] thereby placing logistical considerations, notably time, above the fairness of the trial and the right of the Prosecution to present its arguments.[7] Furthermore, the Prosecution reproaches the Chamber for not having informed the Parties that the Report would not be relevant to the main case while at the same time postponing the scheduling of the closing arguments until the said report was filed.[8] Finally, the Prosecution believes that it is contradictory on the part of the Chamber to have asked the Parties to file their observations on the Report yet declined the Prosecution's request for clarification about the scope of the observations, including the issue of the Report's admission into evidence.[9]

[1] "Prosecution's request for certification of the Trial Chamber's decision denying admission of *inter partes* or public version of the *Amicus Curiae* Report", confidential, 4 January 2012.
[2] Request, para. 1.
[3] Request, para. 10.
[4] Request, paras 1 and 3: the Prosecution claims *in sus* that this is the reason why the Chamber called Daniel Saxon to the witness stand (para. 4).
[5] Request, para. 6.
[6] Request, paras 7-9.
[7] Request, para. 8.
[8] Request, para. 9.
[9] Request, para. 11.

On applicable law, the Prosecution deems that the two conditions required under Rule 73 (B) of the Rules for certification to appeal have been met.[10]

On the first condition, the Decision allegedly infringed upon the right of the Parties to a fair trial. As noted by Judge Lattanzi,[11] the *Amicus Curiae* Report is highly relevant to evaluate the credibility and reliability of the statements from the Office of the Prosecutor admitted by the Chamber, and of the recanting witnesses, and will assist the Chamber in rendering its Judgement.[12] The Prosecution notes that eight witnesses who were the subject of the investigation and whose allegations of pressure were deemed unfounded are part of the trial record.[13] Finally, according to the Prosecution, it is unreasonable for the Chamber to refuse to admit the Report while simultaneously considering that the *prima facie* reliability of the statements from Prosecution witnesses is unaffected by the allegations of pressure.[14] On the contrary, the Report allegedly proves the credibility of Prosecution witnesses and discredits the recanting witnesses.[15]

On the second condition, the Prosecution claims that the immediate resolution of this issue would materially advance the proceedings because, in the event of an appeal, the Appeals Chamber would have to reconsider the facts and re-evaluate the totality of the evidence.[16] It warns the Chamber of the risk of a costly and time-consuming re-trial if the Chamber does not manage to ensure a fair trial.[17]

It is clear that henceforth, as a responsible Judge, I must take certain parameters into account in my assessment. Consequently, I must take into consideration the statements made by the President of the Security Council during the 6678th session held in New York on 7 December 2011: "Particular attention should be paid to the notorious case of Šešelj. He has been in detention for nine years now. Moreover there has still not been a first instance judgement. Furthermore, we hear worrying reports of Mr Šešelj's state of health and the problems that he has encountered in enjoying his procedural rights. We would be grateful if the ICTY leadership could include the developments of that case and the general condition of Mr Šešelj in its next report to the Security Council".

Upon reading these statements, a reasonable and competent trier of fact must ask himself whether he has done everything to ensure that this detention is not critically prolonged. Therefore, the treatment of these written submissions may directly affect the extension of the provisional detention, even more so because in its Decision of 31

[10] Request, para. 14: above all else, the Prosecution invokes the case-law of the Appeals Chamber, which recognises the significant importance of the *Amicus Curiae* Reports as they relate to pressure on witnesses and the right for the parties to rely on these reports.
[11] Request, par. 17 quoting the Dissenting Opinion of Judge Lattanzi.
[12] Request, paras 15-20.
[13] Request, para. 18.
[14] Request, paras 19-21.
[15] Request, para. 21.
[16] Request, paras 2 and 24.
[17] Request, para. 24.

October 2011, the Chamber scheduled the Prosecution and Defence closing arguments for 5 March 2012.[18]

As a result, nothing should stand in the way of this schedule.

The Prosecution filed a request for certification to appeal following the Chamber's decision, by a majority, not to admit the *Amicus Curiae* Report into the record. It should be recalled firstly that, pursuant to Rule 77 (C) (ii) of the Rules, the Chamber appointed an *Amicus Curiae* to find out "whether adequate grounds exist for initiating contempt proceedings (…)". In his report, the *Amicus Curiae* clearly indicated that the grounds were insufficient.

Based on this, what more does the Office of the Prosecution want after it has been completely exonerated by the findings of the *Amicus Curiae*? Does the Prosecution want to take advantage of this report so that it can play an additional card regarding the weight to be accorded to the evidence? To take up this logic would mean to infringe upon the fairness of the trial and the equality of arms. What do we have here as Judges?

We have a complaint supported by detailed statements from witnesses who accused members of the Office of the Prosecutor of intimidating and pressuring witnesses. On the other hand, we have revelations from the Prosecution and an investigation by the *Amicus Curiae*, who only interviewed the "accused" but not the "accusers". The Prosecution would like us to admit this report and, consequently, give additional credit to its version. Following this logic, however, it would also be appropriate to admit the Report and the subsequent exhibits, notably statements from the "accusing witnesses". Why admit only the Report without the annexed exhibits unless to privilege the Prosecution?

Moreover, we are in a situation where, according to Rule 77 (C) of the Rules, a Chamber must have sufficient grounds for instigating contempt of court proceedings. In this case, as the Chamber does not have such evidence and is relying on the findings of the *Amicus Curiae* Report, such proceedings will not impact the rest of the trial, otherwise all the evidence produced by X and Y would have to be admitted in one sense or the other.

To my knowledge, the evidence produced by the Accused was not introduced, because he failed to appear both for the presentation of his Defence case and for the last contempt proceedings brought against him, even though the statements from the accusing witnesses contradicted the version put forth by the Prosecution. In this context, it is my opinion that admitting the Report would also entail admitting all the documents related to the complaint. To ensure fairness, the present Chamber deemed that it did not have any convincing grounds and that it was not appropriate to admit the said report. To go down this oh-so-dangerous road might result in admitting into

[18] *The Prosecutor v. Vojislav Šešelj*, "Scheduling Order (Final Briefs, Prosecution and Defence Closing Arguments)", public, 31 October 2011.

the trial record all the other secondary contempt of court proceedings brought against the Accused.

Furthermore, the certification to appeal complies with very precise and specific criteria and, notably, the decision of the Appeals Chamber must not have consequences on the trial. As a general rule, the Appeals Chamber takes at least four months before rendering a decision, which would make it impossible for us to hold a hearing on 5 March 2012. I am particularly surprised at this request for certification to appeal since the Chief Prosecutor Mr BRAMMERTZ intimated that the Šešelj case was not a model for International Justice.[19] Two things could have happened: Chief Prosecutor Mr BRAMMERTZ gave a green light to the request for certification to appeal, thereby completely contradicting his statements, or perhaps it was his Deputy who seized the Chamber without consulting with his superior and ignoring the latter's previous statements.

Clearly, at my level I am unable to resolve these issues, but they exist nevertheless. Their existence is further underscored by the fact that an important member of the Security Council publicly mentioned the trial's slow development.[20] Everyone must comply with the date of 5 March 2012. The *Amicus Curiae* Report is what it is and it cannot be brought into question for any reason whatsoever.

The Prosecution wants "to have its cake and eat it too" but in terms of evidence, it was allowed the maximum when the Chamber admitted previous statements into evidence, which, in common law, are not part of the procedure as only statements made by the witnesses in court are taken into account. This notwithstanding, the Chamber decided to admit the said previous statements. Consequently, the Chamber has in its possession all the evidence to able to judge the credibility of a witness and has absolutely no need of the *Amicus Curiae* Report for that; one must not forget that for the most part, the witnesses testified in open session after being sworn in and answered questions from the Prosecution, questions from the Accused during the cross-examination, and questions from the Trial Chamber Judges.

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

[20] "(…) As for the Šešelj Case, the situation is becoming increasingly scandalous as the Accused has already spent almost nine years in detention awaiting a first instance judgement. Furthermore, the issue in this case is also that the schedule has been delayed." (Transcript of the 6678th Session of the Security Council, New York, 7 December 2011, p. 24).

If I have understood the Prosecutor's position well, he is seeking admission of this report to, in a way, enable the Chamber to assess the credibility of the witnesses.

In this respect, he quotes the findings of the *Amicus Curiae* concerning Aleksandar Stefanović, Nenad Jović, Nebojša Stojanović, Jovan Glamočanin and Zoran Rankić. With respect to the latter, Zoran Rankić, the *Amicus Curiae* found that he was not sufficiently reliable to constitute contempt of Court.

The request of the Office of the Prosecutor is very surprising because it in no way corresponds to the Chamber's Decision of 29 June 2010 designating an *Amicus Curiae*.[21] The Prosecutor's justification for his request is that, in his opinion, the aim of the *Amicus Curiae* investigation was to facilitate the work of the Chamber regarding the credibility and reliability of the statements of Prosecution witnesses and recanting witnesses, notably Chamber witnesses. I deeply object to this interpretation of our decision because there was no question in the decision of the need to evaluate the credibility of the witnesses through the expertise of the *Amicus Curiae*. The only issue at hand was to know whether there were reasons to believe that witnesses were pressured and/or intimidated by the Office of the Prosecutor.

The disposition of the said decision is very clear as the only issue was to investigate the alleged intimidation and/or pressure, and the Chamber provided a list in this regard of all the witnesses who testified or may testify. This was in essence a typical investigation and moreover, the *Amicus Curiae* was requested to seek the assistance of the War Crimes Chamber of the Belgrade District Court and its counterpart in Bosnia and Herzegovina if necessary. The mission entrusted to the *Amicus Curiae* by the Chamber consisted, therefore, of issuing a finding on whether there had been pressure and/or intimidation and not on witness credibility. The Prosecution has made a **colossal error** in justifying its request.

This work was never supposed to enable the Chamber to assess the evidence. It is extremely surprising to see the Prosecution argue that "in this way, the Chamber delegated its power to assess the credibility of the evidence in the main trial to an *Amicus Curiae* (…)". Such a thing was never even entertained; the assessment of witness credibility comes under the **sole authority of the Chamber** at the time of deliberations on the evidence on the record, such as witness statements and testimony. The Prosecution appears to be **completely confused** and I find this all the more disturbing because the Prosecution knows perfectly well that the *Amicus Curiae* did not interview the witnesses. He merely interviewed the "accused" but not the "accusers". Furthermore, although the Chamber sought observations from the parties, it was not on the issue of witness credibility but on whether they agreed with the findings of the *Amicus Curiae* Report that there had been no pressure or intimidation.

Finally, it was not mentioned in the Decision, or even in court, that the Report would automatically be admitted into evidence. I wish to add that not admitting the Report does not prejudice the Prosecution in any way because, from the beginning, this was a

[21] *The Prosecutor v.. Vojislav Šešelj*, "Decision in Reconsideration of the Decision of 15 May 2007 on Vojislav Šešelj's Motion for Contempt Against Carla del Ponte, Hildegard Uertz-Retzlaff and Daniel Saxon", public, 29 June 2010.

question of establishing whether members of the Office of the Prosecutor had intimidated or pressured witnesses and the response of the *Amicus Curiae* was very clear in that regard: **there was no intimidation and/or pressure by the Prosecution.**

For these reasons and for those emerging from the established case-law of the Appeals Chamber, I am denying the certification to appeal.

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

/signed/

Jean-Claude Antonetti
Presiding Judge

Done this twenty-fifth day January 2012
The Hague (The Netherlands)

[Seal of the Tribunal]

ANNEX II:
SEPARATE OPINION OF JUDGE FLAVIA LATTANZI

1. In light of my Partially Dissenting Opinion on the Decision on Vojislav Šešelj's Motion for Contempt against Carla Del Ponte, Hildegard Uertz-Retzlaff and Daniel Saxon, filed on 28 December 2011 as a confidential and *ex parte* document, with the public version filed on the same date, I would like to specify that I consider that the first condition of Rule 73 (B) of the Rules has been met in this case, namely that the Decision of 22 December 2011 touches upon an issue likely to affect the outcome of the trial. As the two conditions described under Rule 73 (B) of the Rules are cumulative, I was led, contrary to the Chamber, to consider the second condition relating to the progress of the proceedings. In this respect, I came to the conclusion that, bearing in mind the advanced stage in the proceedings (notably the deadlines for the Prosecution and Defence closing arguments[1]), the immediate resolution of this issue by the Appeals Chamber, as requested by the Prosecution, would not materially advance the proceedings; it would, on the contrary, be likely to delay it. In my opinion, the second condition of Rule 73 (B) of the Rules has not been met and, consequently, I fully share the Chamber's decision to deny the Request.

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

/signed/
Flavia Lattanzi
Judge

Done this twenty-fifth day of January 2012
The Hague (The Netherlands)

[1] "Scheduling Order (Final Briefs, Prosecution and Defence Closing Arguments)", 31 October 2011 (public).