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-R77.3-A
	Date:	29 November 2011

IN THE APPEALS CHAMBER

Before: Judge Mehmet Güney
Judge Fausto Pocar
Judge Liu Daqun
Judge Arlette Ramaroson
Judge Andrésia Vaz

Registrar: Mr. John Hocking

PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC

AMICUS CURIAE PROSECUTOR'S APPELLANT BRIEF ON SENTENCE

***Amicus Curiae* Prosecutor**	**The Accused**
Mr. Bruce A. MacFarlane, Q.C.	Mr. Vojislav Šešelj

Appellants Brief on Sentencing

A. Introduction

1. Pursuant to Article 25 of the *Statute of the International Criminal Tribunal for the Former Yugoslavia* **("The Statute")** and Rule 108 of the Rules of Procedure and Evidence **("The Rules")**, the *Amicus Curiae* Prosecutor appointed to prosecute case number IT-03-67-R77.3 respectfully appeals against the sentence imposed by the Trial Chamber in the current proceedings on 31 October 2011 **("The Second Contempt"),** in which the Accused was sentenced "to a single term of eighteen months to be served concurrently with the sentence of fifteen months imposed by the Chamber on 24 July 2009 in case number IT-03-67-R77.2" **("The First Contempt").**

B. Procedural History

2. On 26 January 2009, the Office of the Prosecutor ("Prosecution") filed, confidentially and *ex parte*, the "Prosecution's Motion under Rule 77 Concerning Further Breaches of Protective Measures", in which it was submitted that Vojislav Šešelj had violated the orders of the Trial Chambers hearing the case of *Prosecutor v. Vojislav Šešelj* through the publication of 3 books **("Book")** allegedly authored by Šešelj.[1] Furthermore, the Prosecution submitted that Šešelj had knowingly violated these protective orders by publishing the statements of 13 witnesses as well as disclosing information enabling their identification. On 13 March 2009, the President of the Tribunal assigned the 26 January Motion to Trial Chamber II.[2]

3. On 21 August 2009, the Chamber issued, confidentially and *ex parte*, the "Decision on Prosecution's Motion under Rule 77 Concerning Further Breaches of Protective Measures **("Three Books"),** finding that despite there being evidence there had been publication of submissions in these books that knowingly disclosed information that violated an order of the Chamber, the Chamber was not persuaded it was of such a level of gravity to initiate proceedings pursuant to Rule 77(D), nor were there sufficient grounds to believe that the information published regarding the 13 witnesses would in fact lead to the identification of these protected Prosecution witnesses.[3]

4. On 17 December 2009, in response to the Prosecution's "Notice of Appeal", filed confidentially and *ex parte* on 7 September 2009, the Appeals Chamber ruled that there was a *prima facie* case that Šešelj knowingly violated the order of the Trial Chambers by publishing

[1] *Prosecutor v. Vojislav Šešelj*, Case Number IT-03-67-R77.3 ("**Judgement**"), 31 October 2011, para. 1.
[2] *Ibid*.
[3] *Ibid*. at para. 2.

information about these protected witnesses.[4] The Appeals Chambers ordered that the Chamber proceed against Šešelj pursuant to Rule 77(D)(ii) of the Rules.[5]

5. On 3 February 2010, the Trial Chamber issued an order in lieu of an indictment which charged the Accused, Vojislav Šešelj, with one count of contempt of the Tribunal, punishable under Rule 77(A)(ii) of The Rules, for having disclosed in a book information which may identify 11 protected witnesses in violation of orders of a Chamber.[6]

6. On 2 March 2010, The Registrar appointed Bruce MacFarlane, Q.C. as the *Amicus Curiae* Prosecutor in this case.

7. On 27 April 2010, Šešelj filed a Disqualification Motion[7], which was dismissed on 19 November 2010 by a special bench composed upon the order of the President.[8]

8. On 2 December 2010, the Trial Chamber dismissed a motion brought by the *Amicus Curiae* Prosecutor seeking to amend the order in lieu of indictment such that it would specify that the book in issue was available in both hardcopy and electronic format; in the order, however, the Chamber noted that the format was "immaterial to the central issue as to whether or not the witness's identity were revealed in the said book", and that, as a result, "during the course of the trial, the Amicus Curiae will have an opportunity to present submissions regarding the dissemination of the book in relation to the seriousness of the alleged offence"[9]

9. The initial appearance of Šešelj took place on 29 April 2010. Šešelj chose to represent himself for the purpose of the hearing as well as the remainder of the proceedings, and declined to plead to the charge in the Indictment. [10] At a further initial appearance on 6 May 2010, Šešelj refused to enter a plea. A plea of not guilty was entered on his behalf pursuant to Rule 62(A)(iv) of The Rules.[11]

10. On 22 February 2011, a pre-trial conference was held to address pending procedural matters; the trial commenced the same day, immediately thereafter. At the close of the *Amicus Curiae* Prosecutor's case, the Trial Chamber granted Šešelj's request to postpone his case to prepare his defence.[12]

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[4] Judgement, para. 3 and 4.
[5] Judgement, para. 4.
[6] Judgement, para. 5.
[7] Motion by Professor Vojislav Šešelj for the Disqualification of Judges O-Gon Kwon and Kevin Parker, IT-03-67-R77.3, 27 April 2010.
[8] Judgement, para. 7.
[9] Decision on Prosecutor's Motion to Amend the Order in Lieu of Indictment, 2 December 2010, Case No. IT-03-67-R77.3, p. 2.
[10] Judgement, para. 8.
[11] *Ibid.*
[12] Judgement, para. 10.

11. The trial proceedings continued on 6 June 2011 with the accused's case, and concluded on 8 June 2011.[13]

12. The Trial Chamber rendered its judgement on 31 October 2011, convicting Šešelj of contempt, and sentenced him to eighteen months imprisonment to be served concurrently with the sentence of fifteen months imposed by the Trial Chamber on 24 July 2009, affirmed by the Appeals Chamber on 19 May 2010, in The First Contempt.[14]

13. On 14 November 2011 the *Amicus Curiae* Prosecutor filed an "*Amicus Curiae* Prosecutor Notice of Appeal Against Sentence".[15]

Orders to Remove Material from Website

14. On 26 April 2010, the *Amicus Curiae* Prosecutor filed a confidential "Prosecutor's Motion for Order to Remove Document from Website".[16] The Trial Chamber issued a confidential "Decision on Prosecutor's Motion for Order to Remove Document from Website" on 16 December 2010 **("16 December 2010 Decision"),** which ordered that, within 14 days, Šešelj was to withdraw the Book from his website **("Website")** or file a report explaining his reasons for not doing so.[17]

15. Šešelj submitted a report[18], in which he indicated he did not intend to remove the Book from the Website. The *Amicus Curiae* Prosecutor filed confidentially a response to the accused's report[19] which argued that Šešelj had not provided any justification for his noncompliance with the 16 December 2010 Decision. On 31 January 2011, the Trial Chamber issued a confidential order[20] requiring that Šešelj remove the Book from the Website no later than 14 February 2011, and for the Registry to report on the implementation of the order by 21 February 2011.[21]

16. On 17 February 2011, the Trial Chamber issued an "Order to Remove Confidential Information from Website", ordering Šešelj to remove confidential submissions from the Website by 3 March 2011, as well as the Website's registrant and any other company providing web hosting services to the Website; and further ordered the Registry to report on the implementation of this decision no later than 10 March 2011.[22]

[13] Judgement, para. 11.
[14] Judgement.
[15] *Amicus Curiae* Prosecutor Notice of Appeal Against Sentence, IT-03-67-R77.3, 14 November 2011.
[16] Judgement, para. 12.
[17] *Ibid.*
[18] Professor Vojislav Šešelj's Response/Report on the Trial Chamber II Decision of 16 December 2010, IT-03-R77.3, 10 January 2011.
[19] Prosecution Response to Report on the Decision of 16 December 2010, IT-03-R77.3, 21 January 2011.
[20] Order to Remove Book from Website, IT-03-R77.3, 31 January 2011.
[21] Judgement, para. 13.
[22] Judgement, para. 14.

Šešelj's continued failure to comply with the orders to remove the Book, in addition to other information which was ordered to be confidential in the course of the proceedings, has led the Trial Chamber to issue an order in lieu of indictment pursuant to Rule 77(D)(ii) of the Rules, charging the Accused with one count of contempt pursuant to Rules 77(A) and 77(A)(ii) of the Rules.[23] That matter remains pending before the Trial Chamber.

C. Standard of Review

17. The Appeals Chamber will consider arguments alleging errors on questions of law invalidating a decision,[24] and errors of fact that have occasioned a miscarriage of justice.[25] The same standard of review applies to all appeals against judgements, including appeals against convictions for contempt.[26]

18. Correctness is the standard of review for errors of law.[27] Appellants must identify alleged errors of law, present arguments in support of its claim and explain how the error invalidates the judgment.[28] Allegations which have no chance of changing the outcome of a judgment can be rejected.[29] Where the Appeals Chamber finds errors of law arising from the application of the wrong legal standard, the correct legal standard is articulated and the relevant factual findings are reviewed.[30]

19. The relevant provisions on sentencing are Articles 23 and 24 of the Statute and Rules 100 to 106 of The Rules. Both Article 24 of The Statute and Rule 101 of The Rules contain general

[23] Judgement, para. 15. Note: This count of contempt is now being addressed in the case bearing number IT-03-67-R77.4.
[24] Art.25(1)(a), Statute
[25] Art.25(1)(b), Statute
[26] *Prosecutor v. Hartmann*, IT-02-R77.5-A, 19 July 2011 ("***Hartmann* Appeal Judgement"**), para. 7; *Prosecutor v. Šešelj*, IT-03-63-R77.2-A, 19 May 2010, ("***Šešelj* Appeal Judgement**); para. 9; *Contempt Proceedings Against Dragan Jokić*, IT-05-88-R77.1-A, Judgement on Allegations of Contempt, 25/06/2009 ("***Jokić***"), para. 11; *Prosecutor v. Jović*, IT-95-14 & 14/2-R77-A, Judgement, 15 March 2007 ("***Jović* Appeal Judgement**"), para. 11; *Prosecutor v. Marijačić & Rebić*, IT-95-14-R77.2-A, Judgement, 27 September 2006 ("***Marijačić & Rebić* Appeal Judgement**"), para. 15. See also, *Prosecutor v. Mrkšić & Šljivančanin, IT*-95-13/1-A, Judgement, 5 May 2009 ("***Mrkšić***"), para. 10; *Prosecutor v. Krajišnik*, IT-00-39-A, Judgement, 17 March 2009 ("***Krajišnik***"), para. 11; *Prosecutor v. Martić, IT*-95-11-A, Judgement, 8 October 2008 ("***Martić***"), para. 8.
[27] *Jović* Appeal Judgement, para. 12; *Marijačić & Rebić* Appeal Judgement, para. 16. See also, *Jokić*, para. 12; *Mrkšić*, para. 12; *Krajišnik*, para. 13; *Martić*, para. 10.
[28] *Hartmann* Appeal Judgement, para. 8; *Šešelj* Appeal Judgement, para. 10; *Jović* Appeal Judgement, para. 12; *Marijačić & Rebić* Appeal Judgement, para. 15. See also, *Mrkšić*, para. 11; *Krajišnik*, para. 12; *Martić*, para. 9; *Jokić*, para. 12; *Prosecutor v. Brđanin*, IT-99-36-A, 3 April 2007, para. 9; *Prosecutor v. Krnojelac*, IT-97-25-A, Judgement, 17 September 2003, para. 10; *Prosecutor v. Kvočka*, IT-98-30/1-A, Judgement, 28 February 2005, para. 16.
[29] *Hartmann* Appeal Judgement, para. 8; *Šešelj* Appeal Judgement, para. 10; *Jović* Appeal Judgement, para. 12; *Marijačić & Rebić* Appeal Judgement, para. 17. See also, *Mrkšić*, para. 11; *Krajišnik*, para. 12; *Martić*, para. 9.
[30] *Hartmann* Appeal Judgement, para. 8; *Šešelj* Appeal Judgement, para. 10; *Inter alia*, *Mrkšić*, para. 12; *Krajišnik*, para. 13; *Martić*, para. 10.

factors that a Trial Chamber is required to take into account: (i) the general practice regarding prison sentences in the courts of the former Yugoslavia; (ii) the gravity of the offence; (iii) the individual circumstances of the convicted person (including aggravating and mitigating circumstances); and (iv) the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served.[31]

20. Due to their obligation to individualise the penalties to fit the circumstance of an accused and the gravity of the crime, Trial Chambers are vested with broad discretion in determining the appropriate sentence, including the determination of the weight given to mitigating or aggravating circumstances.[32] The Appeals Chamber may, however, revise a sentence where the Trial Chamber has committed a discernible error in the exercise of its discretion, or has failed to follow the applicable law.[33] In the consideration of that issue, the Appeals Chamber may consider whether the Trial Chamber gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, made a clear error as to the facts upon which it exercised its discretion, or whether the Trial Chamber's decision was so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.[34]

D. Grounds of Appeal

> **<u>Ground One</u>: The Trial Chamber committed a discernible error in the exercise of its jurisdiction on the issue of sentencing in these proceedings, or failed to follow the applicable law, in the following respect: The sentence imposed for The First Contempt had expired as a matter of law well before the trial in these proceedings; the Second Contempt sentence therefore had no contempt sentence with which to run concurrently.**

[31] *Prosecutor v. Milošević*, IT-98-29/1-A, 12 November 2009, ("***Milošević* Appeal Judgement**") para. 296; *Prosecutor v. Babić*, IT-03-72-A, 18 July 2001 ("***Babić* Sentencing Appeal Judgement**"), para. 5; *Prosecutor v. Mucić et. al.*, IT-96-21-A, 20 February 2011 ("***Čelebići* Appeal Judgement**"), paras. 429 and 716; *Mrkšić and Šljivančanin* Appeal Judgement, para. 351; *Prosecutor v. Strugar*, IT-01-42-A, 17 July 2008 ("***Strugar* Appeal Judgement**"), para. 335.

[32] *Hartmann* Appeal Judgement, para. 167; *Šešelj* Appeal Judgement, para. 37; *Miloševič* Appeal Judgement, para. 297; *Mrkšić and Šljivančanin* Appeal Judgement, para. 352; *Strugar* Appeal Judgement, para. 336; *Prosecutor v. Hadžihasanović and Kubura,* IT-01-47-A, 22 April 2008 ("***Hadžihasanović and Kubura* Appeal Judgement**"), para. 302.

[33] *Hartmann* Appeal Judgement, para. 167; *Šešelj* Appeal Judgement, para. 37; *Miloševič* Appeal Judgement, para 297; *Mrkšić and Šljivančanin* Appeal Judgement, para. 353; *Babić* Sentencing Appeal Judgement, para. 7; *Strugar* Appeal Judgement, para. 336; *Hadžihasanović and Kubura* Appeal Judgement, para. 302; *Prosecutor v. Limaj et al.*, IT-03-66-A, 27 September 2007 ("***Limaj* Appeal Judgement**"), para. 127; *Prosecutor v. Zelenović*, IT-96-23/2-A, 31 October 2007, para. 11; *Prosecutor v. Blagojević and Jokić*, IT-02-60-A, 9 May 2007, para. 137; *Prosecutor v. Tadić*, IT-94-1-A and IT-94-1-A*bis*, 26 January 2000, para. 22.

[34] *Miloševič* Appeal Judgement, para 297. See*, e.g*., *Mrkšić and Šljivančanin* Appeal Judgement, para. 353; *Martić* Appeal Judgement, para. 326; *Strugar* Appeal Judgement, paras 336-337.

21. Rule 102(A) is pivotal in the calculation of when the sentence in The First Contempt and The Second Contempt both commenced and expired. It provides as follows:

> The sentence shall begin to run from the day it is pronounced. However, as soon as notice of appeal is given, the enforcement of the judgment shall thereupon be stayed until the decision on the appeal has been delivered, the convicted person meanwhile remaining in detention, as provided in Rule 64.

22. This Rule has two separate and distinct aspects, both of which are relevant here. First, a sentence of imprisonment starts to run on the day it is pronounced. Second, an appeal against sentence stays enforcement of that sentence until the appeal is decided.

23. On the facts here, there are two ways of calculating when sentence in The First Contempt commenced and expired. Below, the *Amicus Curiae* Prosecutor will submit that one of these approaches is the correct one. The main point, however, is this: *both* lead to the conclusion that at the time of the trial of The Second Contempt, sentence in The First Contempt had expired. There was, therefore, no sentence in existence with which the sentence imposed in The Second Sentence could run concurrently.

a) Calculation number one (submitted to be the correct one)

24. The Trial Chamber convicted the Accused in The First Contempt on 24 July 2009 and sentenced him to fifteen months imprisonment. On the basis of Rule 102(A), sentence commenced that day. It ran continually until a *valid* Notice of Appeal was filed by the Accused, on the issues of both conviction and sentence, on 12 January 2010.[35] By that time, five months and nineteen days had passed. Accordingly, at the time he commenced his appeal validly, the Appellant had served five months and nineteen days of his fifteen month sentence.

25. This Chamber delivered its judgment on 19 May 2010. All grounds of appeal advanced by Šešelj were dismissed, and his sentence of fifteen months imprisonment was affirmed.[36] On the basis of Rule 102(A), Šešelj re-commenced serving his sentence that same day, from the time

[35] The Accused had initially filed a Notice of Appeal on 18 August 2009. This Chamber directed the Accused to file new appeal documents on 16 December 2009: Judgment was delivered 19 May 2010 at para. 6. In the resulting decision, this Chamber expressly noted that the operative Notice of Appeal and argument was the second one, not the first: Judgment delivered 19 May 2010 at para. 7 ["The Appeals Chamber notes that the present Judgment is based on the contentions Seselj advances in the Combined Filing and on the Amicus Prosecutor's refiled Response, rather than on the earlier notice of appeal, Appellant's brief and Respondent's brief."] This development is discussed in more detail, below.

[36] Judgement on The First Contempt, para. 42.

of the pronouncement of this Chamber. Somewhat in excess of nine months remained to be served. The sentence therefore expired on or about 2 March 2011.[37]

b) Calculation number two

26. An intervening event in the chronology complicates an otherwise straightforward sentence calculation.

27. As noted above, the Trial Chamber in The First Contempt delivered its judgment on 24 July 2009. Šešelj filed a document that purported to be a Notice of Appeal on 18 August 2009, and a document that purported to be an Appeal brief was filed on 6 October 2009. Acting on motions filed by the *Amicus Curiae* Prosecutor, on 16 December 2009 this Chamber found "that both Šešelj's initial notice of appeal and his initial Appellant's brief were so flawed that they need to be re-filed".[38] That prompted Šešelj to file on 12 January 2010 a combined filing which contained a new notice of appeal and Appellant's brief.[39]

28. On this basis of this alternate calculation, the sentence of imprisonment commenced on the date of pronouncement by the Trial Chamber (24 July 2009) and was stayed with the filing of a Notice of Appeal on 18 August 2009. That meant that for three weeks and four days, Šešelj was in the process of serving his sentence. Sentence was then stayed in accordance with Rule 102(A), and was not re-activated until the judgment of this Chamber on 19 May 2010. At that point, 14 months and three days remained to be served. On the basis of this approach, the sentence expired on or about 22 July 2011. Judgement in the present proceedings was delivered on 31 October 2011.

c) Which calculation is correct?

29. This issue turns on the effect to be given to the initial notice of appeal filed on 18 August 2009. On the one hand, it could be argued that the appeal was commenced that day, and was simply perfected through the filing of the second notice of appeal on 12 January 2010 which overcame non-compliance with the *Rules of Procedure and Evidence*. On the other hand, it may be argued that this Chamber found the initial appeal documents to be so flawed that they were of

[37] Calculation of a sentence based on a fixed number of months, when it is interrupted part way, becomes difficult given the fact that some months have 28, 30 or 31 months. In any event, for reasons that will be developed in this brief, the precise date of expiration is not determinative of this appeal.
[38] Judgement In the Case Against Vojislav Seselj, Appeals Chamber decision in Case No. IT-03-67-R77.2-A, 19 May 2010, at para. 6.
[39] Ibid.

no force and effect, requiring replacement documents. The precise words used by this Chamber when delivering its judgment on the appeal respecting The First Contempt are instructive:[40]

> The Appeals Chamber notes that the present Judgment is based on the contentions Šešelj advances in the Combined Filing and on the Amicus Prosecutor's refiled Response, rather than on the earlier notice of appeal, Appellant's brief and Respondent's brief. It has also not considered any arguments set out in the Oversized Reply that was rejected by the Appeals Chamber and which Šešelj did not refile, despite an order to do so.

30. Viewed in this light, the initial notice of appeal became irrelevant; rights and determinations of culpability and sentence turned on the re-filed ("Combined Filing") appeal documents. In the analysis of this issue, it is helpful to ask this question: given the direction of this Chamber on 16 December 2009 to refile, what position would Šešelj have been in if he had elected not to refile? The answer is clear: he would have had no appeal before this Chamber. Given this state of affairs, it is clear that all rights, responsibilities and determinations of fact and law flow from the Combined Filing filed on 12 January 2010. The result is this: Šešelj's sentence ran from the date of pronouncement by the Trial Chamber on 24 July 2009 until he filed a valid notice of appeal on 12 January 2010, and recommenced with the judgment of this Chamber on 19 May 2010. For that reason, it is submitted that "Calculation number one", above, is the correct one.

d) Does it make any difference which one is correct?

31. On the basis of the first calculation outlined above, the sentence on The First Contempt expired on or about 2 March 2011. On the basis of the second, it expired on or about 22 July 2011. In the present proceedings, judgment was delivered on 31 October 2011. Either way, sentence in The First Contempt had expired. There was, therefore, no sentence with which sentence in The Second Contempt could have run concurrently.

e) Conclusion

32. Respectfully, the *Amicus Curiae* Prosecutor submits that, for the reasons outlined above, the Trial Chamber made a legal error that invalidates its judgment on the issue of sentence, justifying a revision on the basis that the Trial Chamber committed a discernible error in the exercise of its jurisdiction, or failed to follow the applicable law in sentencing the Accused.

[40] Ibid., para. 7 [footnotes are deleted].

<u>Ground Two:</u> The Trial Chamber committed a discernible error in the exercise of its jurisdiction on the issue of sentencing in these proceedings, or failed to follow the applicable law, in the following respect: There is no basis in law for a concurrent sentence to be imposed "*ex post facto*" – that is, after expiration of the sentence with which it is ordered to proceed concurrently. The sentence in The First Contempt commenced as a matter of law on the day it was pronounced (Rule 102(A)), and terminated before the sentence imposed by the Trial Chamber in The Second Contempt.

33. The issue raised under this ground is similar to that raised in relation to the first ground. Here, however, the essential point is this: assuming that sentence in The First Contempt had expired when judgement was delivered in The Second Contempt, as is argued in relation to the first ground of appeal, there is no basis in law to order that a sentence run concurrently with another sentence, *ex post facto.* Put another way, once a sentence has expired, it is over. It cannot be re-activated in some way so that a new sentence can be ordered to run alongside of it.

34. The rationale flows, once again, from Rule 102(A). A sentence begins on the day it is commenced. Here, it began on 31 October 2011. And, for the reasons outlined in relation to Ground One, the sentence on The First Contempt had expired well before then. As a matter of law, it was not open to the Trial Chamber to reach back and retroactively order a sentence to run concurrent to an expired sentence. For this reason, the argument advanced in relation to ground one is adopted in relation to this ground.

35. Respectfully, the *Amicus Curiae* Prosecutor submits that, for the reasons outlined above, the Trial Chamber made a legal error that invalidates its judgment on the issue of sentence, justifying a revision on the basis that the Trial Chamber committed a discernible error in the exercise of its jurisdiction, or failed to follow the applicable law in sentencing the Accused.

<u>Ground three</u>: The Trial Chamber committed a discernible error in the exercise of its jurisdiction on the issue of sentencing in these proceedings, or failed to follow the applicable law, in the following respect: The Trial Chamber failed to provide a reasoned opinion for imposing a concurrent sentence on the facts found by it, as required by Article 23 of The Statute

36. The Trial Chamber's discussion regarding its imposition of an eighteen month sentence to be served concurrently with the fifteen month sentence imposed by the Chamber in the First Contempt is confined solely to one paragraph of its decision.[41] With the exception of the

[41] Judgement, para. 81.

Chamber's reference to the *Amicus Curiae* Prosecutor's sentencing argument[42], neither the conviction nor the sentence of The First Contempt was mentioned by the Chamber in either its deliberation of the elements of the offence nor in its sentencing considerations. The Chamber imposed a concurrent sentence without foundation, explanation, or analysis of the appropriateness of a concurrent sentence, or even whether it was possible, thus committing a discernible error.

The Trial Chamber's obligation to provide a reasoned opinion is established in both The Statute and The Rules, as well as being developed in the case law. More specifically, Article 23 of The Statute provides the following in regard to judgements:

> The judgement shall be rendered by a majority of the judges of the Trial Chamber, and shall be delivered by the Trial Chamber in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

37. This obligation is echoed in Rule 98*ter*(C), which provides that the judgement shall be "accompanied by or followed as soon as possible by a reasoned opinion in writing".

38. Case law explains these provisions. This Chamber has confirmed that a reasoned opinion is a requirement of a fair trial as it ensures that an accused can exercise his or her right of appeal, and the Appeals Chamber can carry out its statutory duty to review appeals under Article 25.[43] The requirement of a reasoned opinion is limited to the Trial Chamber's judgement rather than to every submission made at trial.[44] The reasoned opinion required under Article 23 is an aspect of the fair hearing requirement under Article 20 and 21.[45]

39. Although generally the case law discusses the right of the accused to an appeal in the context of a fair trial, the right to a fair trial is not limited to the accused alone; fairness of trial is guaranteed to the Prosecution as well.[46] For instance, as an aspect of fair trial requirements, one of the rights accorded to the Prosecution is the right of appeal under Article 25 of The Statute.

40. For a party to successfully challenge a sentence, the Appeal Chambers must be satisfied that the Trial Chamber has committed a discernible error in exercising its discretion, or has failed

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[42] Judgement, para. 74.

[43] *Limaj* Appeal Judgement, para 81; *Naletilič and Martinovič* Appeal Judgement, para. 603; *Prosecutor v. Kvočka et al*., IT-98-30/1-A, 28 February 2005 ("***Kvočka et al*. Appeal Judgement**"), para. 23; *Prosecutor v. Kunarac et al*., IT-96-23 & IT-96-23/1-A, 12 June 2002 ("***Kunarac et al*. Appeal Judgement**"), para. 41.

[44] *Limaj* Appeal Judgement, para 81; *Naletilič and Martinovič* Appeal Judgement, para. 603; *Kvočka et al*. Appeal Judgement, para. 23; *Kunarac et al*. Appeal Judgement, para. 41.

[45] *Prosecutor v. Furundezija,* IT-95-17/1-A, 21 July 2000, para. 60. This paragraph of the judgement also confirms that the right to a fair hearing has been confirmed by case law developed under the *European Convention of Human Rights.*

[46] *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, ed. Bert Swart, Alexander Zahar, Göran Sluiter. New York: Oxford University Press, 2011 (Chapter 5, "Rights in Criminal Proceedings under the ECHR and the ICTY Statute – A Precarious Comparison" by Stefan Trechsel), p. 154.

to follow the applicable law. As outlined above in Part C, "Standard of Review", it is incumbent upon the appellant to demonstrate how the Trial Chamber committed a discernible error. A reasoned opinion provides the foundation upon which an appellant can examine and challenge a particular sentence which has been imposed. Without this reasoned opinion, an appellant is stripped of the ability to address the required factors on a sentence appeal.

41. For instance, Rule 87(C) provides the Trial Chamber with authority to impose a concurrent sentence.[47] However, this authority is confined to circumstances where the accused is found guilty on *"*one or more of the charges contained *in the indictment"* [emphasis added]. The Rule seems directed to managing concurrent and consecutive sentences within the context of multiple counts on a single indictment. Here, there was but a single count facing the Accused. If the Trial Chamber in fact relied upon Rule 87(C), it would have been in error to do so. But neither the parties, nor this Chamber, can be certain on this issue as there was simply no articulation of the basis on which a concurrent sentence was imposed.

42. The *Amicus Curiae* Prosecutor therefore respectfully submits that the Trial Chamber committed a discernible error in the exercise of its jurisdiction that invalidates the judgement on the issue of sentence. This was done by failing to provide a reasoned opinion for imposing a concurrent sentence which had the effect of preventing the prosecution from articulating a full and proper basis for appeal.

> **<u>Ground four</u>: The Trial Chamber committed a discernible error in the exercise of its jurisdiction on the issue of sentencing in these proceedings, or failed to follow the applicable law, in the following respect: given the findings of fact made by the Trial Chamber during judgement on The Second Contempt, the Chamber erred in the exercise of its sentencing discretion in imposing a manifestly inadequate sentence of eighteen months imprisonment.**

43. The *Amicus Curiae* Prosecutor respectfully submits that, quite apart from the issue of imposing a concurrent sentence, a sentence of eighteen months was, on the facts found by the Trial Chamber, and the uncontested facts before the Chamber, manifestly inadequate.

44. In support for this ground of appeal, the *Amicus Curiae* Prosecutor advances submissions which are anchored entirely on the findings of the Trial Chamber, and the statements of the Accused in his closing address to the Trial Chamber and throughout these proceedings. Cumulatively, they lead to the conclusion that the Trial Chamber: a) failed to give weight, or gave insufficient weight, to the gravity of the offence, as evidenced by circumstances outlined below, and the fact that it was his second conviction for contempt; b) must have failed to exercise its discretion properly, given the sentence imposed in the light of the uncontested facts and the maximum penalty of seven years imprisonment.

[47] *Čelebići* Appeal Judgement, para. 771.

45. It is a matter of public record, and is uncontested, that this is the second time that Šešelj has been convicted of contempt of the Tribunal. It is also a matter of public record that no other Accused has similarly been convicted on two separate occasions for contempt of the Tribunal. Against this backdrop, the *Amicus Curiae* Prosecutor submits that the following uncontested facts are particularly relevant to the issue of sentence. Moreover, in line with this Chamber's previous decisions, these facts inevitably invite an inference by this Chamber that the Trial Chamber must have failed to exercise its discretion properly when imposing a sentence of eighteen months for an offence which, *even on first conviction,* carries a maximum penalty of seven years imprisonment.

46. The critical facts found by the Trial Chamber in its judgement, or advanced by the Accused during the proceedings, or at the end of his trial, are as follows:

a) Not only was the Accused fully informed of the protective measures that had been granted by the Trial Chamber in his case, he had actually requested that protective measures previously granted in respect of certain witnesses be altered or reconsidered. He was, therefore, fixed with *actual knowledge* that protective measures had to be varied by the Chamber, and could not be ignored as he saw fit.[48] This was *not* a case of wilful blindness or recklessness.
b) The Trial Chamber found that "In the year prior to the publication of the Book, the Accused had therefore exhausted all the legal remedies available to him under the Rules to seek the variation or rescission of the protective measures in place, was unsuccessful in so doing, and thus opted to take it upon himself to "vary" the protective measures with which he disagreed."[49] It is abundantly clear that the conduct of the Accused was deliberate and brazen.
c) As the Trial Chamber noted, "Quite tellingly, in his closing argument on 8 June 2011, the Accused declared that his "mission here is to disassemble The Hague tribunal' and that in attempting to do so, 'the public is [his] only weapon'".[50]
d) The accused at the close of the trial, agreed that he is a defiant person, and that "[he is] proud of that characteristic of mine".[51] He also agreed that he had published the information "on purpose".[52] He advanced a rationale for his actions. The rationale is both curious and disingenuous: he is superior to

[48] Judgement, para. 66-7.
[49] Judgement, para. 68.
[50] Judgement, para. 68.
[51] Transcript of evidence, p. 380, l. 19-20.
[52] Transcript of evidence, p. 381, l. 3-4.

everyone, and when you are that superior, you have the right to be both defiant and arrogant.[53]

e) In the same vein, it should also be observed that routinely and without variation, the Accused has introduced himself at the beginning of each session before the Trial Chamber as "the greatest enemy of the Hague Tribunal";[54]

f) The Accused expressed indifference to any sentence that might be imposed by the Chamber;[55]

g) The Accused admitted that he had "published the Book deliberately and spitefully, [and] that he had acted pre-emptively to frustrate the actions of the Registrar pursuant to the Chamber's orders;[56]

h) The Trial Chamber, at trial, found as a fact, that "[…] the deliberate way in which the protective measures issued by the Šešelj Trial Chamber were violated constitutes a serious interference with the administration of justice;"[57]

i) Concerning the Website publication of the protective measures, the Trial Chamber found that "[…] the electronic publication and dissemination of the Book increase[d] the scope of the disclosure and therefore render[ed] the violation of the Šešelj Trial Chamber's orders even more serious;[58]

j) Significantly, the Trial Chamber found that the Accused lacked remorse for having committed the offence; *more seriously, the Chamber found that he intends to continue to disclose information in knowing violation of orders of a Chamber in the future*;[59] The Chamber's finding on this issue is amply supported by the record in these proceedings. On the first day of the trial, Seselj outlined his plan to orchestrate ten further contempt charges against him, in these terms:[60]

> For all I know there might be another ten trials where I will stand accused. I will certainly do my best to have at least another ten contempt trials instituted against me. I will not be deterred by anyone.

k) Before the Trial Chamber, the Accused was adamant that he would not remove any material from his website or permit it to be shut down.[61] Indeed, at the

[53] Transcript of evidence, p. 381 l. 10 – p. 382, l. 22, especially p. 382, l. 11 -12.
[54] For instance, transcript of evidence, p. 5, l. 2 (29 April 2010); Transcript of evidence, p. 64, l. 5 (22 February 2011); Transcript of evidence, p. 136, l. 22 (6 June 2011); and even on the day of judgment: Transcript of evidence, p. 390, l. 14 (31 October 2011). Sometimes the transcript reads "principal enemy" or "biggest enemy" rather than "greatest enemy", but that is probably more a function of the translation process than anything else.
[55] Judgement, para. 75.
[56] Judgement, para. 75.
[57] Judgement, para. 78.
[58] Judgement, para. 78.
[59] Judgement, para. 79.
[60] Transcript of evidence, 22 February 2011, p. 97, l. 16-18.
[61] Judgement, para. 75.

commencement of the trial, Seselj manifested his contempt for the Tribunal, and his desire to thwart attempts by Chamber to protect witnesses, by publishing contemptuous material on his website, *then moving his Internet service providers from country to country, and around the world if necessary, to avoid the reach of Chambers' orders to remove:*[62]

> It's already been two years now that the Registry of The Hague Tribunal has been trying to do away with my Internet website by sending instructions to these distributors of the Internet in Sweden, Germany, Serbia, and they haven't succeeded in doing that throughout those two years. They succeeded in the beginning of February this year; however, six hours later, my website appeared elsewhere. It proved to be indestructible.
>
> Secondly, at my proposal, the appropriate authorities of the Serb Radical Party appointed my oldest son, Nikola Seselj, to be editor of my website, since in that case I am quite sure that he is not going to relent to any kind of pressure and that I'm going to be the main creator of the website and that nobody is going to intimidate him in order to remove anything from my website.
>
> What I decide once and for all to have on my website remains there. Once and for all. And no one can do away with that. You can find a new distribute [sic] yet again. The one where my website is now, perhaps you can force them to do away with my website. I'm going to find another one and yet another and so on and so forth. And if I do not manage to do that, then I'm going to address my great friend, the great leader of the Korean people, Kim Jong-il to re-establish my website. And no one can force him to relent to any kind of pressure exerted by The Hague Tribunal. So my website will not be destroyed. Then there's my friend Hugo Chavez, then there's my friend Mahmoud Ahmadinejad. I have friends throughout the world and I will find friends throughout the world who are going to take good care of my website and will not allow you to do away with it.

47. In summary, therefore, the evidence is clear that the Accused knew he could not unilaterally "vary" the protective measures himself, but he made a deliberate decision to go ahead and publish the confidential information anyway. He agrees that his actions were deliberate, defiant and arrogant – and even spiteful – but he rationalizes his conduct on the basis that he is superior to everyone, and in that position he has the right to be arrogant. The electronic disclosure of the information widened the scope of disclosure considerably, and significantly increased the seriousness of the offence. The Accused is adamant that he will not take the material off his Website. In fact, he intends to move his Internet service providers from country

[62] Transcript of evidence, 22 February 2011, p. 67, l. 4 – p. 68, l. 3.

to country to thwart attempts by the International Tribunal to enforce its orders. The Accused is indifferent to any sentence that may be imposed in this case, as his mission is to "disassemble" the International Tribunal. He is, as he so often puts it, "the greatest enemy of the Hague Tribunal". And his avowed future intention is to continue to disclose information in violation of orders of a Chamber.

48. Far from demonstrating remorse, the eleven factors outlined as "a" through "k" above speak clearly to the gravity of the offence with which the Accused was convicted, and the circumstances that aggravate the offence. This evidence comes directly from the Accused himself during or at the conclusion of the trial, or were facts found by the Trial Chamber which are amply supported by the evidence. The Trial Chamber correctly cited no mitigating circumstances – something which is amply confirmed by the record in this case.

Respectfully, the *Amicus Curiae* Prosecutor submits that the Trial Chamber failed to give weight or sufficient weight to these critical considerations. In doing so, it made a clear error as to the facts upon which it exercised its discretion, and as a result imposed a manifestly inadequate sentence of 18 months imprisonment.

E. Relief Sought

49. The *Amicus Curiae* Prosecutor respectfully asks the Appeals Chamber to intervene in this case on the issue of sentence, vacate the sentence of eighteen months imposed by the Trial Chamber, and substitute a sentence of three years imprisonment, to commence prospectively in accordance with Rule 102(A) of the *Rules of Procedure and Evidence.*

Word Count: 6774

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

Bruce A. MacFarlane, Q.C.
Amicus Curiae Prosecutor

Dated this 29th day of November
At Winnipeg, Canada