



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: 28 November 2012
Original: English

IN THE APPEALS CHAMBER

Before: Judge Arlette Ramaroson, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Liu Daqun
Judge Andrézia Vaz

Registrar: Mr. John Hocking

Judgement of: 28 November 2012

PROSECUTOR

v.

VOJISLAV ŠEŠELJ

PUBLIC

JUDGEMENT

Amicus Curiae Prosecutor:

Mr. Bruce MacFarlane

Mr. Vojislav Šešelj, pro se

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I. INTRODUCTION

1. The Appeals 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 (“Appeals Chamber” and “Tribunal” respectively) is seised of an appeal by the *Amicus Curiae* Prosecutor (“*Amicus* Prosecutor”)¹ against the Judgement rendered by Trial Chamber II of the Tribunal (“Contempt Trial Chamber”) on 31 October 2011 in the case of *Prosecutor v. Vojislav Šešelj* (“Contempt Trial Judgement”).²

A. Background

2. Vojislav Šešelj (“Šešelj”) is currently being tried before Trial Chamber III of the Tribunal (“Šešelj Trial Chamber”) on nine counts of crimes against humanity and violations of the laws or customs of war.³

3. On 26 January 2009, the Office of the Prosecutor (“Prosecution”) filed a confidential and *ex parte* motion in which it submitted that Šešelj knowingly violated orders of the Šešelj Trial Chamber by disclosing confidential information identifying 13 protected witnesses in three books authored by Šešelj (“26 January 2009 Motion”).⁴ In particular, the Prosecution alleged that Šešelj knowingly violated decisions of the Šešelj Trial Chamber by, *inter alia*, publishing information enabling the identification of protected witnesses in one of these books, which subsequently became the subject of the Contempt Trial Judgement (“Book”).⁵ On 13 March 2009, the President of the Tribunal assigned the 26 January 2009 Motion to the Contempt Trial Chamber.⁶

4. On 21 August 2009, the Contempt Trial Chamber issued a confidential and *ex parte* decision on the 26 January 2009 Motion finding, *inter alia*, that the disclosure of confidential material did not attain such a level of gravity that it should exercise its discretion to instigate proceedings pursuant to Rule 77(D) of the Rules of Procedure and Evidence of the Tribunal (“Rules”) and that it

¹ *Amicus Curiae* Prosecutor Notice of Appeal Against Sentence, 14 November 2011 (“Notice of Appeal”); *Amicus Curiae* [sic] Prosecutor’s Appellant Brief on Sentence, 29 November 2011 (“Appeal Brief”).

² *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.3, Judgement, 31 October 2011 (public redacted version).

³ *See Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Third Amended Indictment, 7 December 2007, pp. 5-14.

⁴ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Prosecution’s Motion under Rule 77 Concerning Further Breaches of Protective Measures, 26 January 2009 (confidential and *ex parte*), paras 1-3.

⁵ 26 January 2009 Motion, paras 21-22.

⁶ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Order Assigning Motions to a Trial Chamber, 13 March 2009 (confidential and *ex parte*).

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did not have sufficient grounds to believe that the information contained in the Book might identify or lead to the identification of protected Prosecution witnesses.⁷

5. On 7 September 2009, pursuant to Rule 77(J) of the Rules, the Prosecution filed a confidential and *ex parte* notice of appeal against the Contempt Trial Chamber's Decision of 21 August 2009⁸ in relation to 11 of the 13 protected witnesses ("Witnesses") originally alleged to be identified in the Book.⁹

6. On 17 December 2009, the Appeals Chamber found that the evidence before the Contempt Trial Chamber gave rise to a *prima facie* case that Šešelj knowingly disclosed the identifying information of the Witnesses in violation of the Šešelj Trial Chamber's orders and that no reasonable trier of fact could have concluded that there were insufficient grounds to prosecute Šešelj pursuant to Rule 77(D) of the Rules.¹⁰ The Appeals Chamber ordered the Contempt Trial Chamber to proceed against Šešelj for contempt of the Tribunal by issuing an order in lieu of an indictment pursuant to Rule 77(D)(ii) of the Rules.¹¹

7. On 3 February 2010, the Contempt Trial Chamber issued an order in lieu of an indictment ("Indictment"), which charged Šešelj with one count of contempt of the Tribunal, punishable under Rule 77(A)(ii) of the Rules, for having disclosed information in the Book which could identify the Witnesses in violation of orders of the Šešelj Trial Chamber, and directed the Registrar to appoint an *amicus curiae* prosecutor to prosecute the charge.¹²

8. The contempt trial began on 22 February 2011.¹³ On 31 October 2011, the Contempt Trial Chamber found Šešelj guilty of one count of contempt of the Tribunal and sentenced him "to a single term of imprisonment of eighteen months to be served concurrently with the sentence of fifteen months imposed" on 24 July 2009 in Case No. IT-03-67-R77.2.¹⁴

⁷ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Decision on Prosecution's Motion Under Rule 77 Concerning Further Breaches of Protective Measures (Three Books), 21 August 2009 (confidential and *ex parte*) ("Decision of 21 August 2009"), paras 28, 31-32, 37.

⁸ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR77.4, Prosecution's Notice of Appeal, 7 September 2009 (confidential and *ex parte*).

⁹ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR77.4, Prosecution's Appeal Brief, 22 September 2009 (confidential and *ex parte*); *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR77.4, *Corrigendum* to Prosecution's Appeal Brief, 25 September 2009 (confidential and *ex parte*).

¹⁰ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR77.4, Decision on the Prosecution's Appeal Against the Trial Chamber's Decision of 21 August 2009, 17 December 2009 (confidential and *ex parte*) ("Appeal Decision of 17 December 2009"), para. 27.

¹¹ Appeal Decision of 17 December 2009, para. 28.

¹² *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.3, Second Decision on Prosecution's Motion Under Rule 77 Concerning Further Breaches of Protective Measures (Three Books), 3 February 2010 (confidential; public redacted version filed on 4 February 2010), para. 20, Confidential Annex appended thereto.

¹³ See Contempt Trial Judgement, para. 10.

¹⁴ Contempt Trial Judgement, para. 82.

9. The *Amicus* Prosecutor filed his Notice of Appeal on 14 November 2011 and his Appeal Brief on 29 November 2011. Šešelj filed his Response Brief on 9 February 2012.¹⁵ The *Amicus* Prosecutor filed his Reply Brief on 24 February 2012.¹⁶

10. On 17 November 2011, Šešelj requested a stay of deadlines in the present appeal proceedings.¹⁷ On 11 January 2012, the Pre-Appeal Judge denied the request and set out a Consolidated Briefing Schedule, which required Šešelj to file a notice of appeal, if any, within 15 days of receiving the B/C/S translation of the Consolidated Briefing Schedule.¹⁸ The Pre-Appeal Judge also ordered Šešelj to file an appeal brief, if any, of no more than 9,000 words, within 15 days of filing his notice of appeal.¹⁹

11. Šešelj received the B/C/S translation of the Consolidated Briefing Schedule on 20 January 2012.²⁰ He filed a notice of appeal on 2 February 2012 and an appeal brief of 33,606 words on 16 February 2012.²¹

12. On 13 March 2012, the *Amicus* Prosecutor filed a motion to strike Šešelj's Appeal Brief for exceeding the designated word limit and requested that a stay of the proceedings be granted until a decision was rendered on the matter.²² As an interim measure, on 15 March 2012, the Pre-Appeal Judge ordered a stay of the deadlines for the filing of the *Amicus* Prosecutor's response brief and Šešelj's brief in reply.²³

13. On 23 April 2012, the Appeals Chamber struck Šešelj's Appeal Brief, lifted the stay of deadlines, and ordered Šešelj to re-file an appeal brief of no more than 9,000 words no later than one week from the date of receipt of the B/C/S translation of the decision.²⁴ Šešelj received the

¹⁵ Response to the *Amicus Curiae* [sic] Prosecutor's Appellant Brief on Sentence of 29 November 2011, 9 February 2012 (confidential) ("Response Brief"). The English translation of the Bosnian/Croatian/Serbian ("B/C/S") original was filed on 20 February 2012.

¹⁶ *Amicus Curiae* Prosecutor's Reply Brief, 24 February 2012 ("Reply Brief").

¹⁷ Submission No. 482, 17 November 2011. The English translation of the B/C/S original was filed on 21 November 2011.

¹⁸ Decision on Vojislav Šešelj's Motion for Stay of Time-Limits and Order on Consolidated Briefing Schedule, 11 January 2012 ("Consolidated Briefing Schedule"), para. 7(c).

¹⁹ Consolidated Briefing Schedule, para. 7(d).

²⁰ See *Procès-Verbal*, 23 January 2012.

²¹ Notice of Appeal Against Judgement on Allegations of Contempt of Court of 31 October 2011, 2 February 2012 (confidential) ("Šešelj's Notice of Appeal"). The English translation of the B/C/S original was filed on 8 February 2012. Appeal of the Judgement for Contempt of Court of 31 October 2011, 16 February 2012 (confidential) ("Šešelj's Appeal Brief"). The English translation of the B/C/S original was filed on 8 March 2012.

²² *Amicus Curiae* Prosecutor's Motion to Strike the Appellant's Brief and Urgent Motion for Stay of Deadline, 13 March 2012, paras 1; 19-20.

²³ Order Staying Deadlines for Respondent's Brief and Appellant's Brief in Reply, 15 March 2012, para. 4.

²⁴ Decision on *Amicus Curiae* Prosecutor's Motion to Strike the Appellant's Brief and Urgent Motion for Stay of Deadline, 23 April 2012 ("Decision on Motion to Strike"), para. 15.

B/C/S translation of the Decision on the Motion to Strike on 25 April 2012,²⁵ but failed to re-file an appeal brief of no more than 9,000 words within the prescribed time-limit.

14. On 2 May 2012, Šešelj filed Submission No. 491 in which he rejected the Decision on the Motion to Strike.²⁶ On 21 May 2012, the *Amicus* Prosecutor argued that Submission No. 491 did not constitute an appeal brief and that Šešelj had therefore made a conscious decision not to re-file an appeal brief and abandon his appeal altogether.²⁷ The *Amicus* Prosecutor submitted that, in any event, Šešelj's Notice of Appeal should be struck because it did not conform to the requirements of the Rules and relevant practice directions.²⁸ On 6 July 2012, the Appeals Chamber issued its Decision on the Second Motion to Strike,²⁹ which struck Šešelj's Notice of Appeal in its entirety, provided Šešelj an opportunity to re-file a notice of appeal and an appeal brief, and warned him that, should he fail to file both a notice of appeal and an appeal brief in conformity with Rule 108 of the Rules, the Practice Direction on Formal Requirements, and the Decision on the Second Motion to Strike, he would be considered to have waived his right to appeal.³⁰

15. On 17 July 2012, Šešelj filed Submission No. 496 rejecting the Decision on the Second Motion to Strike without submitting a request for relief.³¹ On 30 July 2012, the *Amicus* Prosecutor requested that the Appeals Chamber issue a decision declaring that Šešelj had waived his right of appeal for failing to re-file a notice of appeal and appeal brief or, in the alternative, dismiss Submission No. 496 should the Appeals Chamber construe it as a motion for reconsideration.³² On 23 August 2012, the Appeals Chamber found that Šešelj had waived his right to appeal and declared the briefing in the case to be completed.³³

²⁵ See *Procès-Verbal*, 27 April 2012.

²⁶ Response of Professor Vojislav Šešelj to the Decision on *Amicus Curiae* Prosecutor's Motion to Strike the Appellant's Brief and Urgent Motion for Stay of Deadline, 2 May 2012 (confidential) ("Submission No. 491"), para. 8. The English translation of the B/C/S original was filed on 9 May 2012.

²⁷ *Amicus* Prosecutor's Motion for Order Striking Notice of Appeal and Closing the Case, 21 May 2012 ("Second Motion to Strike"), paras 17-18, 20-21, 23.

²⁸ Second Motion to Strike, para. 26.

²⁹ Decision on Vojislav Šešelj's Submission No. 491 and on the *Amicus* Prosecutor's Motion to Strike Vojislav Šešelj's Notice of Appeal and to Close the Case, 6 July 2012 ("Decision on the Second Motion to Strike").

³⁰ Decision on the Second Motion to Strike, paras 21-24, referring to Practice Direction on Formal Requirements for Appeals from Judgement, IT/201, 7 March 2002 ("Practice Direction on Formal Requirements").

³¹ Response to the Decision on Vojislav Šešelj's Submission No. 491 and on the *Amicus* Prosecutor's Motion to Strike Notice of Appeal and to Close the Case, 17 July 2012 ("Submission No. 496"), para. 5. The English translation of the B/C/S original was filed on 19 July 2012.

³² *Amicus Curiae* Prosecutor's Motion for a Declaration that the Respondent Has Waived His Right to Appeal, 30 July 2012, paras 13, 17.

³³ Decision on *Amicus Curiae* Prosecutor's Motion for a Declaration that Vojislav Šešelj Has Waived His Right to Appeal, 23 August 2012, p. 2.

II. STANDARD OF APPELLATE REVIEW IN SENTENCING

16. The Appeals Chamber recalls the applicable standards of appellate review pursuant to Article 25 of the Statute of the Tribunal (“Statute”). The Appeals Chamber reviews only errors of law which have the potential to invalidate the decision of the trial chamber and errors of fact which have occasioned a miscarriage of justice.³⁴

17. Appeals against sentence, as in the case of appeals from a trial judgement, are appeals *stricto sensu*, which means that they are of a corrective nature and not trials *de novo*.³⁵ Trial chambers are vested with broad discretion in determining an appropriate sentence, including the determination of the weight given to mitigating or aggravating circumstances due to their obligation to individualise penalties to fit the circumstances of the convicted person and the gravity of the crime.³⁶ As a general rule, the Appeals Chamber will not substitute its own sentence for that imposed by the trial chamber unless the appealing party demonstrates that the trial chamber committed a “discernible error” in exercising its discretion or failed to follow the applicable law.³⁷

18. To demonstrate that the trial chamber committed a discernible error in exercising its discretion, an appellant is required to show that 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 that 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 properly exercise its discretion.³⁸

III. APPEAL OF *AMICUS* PROSECUTOR

19. The Contempt Trial Chamber found that the deliberate way in which Šešelj violated the protective measures issued by the Šešelj Trial Chamber constituted a serious interference with the administration of justice and that the electronic publication of the Book rendered the violation even more serious because of the scope of its disclosure.³⁹ The Contempt Trial Chamber further took into account: (i) Šešelj’s lack of remorse; (ii) his stated intent to continue similar disclosures; (iii) the adverse impact such violations may have upon the work of the Tribunal; and (iv) the need to

³⁴ *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-A, Judgement, 19 July 2010 (“*Haradinaj et al.* Appeal Judgement”), para. 9 and references cited therein. *See also Aloys Ntabakuze v. The Prosecutor*, Case No. ICTR-98-41A-A, Judgement, 8 May 2012 (“*Ntabakuze* Appeal Judgement”), para. 10.

³⁵ *Haradinaj et al.* Appeal Judgement, para. 321 and references cited therein.

³⁶ *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Judgement, 12 November 2009, para. 297; *Ntabakuze* Appeal Judgement, para. 264.

³⁷ *Haradinaj et al.* Appeal Judgement, para. 321 and references cited therein; *Ntabakuze* Appeal Judgement, para. 264.

³⁸ *Haradinaj et al.* Appeal Judgement, para. 322 and references cited therein.

³⁹ Contempt Trial Judgement, para. 78.

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discourage the recurrence of such violations in the future.⁴⁰ The Contempt Trial Chamber found that a sentence of 18 months' imprisonment to be served concurrently with the sentence of 15 months' imprisonment imposed on Šešelj in Case No. IT-03-67-R77.2 on 24 July 2009 "recognises the gravity of the breach and the need for deterrence".⁴¹

20. The *Amicus* Prosecutor advances four grounds of appeal against the sentence imposed on Šešelj by the Contempt Trial Chamber and requests that the Appeals Chamber vacate the sentence of 18 months' imprisonment and substitute a sentence of three years' imprisonment to commence prospectively.⁴²

A. Grounds 1 and 2

21. The *Amicus* Prosecutor contends that the sentence of 15 months of imprisonment imposed in Case No. IT-03-67-R77.2 had expired before the Contempt Trial Judgement was rendered and therefore the sentence imposed by the Contempt Trial Chamber had no sentence with which to run concurrently.⁴³ According to the *Amicus* Prosecutor, two calculations can be made as to when the sentence in Case No. IT-03-67-R77.2 was served and either calculation leads to the conclusion that this sentence expired before the Contempt Trial Judgement was rendered.⁴⁴ The *Amicus* Prosecutor also argues that there is no basis in law for a sentence to run concurrently with another sentence *ex post facto* because, once a sentence has expired, it cannot be reactivated so that a new sentence can be ordered to run alongside of it.⁴⁵ The *Amicus* Prosecutor argues that the rationale for this conclusion flows from Rule 102(A) of the Rules, which provides that a sentence begins the day it is pronounced.⁴⁶ The *Amicus* Prosecutor submits that the Contempt Trial Chamber therefore erred in law and that such error invalidates the sentence imposed on Šešelj and justifies a revision of the sentence.⁴⁷

22. Šešelj responds that, if his sentence in Case No. IT-03-67-R77.2 expired when the *Amicus* Prosecutor contends it did, he should therefore have been released until the judgement of the

⁴⁰ Contempt Trial Judgement, paras 79-80.

⁴¹ Contempt Trial Judgement, para. 81. *See also* Contempt Trial Judgement, para. 82.

⁴² Notice of Appeal, paras 3-4; Appeal Brief, paras 21-49.

⁴³ Notice of Appeal, para. 3(i); Appeal Brief, paras 23, 31.

⁴⁴ Appeal Brief, paras 23-28, 31. Calculation One: Šešelj's sentence in Case No. IT-03-67-R77.2 commenced on 24 July 2009 and was stayed as of the filing of his valid second notice of appeal in Case No. IT-03-67-R77.2-A on 12 January 2010 until the delivery of the appeal judgement on 19 May 2010. His contempt sentence of 15 months' imprisonment therefore expired on or about 2 March 2011. Calculation Two: Šešelj's sentence in Case No. IT-03-67-R77.2 commenced on 24 July 2009 and was stayed as of the filing of his initial notice of appeal in Case No. IT-03-67-R77.2-A on 18 August 2009 until the delivery of the appeal judgement on 19 May 2010. Thus, his contempt sentence of 15 months' imprisonment expired on or about 22 July 2011. *See* Appeal Brief, paras 24-25, 27-28.

⁴⁵ Notice of Appeal, para. 3(ii); Appeal Brief, paras 33-34.

⁴⁶ Notice of Appeal, para. 3(ii); Appeal Brief, para. 34.

⁴⁷ Appeal Brief, paras 32, 35.

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Appeals Chamber in Case No. IT-03-67-R77.2-A came into force. Accordingly, Šešelj requests that the *Amicus* Prosecutor's first ground of appeal be "rejected as confused and frivolous."⁴⁸ Šešelj argues that the *Amicus* Prosecutor's second ground of appeal is a repetition of the first ground of appeal and requests that it be dismissed for "being confused, incorrect and unnecessary".⁴⁹

23. The Appeals Chamber recalls that Rule 102(A) of the Rules provides that a sentence shall begin to run from the day it is pronounced; however, as soon as a notice of appeal is filed, the enforcement of the judgment is stayed until the appeal judgement has been delivered. Irrespective of whether the stay of proceedings is calculated from the first or second notice of appeal filed by Šešelj in Case No. IT-03-67-R77.2-A,⁵⁰ the sentence of 15 months' imprisonment imposed on Šešelj in Case No. IT-03-67-R77.2 on 24 July 2009 was served before the Contempt Trial Judgement was rendered on 31 October 2011. Based on the plain text of Rule 102(A) of the Rules, the Appeals Chamber finds that Šešelj's sentence in Case No. IT-03-67-R77.2 was stayed as soon as the first notice of appeal was filed on 18 August 2009, whether or not that notice was valid; hence, the calculation from the first notice of appeal is operative. Therefore, the Appeals Chamber finds that there was no sentence in Case No. IT-03-67-R77.2 at the time the Contempt Trial Judgement was rendered with which the sentence imposed by the Contempt Trial Chamber could run concurrently. As a newly imposed sentence cannot run concurrently with a sentence that has expired, the Appeals Chamber considers that Šešelj has not served any part of the 18-month sentence imposed by the Contempt Trial Chamber by virtue of having served the sentence imposed on him in Case No. IT-03-67-R77.2.

24. For the foregoing reasons, the Appeals Chamber grants grounds one and two of the *Amicus* Prosecutor's appeal. In accordance with Rule 102(A) of the Rules, the un-served portion of the 18-month sentence should commence and run prospectively from the date of this Appeal Judgement. However, the Appeals Chamber notes that pursuant to Rule 101(C) of the Rules, Šešelj must be given credit for the period he has been detained in the custody of the Tribunal. As Šešelj has been detained for a period longer than the total of his 15-month sentence imposed with respect to Case No. IT-03-67-R77.2 and his 18-month sentence with respect to the present case, the Appeals Chamber finds that the sentence imposed in this case has been served.

⁴⁸ Response Brief, para. 9. *See also* Response Brief, para. 13.

⁴⁹ Response Brief, para. 10. *See also* Response Brief, para. 13.

⁵⁰ *See Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.2-A, Notice of Appeal Against the Judgement on Allegations of Contempt of 24 July 2009, 18 August 2009 (confidential). The English translation of the B/C/S original was filed on 25 August 2009. *See Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.2-A, Notice of Appeal and Appellant's Brief Against the Judgment [*sic*] on Allegations of Contempt Pursuant to the Decision on the Prosecution's Motion for Order Striking Appellant's Notice of Appeal and Appeal Brief and Closing the Case Issued by the Appeals Chamber on 16 December 2009, 12 January 2010 (confidential). The English translation of the B/C/S original was filed on 18 January 2010.

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B. Ground 3

25. The *Amicus* Prosecutor submits that the Contempt Trial Chamber failed to provide a reasoned opinion for imposing a concurrent sentence as required by Article 23 of the Statute and Rule 98 *ter* (C) of the Rules.⁵¹ The *Amicus* Prosecutor asserts that a reasoned opinion is a requirement of a fair trial, a right guaranteed not only to an accused, but also to the Prosecution.⁵² The *Amicus* Prosecutor contends that Rule 87(C) of the Rules allows for a concurrent sentence only in the context of multiple counts in a single indictment and that the Contempt Trial Chamber therefore erred in imposing a concurrent sentence when Šešelj only faced a single count of contempt of the Tribunal in the current proceedings.⁵³ The *Amicus* Prosecutor submits that the Contempt Trial Chamber committed a discernible error that invalidates the Contempt Trial Judgement and prevented him from articulating a full and proper basis for his appeal.⁵⁴

26. Šešelj responds that the only relevant consideration in relation to his conviction and sentence in the present case is that the sentence handed down by the Contempt Trial Chamber exceeds the sentence in Case No. IT-03-67-R77.2 by three months, “a period equal to the average sentence for contempt of court at [the Tribunal].”⁵⁵ Šešelj further responds that Rule 87(C) of the Rules does not decisively state whether a concurrent sentence can be passed in relation to another sentence “in one case or in several cases”.⁵⁶ Accordingly, Šešelj requests that this ground of appeal be dismissed.⁵⁷

27. Having found that the Contempt Trial Chamber erred in imposing a sentence on Šešelj that was to run with the expired sentence in Case No. IT-03-67-R77.2, it is not necessary for the Appeals Chamber to decide whether, in doing so, the Contempt Trial Chamber erred by not providing a reasoned opinion.

28. For the foregoing reasons, the Appeals Chamber, Judge Pocar partially dissenting, dismisses ground three of the *Amicus* Prosecutor’s appeal as moot.

⁵¹ Notice of Appeal, para. 3(iii); Appeal Brief, paras 36-37, 42.

⁵² Appeal Brief, paras 38-39, *referring to, inter alia*, Articles 20, 21, 23, and 25 of the Statute.

⁵³ Appeal Brief, para. 41.

⁵⁴ Appeal Brief, paras 40-42.

⁵⁵ Response Brief, para. 11.

⁵⁶ Response Brief, para. 11.

⁵⁷ Response Brief, paras 11, 13.

C. Ground 4

29. The *Amicus* Prosecutor argues that the sentence of 18 months' imprisonment is manifestly inadequate considering the facts upon which the Contempt Trial Chamber based its findings.⁵⁸ More specifically, the *Amicus* Prosecutor submits that Šešelj has been convicted for contempt of the Tribunal on two separate occasions and that the Contempt Trial Chamber therefore "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."⁵⁹ The *Amicus* Prosecutor further contends that the Contempt Trial Chamber committed an error of fact in failing to give weight or sufficient weight to the gravity of the offence, as evidenced by the following critical considerations: (i) Šešelj knew he could not vary protective measures unilaterally, but deliberately published confidential information anyway; (ii) Šešelj agreed that his actions were "deliberate, defiant and arrogant"; (iii) the electronic publication of confidential information widened the scope of disclosure considerably, thereby increasing the seriousness of the offence; (iv) Šešelj refused to remove the confidential information from his website and promised to change his internet service providers to thwart the Tribunal's attempts to enforce its orders; and (v) Šešelj avowed his intent to continue to disclose information in violation of orders of the Tribunal.⁶⁰

30. Šešelj responds that, in comparison to sentences handed down in other contempt cases at the Tribunal, the length of the sentence handed down by the Contempt Trial Chamber is considerably longer, making it "unreasonable and plainly unjust".⁶¹ Šešelj argues that the *Amicus* Prosecutor sought a prison sentence of five months' imprisonment in Case No. IT-03-67-R77.2 and therefore only personal feelings can explain the *Amicus* Prosecutor's appeal for an increased sentence of three years' imprisonment in this case.⁶² Šešelj requests that this ground of appeal be dismissed.⁶³

31. The Appeals Chamber recalls that trial chambers are vested with broad discretion in determining an appropriate sentence. In general, the Appeals Chamber will not revise a sentence unless an appellant demonstrates that the trial chamber has committed a discernible error in exercising its discretion or has failed to follow the applicable law.⁶⁴

⁵⁸ Notice of Appeal, para. 3(iv); Appeal Brief, paras 43, 48.

⁵⁹ Appeal Brief, para. 45 (emphasis in original).

⁶⁰ Appeal Brief, paras 44, 46-48.

⁶¹ Response Brief, para. 8. *See also* Response Brief, para. 12.

⁶² Response Brief, para. 12.

⁶³ Response Brief, paras 12-13.

⁶⁴ *Šešelj* Appeal Judgement, para. 37; *In the Case Against Florence Hartmann*, Case No. IT-02-54-R77.5-A, Judgement, 19 July 2011, para. 167; *Prosecutor v. Astrit Haraqija and Bajrush Morina*, Case No. IT-04-84-R77.4-A, Judgement, 23 July 2009, para. 71.

32. The Appeals Chamber notes that the “critical considerations” enumerated by the *Amicus* Prosecutor were considered by the Contempt Trial Chamber.⁶⁵ Indeed, the *Amicus* Prosecutor’s references to the Contempt Trial Judgement provide evidence that the Contempt Trial Chamber considered these factors.⁶⁶ Šešelj’s prior conviction for contempt of the Tribunal, although not explicitly mentioned by the Contempt Trial Chamber, was considered insofar as it relates to the issue of deterrence.⁶⁷ The Contempt Trial Chamber found that Šešelj’s intent to continue disclosing confidential information in knowing violation of orders of the Tribunal and the need for deterrence warranted a sentence of 18 months’ imprisonment.⁶⁸ It is inconsequential that the maximum penalty for a conviction of contempt of the Tribunal is seven years’ imprisonment. The Contempt Trial Chamber’s conclusion that the gravity of the breach and the need for deterrence warranted 18 months’ imprisonment was reasonable and within the scope of its discretion. The *Amicus* Prosecutor has failed to show an error on the part of the Contempt Trial Chamber that necessitates altering Šešelj’s sentence.

33. For the foregoing reasons, the Appeals Chamber dismisses ground four of the *Amicus* Prosecutor’s appeal.

IV. DISPOSITION

34. For the foregoing reasons, the **APPEALS CHAMBER**,

PURSUANT TO Article 25 of the Statute and Rules 77, 101(C), 116 *bis*, 117, and 118 of the Rules;

GRANTS grounds of appeal one and two of the *Amicus* Prosecutor’s appeal and **FINDS** that there was no sentence in Case No. IT-03-67-R77.2 at the time the Contempt Trial Judgement was rendered with which the sentence imposed by the Contempt Trial Chamber could run concurrently and that, therefore, Šešelj did not serve any part of the 18-month sentence imposed by the Contempt Trial Chamber by virtue of having served the sentence imposed on him in Case No. IT-03-67-R77.2;

DISMISSES, Judge Pocar partially dissenting, ground three of the *Amicus* Prosecutor’s appeal as moot;

DISMISSES ground four of the *Amicus* Prosecutor’s appeal;

⁶⁵ Contempt Trial Judgement, paras 78-81.

⁶⁶ Appeal Brief, paras 46, 48.

⁶⁷ Cf. Contempt Trial Judgement, para. 81.

⁶⁸ Contempt Trial Judgement, paras 79-81.

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AFFIRMS Šešelj's sentence of 18 months' imprisonment;

DECLARES that, pursuant to Rule 101(C) of the Rules, Šešelj must be given credit for the period he has been detained in the custody of the Tribunal; and

FINDS that, as Šešelj has been detained for a period longer than the total of his 15-month sentence imposed with respect to Case No. IT-03-67-R77.2 and his 18-month sentence with respect to the present case, the sentence imposed in this case has been served.

Judge Pocar appends a partially dissenting opinion.

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

Judge Arlette Ramarosan, Presiding

Judge Mehmet Güney

Judge Fausto Pocar

Judge Liu Daqun

Judge Andréia Vaz

Dated this twenty-eighth day of November 2012,
At The Hague,
The Netherlands

[Seal of the Tribunal]

V. PARTIALLY DISSENTING OPINION OF JUDGE POCAR

1. In this Judgement, the Appeals Chamber dismisses ground three of the *Amicus* Prosecutor's appeal as moot.¹ The Appeals Chamber considers that because it already found that the Contempt Trial Chamber erred in imposing a sentence on Šešelj that was to run with the expired sentence in Case No. IT-03-67-R77.2, it is not necessary to decide whether, in so doing, the Contempt Trial Chamber erred by not providing a reasoned opinion.² While I agree with the Majority on this last point, I disagree with the Majority to dismiss ground three of the *Amicus* Prosecutor's appeal as moot in its entirety.

2. By finding that ground three of the *Amicus* Prosecutor's appeal is moot in its entirety, the Majority fails to respond to the second argument of the *Amicus* Prosecutor, namely that Rule 87(C) of the Rules allows for a concurrent sentence only in the context of multiple counts in a single indictment and that the Contempt Trial Chamber therefore erred in imposing a concurrent sentence when Šešelj only faced a single count of contempt of the Tribunal in the current proceedings.³

3. In my view, it is important to respond to the argument of the *Amicus* Prosecutor in order to clarify the law with respect to concurrent sentences in order to avoid any possible ambiguity in the future.

4. Rule 87(C) of the Rules provides as follows:

If the Trial Chamber finds the accused guilty on one or more of the charges contained in the indictment, it shall impose a sentence in respect of each finding of guilt and indicate whether such sentences shall be served consecutively or concurrently, unless it decides to exercise its power to impose a single sentence reflecting the totality of the criminal conduct of the accused.

Therefore, the only interpretation possible is that the reference to *indictment* in the plain text of the Rule allows for a concurrent sentence only in the context of multiple counts in a single case.

5. In light of the foregoing, I would have therefore granted this part of ground three of the *Amicus* Prosecutor's appeal and would have found the remainder of his third ground of appeal moot. Therefore, I partially dissent from the Majority's reasoning and conclusion.

¹ Appeal Judgement, para. 28.

² Appeal Judgement, para. 27.

³ Appeal Judgement, para. 25, *referring to* Appeal Brief, para. 41.

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



Judge Fausto Pocar

Dated this 28th day of November 2012,

At The Hague,

The Netherlands.

[Seal of the Tribunal]

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