

**UNITED  
NATIONS**



International Tribunal for the  
Prosecution of Persons  
Responsible for Serious Violations of  
International Humanitarian Law  
Committed in the Territory of the  
Former Yugoslavia since 1991

Case No. IT-03-67-  
R77.4-A  
Date: 30 May 2013  
Original: English

**IN THE APPEALS CHAMBER**

**Before:** Judge Arlette Ramaroson, Presiding  
Judge Mehmet Güney  
Judge Andréia Vaz  
Judge Khalida Rachid Khan  
Judge Bakhtiyar Tuzmukhamedov

**Registrar:** Mr. John Hocking

**Judgement of:** 30 May 2013

**CONTEMPT PROCEEDINGS AGAINST VOJISLAV ŠEŠELJ**

***PUBLIC***

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**PUBLIC REDACTED VERSION OF "JUDGEMENT" ISSUED  
ON 30 MAY 2013**

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**The Accused:**

Vojislav Šešelj *pro se*

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## I. INTRODUCTION

### A. Relevant Procedural Background

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 against the Judgement (“Contempt Trial Judgement”) rendered by Trial Chamber II (“Contempt Trial Chamber”), on 28 June 2012, in the contempt proceedings against Vojislav Šešelj (“Šešelj”).<sup>1</sup>

2. Šešelj is currently being tried before Trial Chamber III (“Šešelj Trial Chamber”) in the case of *Prosecutor v. Vojislav Šešelj* (“Main Case”), on nine counts of crimes against humanity and violations of the laws or customs of war.<sup>2</sup> On 24 July 2009 and 31 October 2009, Šešelj was found guilty in two contempt cases (IT-03-67-R77.2 and IT-03-67-R77.3 “Contempt Cases”) and sentenced to 15 and 18 months’ imprisonment respectively.<sup>3</sup>

#### 1. Orders in Lieu of Indictments Issued in Case No. IT-03-67-R77.4

3. On 9 May 2011, the Contempt Trial Chamber issued a decision related to Šešelj’s failure to remove confidential information pertaining to protected witnesses from a public website (“First Decision”).<sup>4</sup> Considering there were sufficient grounds to proceed against Šešelj pursuant to Rule 77(D)(ii) of the Rules of Procedure and Evidence of the Tribunal (“Rules”), the Contempt Trial Chamber initiated contempt proceedings against him, issued an order in lieu of an indictment (“Order in Lieu of Indictment”) and declared that it would prosecute the matter itself.<sup>5</sup>

4. On 15 July 2011, the Contempt Trial Chamber issued an order directing Šešelj to remove a book he authored which contained confidential information from a public website (“15 July

<sup>1</sup> *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.4, Public Redacted Version of Judgement Issued on 28 June 2012 (“Contempt Trial Judgement”).

<sup>2</sup> See *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Third Amended Indictment, 7 December 2007, pp. 5-14.

<sup>3</sup> *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.2, Public Redacted Version of Judgement Issued on 24 July 2009; *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.3, Public Redacted Version of Judgement Issued on 31 October 2011. The former of the two judgements was upheld on appeal. See *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.2-A, Public Redacted Version of Judgement Issued on 19 May 2010 (“Šešelj Contempt Appeal Judgement of 19 May 2010”). In the latter case, the Appeals Chamber granted two of the *Amicus* Prosecutor’s grounds of appeal, and dismissed two other grounds of appeal filed by the *Amicus* Prosecutor. The Contempt Appeal Judgement affirmed Šešelj’s sentence of 18 months imprisonment. See *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.3-A, Judgement, 28 November 2012.

<sup>4</sup> Decision on Failure to Remove Confidential Information from Public Website and Order in Lieu of Indictment, 9 May 2011 (confidential).

<sup>5</sup> First Decision, para. 29.

Order”).<sup>6</sup> It subsequently amended the Order in Lieu of Indictment in a decision issued on 21 October 2011 to include Šešelj’s failure to comply with the 15 July Order (“Second Decision”).<sup>7</sup>

5. On 3 November 2011, the Contempt Trial Chamber issued a further order requesting that Šešelj remove a confidential submission published on a public website (“3 November Order”).<sup>8</sup> It amended the Order in Lieu of Indictment a second and final time in a decision issued on 29 March 2012 to include his failure to comply with the 3 November Order (“Third Decision”).<sup>9</sup> In sum, the Order in Lieu of Indictment against Šešelj contains three charges of contempt for failure to comply with orders and decisions to remove confidential information from a public website.

## 2. Procedural History

6. In the previous contempt case against Šešelj (IT-03-67-R77.3), Dejan Mirović (“Mirović”) and Nemanja Sarović (“Sarović”) were recognised<sup>10</sup> as Šešelj’s legal advisor and case manager, respectively.<sup>11</sup>

7. On 13 June 2011, Šešelj informed the Registry that Mirović and Sarović would be his legal advisor and case manager respectively in the present case. He requested their travel expenses to be covered, the ability to have privileged communication with them and their presence at his initial appearance.<sup>12</sup>

8. The initial appearance in the present case was held on 6 July 2011, during which Šešelj entered a plea of not guilty to the charges contained in the First Decision, and stated that he would

<sup>6</sup> *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-Misc.1, Order to Remove Book from Website, 15 July 2011 (confidential).

<sup>7</sup> Second Decision on Failure to Remove Confidential Information from Public Website and Amended Order in Lieu of Indictment, 21 October 2011 (confidential).

<sup>8</sup> *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-Misc.3, Decision on Prosecution’s Urgent Motion for an Order to Remove Submission 478 from Website, 3 November 2011 (confidential).

<sup>9</sup> Third Decision on Failure to Remove Confidential Information from Public Website and Amended Order in Lieu of Indictment, 29 March 2012 (confidential).

<sup>10</sup> The Appeals Chamber notes that the Registry recognised Mirović and Sarović in Case No. IT-03-67-R77.3 on a temporary basis pending the completion of background checks. [REDACTED]. For an explanation of the “recognition” process, see *infra* fn. 31. For an explanation of “background checks”, see *infra* fn. 15.

<sup>11</sup> See Status Conference, 3 September 2010, in Case No. IT-03-67-R77.3, pp. 33-34. The Appeals Chamber notes that Sarović was recognised as Šešelj’s case manager in the contempt case No. IT-03-67-R77.3, but not in the Main Case. See *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Decision on Request for Review of Registry Decision Regarding Visit of Defence Team Members, 10 August 2011, paras 7, 9; *Prosecutor v. Vojislav Šešelj*, Case No. IT 03 67-T, Decision on Accused’s Claim for Damages on Account of Alleged Violations of his Elementary Rights During Provisional Detention, 21 March 2012, para. 31. The English translation of the French original was filed on 16 April 2012. See *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Registry Submission Pursuant to Rule 33(B) Regarding Travel of Vojislav Šešelj’s Defence Team, 14 February 2012 (public with confidential annex), para. 8, fn. 3 (which mistakenly indicates that Sarović is “assigned” to the present contempt case). The Appeals Chamber further notes that Šešelj did not have a case manager in the first contempt case (IT-03-67-R77.2). See *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.2, Registry Submission Pursuant to Rule 33(B) Regarding the Accused’s Representation, 4 March 2009, Annex I. See also Pre-Trial Conference, 29 May 2009 in Case No. IT-03-67-R77.2, p. 32; T. 24 July 2009, p. 107.

<sup>12</sup> Submission No. 474, 13 June 2011. The English translation of the B/C/S original was filed on 14 June 2011.

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represent himself.<sup>13</sup> At this hearing, Šešelj referred to a letter dated 5 July 2011 from the Deputy Head of the Office of the Legal Aid and Detention Matters of the Tribunal (“OLAD”) (“First OLAD Letter”),<sup>14</sup> in which the Registry had denied him the payment of travel expenses for Mirović and Sarović, and the opportunity to communicate with them under privileged conditions, until background checks were completed.<sup>15</sup> During the hearing, Šešelj also noted that he had appealed before the President of the Tribunal the decision of the Registry [REDACTED].<sup>16</sup> Šešelj requested that the Contempt Trial Chamber issue a decision which would allow Mirović and Sarović to visit him at the United Nations Detention Unit (“UNDU”) under privileged conditions and would defray their travelling expenses.<sup>17</sup>

9. On the same day, the President of the Tribunal issued a decision, in relation to the Main Case, declaring that the Registry had not acted inappropriately in refusing to pay for Sarović’s travel expenses, [REDACTED].<sup>18</sup>

10. On 12 July 2011, the Registry declined to allocate legal aid funds to Šešelj with respect to the present case “absent an order to that effect” from the Contempt Trial Chamber.<sup>19</sup> The Registrar considered the decision issued by the Šešelj Trial Chamber in the Main Case, in which the Tribunal agreed to provide Šešelj with 50% of the resources usually allocated to a totally indigent accused

<sup>13</sup> Initial Appearance, 6 July 2011, pp. 1, 8-10.

<sup>14</sup> First OLAD Letter, 5 July 2011. The letter noted that Mirović and Sarović would assist Šešelj in the preparation of the present case. It indicated, however, that neither Mirović nor Sarović were entitled to privileged communication until the finalisation of background checks or additional verifications. Regarding the reimbursement of travel costs, the Registry informed Šešelj that since he is not entitled to receive legal aid funds, their travel costs could not be covered. It further specified that a departure from its policies regarding travel costs could not be justified “absent a Trial Chamber’s order for the presence of [his] defence team in the courtroom”.

<sup>15</sup> Initial Appearance, 6 July 2011, pp. 10-12. *See also* First OLAD Letter. For an explanation of background checks, *see Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Registrar’s Submission Pursuant to Rule 33(B) Regarding Request for Review of Registrar Decision and for Summary Reversal dated 18 April 2012, 1 May 2012, paras 16-17: “The Registry procedure also entails a detailed background check through public sources and other Tribunal databases, including a conflict of interest check, to determine whether there are any impediments to the assignment. Through such checks, the Registry also verifies whether there is any adverse information indicating that a particular assignment would be prejudicial to the administration of justice, or likely to diminish public confidence in the Tribunal or the administration of justice in accordance with paragraph 22 of the Remuneration Scheme as outlined above. These procedures are designed to ensure, *inter alia*, that public funds are not inappropriately disbursed, while protecting the rights of the accused and guaranteeing the integrity of the proceedings before the Tribunal”.

<sup>16</sup> [REDACTED].

<sup>17</sup> Initial Appearance, 6 July 2011, pp. 12-13.

<sup>18</sup> 6 July 2011 Decision, paras 19, 24. The Appeals Chamber notes that even though this decision is related to the Main Case, the issue of privileged communication with a defence team member has a bearing on the Contempt Cases. *See also* 6 July 2011 Decision, para. 9. *See also* First OLAD Letter, which reads: “With regard to Mr. Sarović you are aware that a decision on his status, which will be relevant for this case as well, is pending before the President in connection with case no IT-03-67-R77.3”. [REDACTED].

<sup>19</sup> *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.4, Registry Submission Pursuant to Rule 33(B) Regarding the Application of the Decision on Financing, 12 July 2011 (“12 July 2011 Registry Submission”), para. 7.

(“Decision on Financing”),<sup>20</sup> to be “case-specific” and therefore an insufficient basis for disbursement of public funds in the present case.

11. The Contempt Trial Chamber held a status conference on 4 November 2011 following an amendment to the Order in Lieu of Indictment contained in the Second Decision.<sup>21</sup> During the further appearance Šešelj argued that the Registrar had deprived him of privileged communications with Mirović and Sarović, and that he was therefore unable to enter a plea on the new charge.<sup>22</sup> The Contempt Trial Chamber decided to postpone the hearing.<sup>23</sup>

12. On 11 November 2011, Šešelj was invited to enter a plea on the new charge contained in the Second Decision.<sup>24</sup> He argued that his right to legal assistance was violated since he was deprived of privileged communications, and that he could not enter a plea until he could exercise his right to legal assistance.<sup>25</sup> Šešelj requested the Contempt Trial Chamber to issue an order to the Registrar to protect “his right to self-defence”.<sup>26</sup> The Contempt Trial Chamber ordered a plea of not guilty to be entered on Šešelj’s behalf.<sup>27</sup>

13. On 19 March 2012, the Contempt Trial Chamber held a status conference during which Šešelj stated that he lacked “procedural prerequisites” to prepare for trial because the Registry had disabled communication with Mirović and Sarović.<sup>28</sup> He orally moved the Contempt Trial Chamber to allow Sarović to visit him at the UNDU under privileged conditions.<sup>29</sup> The Contempt Trial Chamber informed Šešelj that “the points [he] ha[d] raised have been noted and certainly there are legal avenues that [he] could raise these issues through if [he] so desire[d]”.<sup>30</sup>

14. On 2 April 2012, the Registry informed Šešelj in a letter from the Deputy Head of OLAD (“Second OLAD Letter”) that the Registry had recognised<sup>31</sup> Mr. Mirović as a “legal assistant” in

<sup>20</sup> *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Decision on Financing of Defence, 29 October 2010 (confidential with confidential and *ex parte* annexes). The English translation of the French original was filed on 1 November 2010.

<sup>21</sup> Further Appearance, 4 November 2011, p. 18.

<sup>22</sup> Further Appearance, 4 November 2011, pp. 19, 21-23, 25-26.

<sup>23</sup> Further Appearance, 4 November 2011, p. 29.

<sup>24</sup> Further Appearance, 11 November 2011, p. 31.

<sup>25</sup> Further Appearance, 11 November 2011, pp. 31-36. Šešelj argued that he could not exercise his right to legal assistance in conditions where he would be “spied” upon.

<sup>26</sup> Further Appearance, 11 November 2011, p. 32. *See also* Further Appearance, 11 November 2011, p. 36.

<sup>27</sup> Further Appearance, 11 November 2011, p. 37. Pursuant to Rule 62(A)(iv), the Trial Chamber is authorised to enter a plea of not guilty on the accused’s behalf if the accused fails to enter a plea at the initial or any further appearance.

<sup>28</sup> Status Conference, 19 March 2012, p. 43.

<sup>29</sup> Status Conference, 19 March 2012, pp. 44, 48.

<sup>30</sup> Status Conference, 19 March 2012, p. 48.

<sup>31</sup> The Appeals Chamber takes note of the practice of the Registry to “recognise” and not “assign” support staff members to accused who do not receive Tribunal funding, i.e. who are not found to be indigent. This “recognition” triggers access to confidential information and to communicate with an accused at the UNDU in a privileged setting. *See* 26 April 2011 Registry Submission, fn. 1, which provides: “It is noted that the Registry “recognises” support staff members of accused who do not receive Tribunal funding, upon, *inter alia*, receipt of a *curriculum vitae* of the

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the present case, thus allowing him access to confidential material with regard to this case and to meet in a privileged setting. The Registry however specified that “the recognition of Mr. Mirović” did not imply that the latter possessed the relevant qualifications to be “assigned” to Šešelj<sup>32</sup> under the Registry’s Remuneration Scheme for Persons Assisting Indigent Self-Represented Accused.<sup>33</sup>

15. A further appearance was held on 17 April 2012 following an amendment to the Order in Lieu of Indictment contained in the Third Decision.<sup>34</sup> Šešelj pleaded not guilty to the new charge, and mentioned that Mirović would conduct the examination-in-chief for his testimony.<sup>35</sup> Moreover, he raised additional concerns<sup>36</sup> which the Contempt Trial Chamber addressed in an order dated 24 April 2012.<sup>37</sup>

16. On 25 May 2012, Šešelj received another letter from the Deputy Head of OLAD (“Third OLAD Letter”) informing him that the Registry had granted Šešelj his request to meet with Mirović in a privileged setting. However, the Registry added that Sarović was not “assigned”<sup>38</sup> to the present case, and therefore could not meet Šešelj in a privileged setting. The Third OLAD Letter reiterated that the Decision on Financing was not applicable to the present contempt case and that OLAD would thus not cover expenses of Šešelj’s “assistants” in this contempt case. However, OLAD indicated that should the Contempt Trial Chamber require Mirović’s presence in The Hague, the Registry might reimburse him for his travel expenses.<sup>39</sup>

17. On 29 May 2012, the Contempt Trial Chamber issued a scheduling order setting the date of 12 June 2012 for trial, and found that “it is in the interest of justice that Dejan Mirović be allowed

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respective candidate, successful completion of a background check, and the signing of an Undertaking to be bound by the Statute of the Tribunal, the [Code of Conduct] and other applicable Rules and Regulations. Such recognition of team members is a prerequisite for the granting of access to a detained accused and confidential case-related material”. *See also* 26 April 2011 Registry Submission, para. 7, fn. 9. The Appeals Chamber further notes that, whether or not receiving legal aid, the legal staff supporting a self-represented accused – due to the absence of supervisory counsel responsible for the conduct of the legal support staff (*See* Code of Conduct, Article 34) – must undergo a background check and give an undertaking as to the proper handling of confidential information.

<sup>32</sup> Second OLAD Letter, 2 April 2012.

<sup>33</sup> Remuneration Scheme for Persons Assisting Indigent Self-Represented Accused, 1 April 2010 (“Remuneration Scheme”).

<sup>34</sup> Further Appearance, 17 April 2012.

<sup>35</sup> Further Appearance, 17 April 2012, pp. 55-56.

<sup>36</sup> Further Appearance, 17 April 2012, pp. 56-62. Šešelj challenged the jurisdiction of the Tribunal to prosecute him in this case, requested the disqualification of Judge Kwon, asked for the permission to hold a press conference before parliamentary elections in Serbia on 6 May 2012, and raised the alleged violation of his right to a fair trial. Šešelj did not raise the issue of the right to communicate with his case manager under a privileged setting during this appearance.

<sup>37</sup> Order on Matters Raised by the Accused During the Further Initial Appearance, 24 April 2012.

<sup>38</sup> The Appeals Chamber notes that, as support staff cannot be “assigned” to an accused who does not receive Tribunal funding (*see supra*, fn. 31), the Registry mistakenly used the word “assigned” instead of “recognised”.

<sup>39</sup> Third OLAD Letter, 25 May 2012.

to appear at trial for the purpose of conducting the examination-in-chief”, and that “the nature of the case is straightforward”.<sup>40</sup>

18. On 12 June 2012, the Contempt Trial Chamber held a pre-trial conference<sup>41</sup> which was followed immediately by the trial.<sup>42</sup> At the pre-trial conference, the Contempt Trial Chamber noted the absence of Mirović.<sup>43</sup> Šešelj explained that he wanted Mirović *and* Sarović to assist him in the courtroom but that the Registry had informed him by letter that Sarović could not visit him at the UNDU under privileged conditions because he was not “assigned” to the present case.<sup>44</sup> The Contempt Trial Chamber informed Šešelj that it had decided to allow his legal advisor to conduct the examination-in-chief during trial but indicated that “there is no justification and certainly no need for a case manager”.<sup>45</sup> After further discussion, the Contempt Trial Chamber informed Šešelj as follows:

We are also not coming back on our decision that Mr. Mirović is allowed to be here, but not Mr. Sarović, the other lawyer -- the other person that you wanted as a Case Manager. This Chamber has examined the question of whether there was any serious need for a Case Manager in this case, and this case is so very simple that the Chamber concluded there is no such necessity. And, again, that -- that is a decision of this Chamber, and it is not going to be changed.<sup>46</sup>

19. Šešelj orally moved the Contempt Trial Chamber to reconsider its decision regarding Sarović’s participation.<sup>47</sup> After a short adjournment for deliberation, the Contempt Trial Chamber declined to reverse its decision.<sup>48</sup> When asked how much time he would require to present his final submissions, Šešelj replied that he was not able to testify, to present his defence or to make final submissions without the assistance of Mirović and Sarović.<sup>49</sup> The Contempt Trial Chamber adjourned the hearing for one week recalling that “Mr. Mirović is welcome in the courtroom to question Mr. Šešelj, as an accused witness, but no assistance by a case manager is warranted”.<sup>50</sup>

20. The next hearing took place on 18 June 2012.<sup>51</sup> Šešelj reiterated that he would not present any submissions because his procedural rights had been denied and that he was prevented from preparing his defence.<sup>52</sup> The Contempt Trial Chamber closed the proceedings.<sup>53</sup>

<sup>40</sup> Order Scheduling Trial, 29 May 2012 (“Order Scheduling Trial”), p. 2.

<sup>41</sup> Pre-Trial Conference, 12 June 2012, p. 64.

<sup>42</sup> Pre-Trial Conference, 12 June 2012, p. 73.

<sup>43</sup> Pre-Trial Conference, 12 June 2012, p. 65.

<sup>44</sup> Pre-Trial Conference, 12 June 2012, pp. 65-67.

<sup>45</sup> Pre-Trial Conference, 12 June 2012, p. 68.

<sup>46</sup> Pre-Trial Conference, 12 June 2012, p. 71.

<sup>47</sup> Pre-Trial Conference, 12 June 2012, p. 72.

<sup>48</sup> Pre-Trial Conference, 12 June 2012, p. 72.

<sup>49</sup> Pre-Trial Conference, 12 June 2012, p. 73.

<sup>50</sup> Pre-Trial Conference, 12 June 2012, pp. 75-76.

<sup>51</sup> Trial, 18 June 2012.

<sup>52</sup> Trial, 18 June 2012, pp. 78-81.

<sup>53</sup> Trial, 18 June 2012, p. 82.

21. On 28 June 2012, the Contempt Trial Chamber convicted Šešelj of contempt and sentenced him to two years' imprisonment.<sup>54</sup>

### B. Šešelj's Appeal

22. Šešelj filed a Notice of Appeal on 18 July 2012 and an Appeal Brief on 2 August 2012.<sup>55</sup> Šešelj requests the Appeals Chamber to reverse the Contempt Trial Judgement and enter an acquittal.<sup>56</sup> In support of this request, he sets out one ground of appeal which raises three separate sub-grounds of appeal. He submits that the Contempt Trial Chamber denied his right to a defence and a fair trial, specifically by limiting his right to a case manager at the pre-trial conference and at trial, on 12 and 18 June 2012, thus preventing him from presenting his defence at trial.<sup>57</sup>

23. On 26 September 2012, Šešelj filed a motion to disqualify Judges Arlette Ramarosan, Mehmet Güney and Andréia Vaz.<sup>58</sup> On 10 January 2013, the President of the Tribunal issued a decision rejecting Šešelj's request.<sup>59</sup>

## II. STANDARD OF REVIEW ON APPEAL

24. On appeal, parties must limit their arguments to legal errors that invalidate the judgement of the Trial Chamber and to factual errors that result in a miscarriage of justice within the scope of Article 25 of the Statute of the Tribunal ("Statute").<sup>60</sup> The settled standard of review for appeals against judgements similarly applies to appeals against contempt judgements.<sup>61</sup>

<sup>54</sup> Contempt Trial Judgement, para. 58.

<sup>55</sup> Notice of Appeal Against the Judgement on Allegations of Contempt of Court of 28 June 2012, 18 July 2012 ("Notice of Appeal"). The English translation of the B/C/S original was filed on 25 July 2012; Appeal Against the Judgement on Allegations of Contempt of Court of 28 June 2012, 2 August 2012 ("Appeal Brief"). The English translation of the B/C/S original was filed on 14 August 2012.

<sup>56</sup> Notice of Appeal, para. 8.

<sup>57</sup> Notice of Appeal, paras 1-6.

<sup>58</sup> Professor Vojislav Šešelj's Request for Disqualification of Judges Arlette Ramarosan, Mehmet Güney and Andréia Vaz, 27 September 2012 The English translation of the B/C/S original was filed on 15 October 2012.

<sup>59</sup> Decision on Vojislav Šešelj's Motion to Disqualify Judges Arlette Ramarosan, Mehmet Güney, and Andréia Vaz, 10 January 2013.

<sup>60</sup> *Šešelj Contempt Appeal Judgement* of 19 May 2010, para. 9; *Léonidas Nshogoza v. The Prosecutor*, Case No. ICTR-2007-91-A, Judgement, 15 March 2010 ("*Nshogoza Appeal Judgement*"), para. 12; *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Judgement, 12 November 2009 ("*Milošević Appeal Judgement*"), para. 12; *Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, Case No. IT-95-13/1-A, Judgement, 5 May 2009 ("*Mrkšić and Šljivančanin Appeal Judgement*"), para. 10; *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Judgement, 17 March 2009 ("*Krajišnik Appeal Judgement*"), para. 11; *Prosecutor v. Milan Martić*, Case No. IT-95-11-A, Judgement, 8 October 2008 ("*Martić Appeal Judgement*"), para. 8; *Prosecutor v. Josip Jović*, Case No. IT-95-14 & 14/2-R77-A, Judgement, 15 March 2007 ("*Jović Appeal Judgement*"), para. 11; *Prosecutor v. Ivica Marijačić and Markica Rebić*, Case No. IT-95-14-R77.2-A, Judgement, 27 September 2006 ("*Marijačić and Rebić Appeal Judgement*"), para. 15.

<sup>61</sup> *Šešelj Contempt Appeal Judgement* of 19 May 2010, para. 9; *Nshogoza Appeal Judgement*, para. 12; *Jović Appeal Judgement*, para. 11; *Marijačić and Rebić Appeal Judgement*, para. 15.

25. The Appeals Chamber reviews the Trial Chamber's findings of law to determine whether or not they are correct.<sup>62</sup> A party alleging an error of law must identify the alleged error, present arguments in support of its claim, and explain how the error invalidates the judgement.<sup>63</sup> An allegation of an error of law that has no chance of changing the outcome of a judgement may be rejected on that ground.<sup>64</sup> Where the Appeals Chamber finds an error of law in the Trial Judgement arising from the application of the wrong legal standard by the Trial Chamber, the Appeals Chamber will articulate the correct legal standard and review the relevant factual findings of the Trial Chamber accordingly.<sup>65</sup>

26. When considering alleged errors of fact, the Appeals Chamber will apply a standard of reasonableness. Only an error of fact that has occasioned a miscarriage of justice will cause the Appeals Chamber to overturn a decision by the Trial Chamber.<sup>66</sup> In reviewing the findings of the Trial Chamber, the Appeals Chamber will only substitute the Trial Chamber's finding with its own when no reasonable trier of fact could have reached the original decision.<sup>67</sup> In determining whether or not a Trial Chamber's finding was one that no reasonable trier of fact could have reached, the Appeals Chamber "will not lightly disturb findings of fact by a Trial Chamber".<sup>68</sup>

27. On appeal, a party may not merely repeat arguments that did not succeed at trial unless the party can demonstrate that the Trial Chamber's rejection of them constituted such an error as to warrant the intervention of the Appeals Chamber.<sup>69</sup> Arguments of a party that do not have the

<sup>62</sup> *Šešelj* Contempt Appeal Judgement of 19 May 2010, para. 10; *Jović* Appeal Judgement, para. 12; *Marijačić and Rebić* Appeal Judgement, para. 16; *Milošević* Appeal Judgement, para. 14; *Mrkšić and Šljivančanin* Appeal Judgement, para. 12; *Krajišnik* Appeal Judgement, para. 13; *Martić* Appeal Judgement, para. 10.

<sup>63</sup> *Šešelj* Contempt Appeal Judgement of 19 May 2010, para. 10; *Milošević* Appeal Judgement, para. 13; *Mrkšić and Šljivančanin* Appeal Judgement, para. 11; *Krajišnik* Appeal Judgement, para. 12; *Martić* Appeal Judgement, para. 9; *Jović* Appeal Judgement, para. 12; *Marijačić and Rebić* Appeal Judgement, para. 15.

<sup>64</sup> *Šešelj* Contempt Appeal Judgement of 19 May 2010, para. 10; *Milošević* Appeal Judgement, para. 13; *Mrkšić and Šljivančanin* Appeal Judgement, para. 11; *Krajišnik* Appeal Judgement, para. 12; *Martić* Appeal Judgement, para. 9; *Jović* Appeal Judgement, para. 12; *Marijačić and Rebić* Appeal Judgement, para. 17.

<sup>65</sup> *Šešelj* Contempt Appeal Judgement of 19 May 2010, para. 10; *Milošević* Appeal Judgement, para. 14; *Mrkšić and Šljivančanin* Appeal Judgement, para. 12; *Krajišnik* Appeal Judgement, para. 13; *Martić* Appeal Judgement, para. 10.

<sup>66</sup> *Šešelj* Contempt Appeal Judgement of 19 May 2010, para. 11; *Milošević* Appeal Judgement, para. 15; *Mrkšić and Šljivančanin* Appeal Judgement, para. 13; *Krajišnik* Appeal Judgement, para. 14; *Martić* Appeal Judgement, para. 11.

<sup>67</sup> *Šešelj* Contempt Appeal Judgement of 19 May 2010, para. 11; *Milošević* Appeal Judgement, para. 15; *Mrkšić and Šljivančanin* Appeal Judgement, para. 13; *Krajišnik* Appeal Judgement, para. 14; *Jović* Appeal Judgement, para. 13; *Marijačić and Rebić* Appeal Judgement, para. 16.

<sup>68</sup> *Šešelj* Contempt Appeal Judgement of 19 May 2010, para. 11; *Milošević* Appeal Judgement, para. 15; *Mrkšić and Šljivančanin* Appeal Judgement, para. 14; *Martić* Appeal Judgement, para. 11; *Jović* Appeal Judgement, para. 13; *Marijačić and Rebić* Appeal Judgement, para. 16.

<sup>69</sup> *Šešelj* Contempt Appeal Judgement of 19 May 2010, para. 12; *Mrkšić and Šljivančanin* Appeal Judgement, para. 16; *Krajišnik* Appeal Judgement, para. 24; *Jović* Appeal Judgement, para. 14; *Marijačić and Rebić* Appeal Judgement, para. 17.

potential to cause the impugned judgement to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits.<sup>70</sup>

28. In order for the Appeals Chamber to assess a party's arguments on appeal, the appealing party is expected to provide precise references to relevant transcript pages or paragraphs in the Trial Judgement to which the challenges are being made.<sup>71</sup> Further, "the Appeals Chamber cannot be expected to consider a party's submissions in detail if they are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies".<sup>72</sup> Therefore, the Appeals Chamber may dismiss such submissions as unfounded without providing detailed reasoning.<sup>73</sup>

29. It should be recalled that the Appeals Chamber has inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing and may dismiss arguments that are evidently unfounded without providing detailed reasoning.<sup>74</sup>

### III. GROUND OF APPEAL: WHETHER ŠEŠELJ'S FAIR TRIAL RIGHTS HAVE BEEN DENIED

#### A. Preliminary Matter: Šešelj's *ex post* Request for Extension of the Word Limit

30. Šešelj moves the Appeals Chamber to allow him an exemption of the word limit pursuant to paragraph (C)(7) of the Practice Direction on the Length of Briefs and Motions.<sup>75</sup> He argues that the denial of a case manager,<sup>76</sup> his two-year sentence for his conviction in this case,<sup>77</sup> his health condition,<sup>78</sup> and his detention for eleven years,<sup>79</sup> all constitute exceptional circumstances within the meaning of this provision.

<sup>70</sup> Šešelj Contempt Appeal Judgement of 19 May 2010, para. 12; Mrkšić and Šljivančanin Appeal Judgement, para. 16; Krajišnik Appeal Judgement, para. 20; Martić Appeal Judgement, para. 17; Jović Appeal Judgement, para. 14; Marijačić and Rebić Appeal Judgement, para. 17.

<sup>71</sup> Šešelj Contempt Appeal Judgement of 19 May 2010, para. 13; Mrkšić and Šljivančanin Appeal Judgement, para. 17; Jović Appeal Judgement, para. 15; Practice Direction on Formal Requirements for Appeals from Judgement, Case No. IT/201, 7 March 2002, para. 4(b)(ii).

<sup>72</sup> Šešelj Contempt Appeal Judgement of 19 May 2010, para. 13; Milošević Appeal Judgement, para. 16; Mrkšić and Šljivančanin Appeal Judgement, para. 17; Marijačić and Rebić Appeal Judgement, para. 18.

<sup>73</sup> Milošević Appeal Judgement, para. 16; Marijačić and Rebić Appeal Judgement, para. 18.

<sup>74</sup> Šešelj Contempt Appeal Judgement of 19 May 2010, para. 14; Milošević Appeal Judgement, para. 16; Mrkšić and Šljivančanin Appeal Judgement, para. 18; Jović Appeal Judgement, para. 15.

<sup>75</sup> Practice Direction on the Length of Briefs and Motions, Case No. IT/184 Rev. 2, 16 September 2005 ("Practice Direction on Length").

<sup>76</sup> Appeal Brief, para. 2. See also Appeal Brief, para. 6.

<sup>77</sup> Appeal Brief, para. 3. See also Appeal Brief, para. 6.

<sup>78</sup> Appeal Brief, para. 4. See also Appeal Brief, para. 6.

<sup>79</sup> Appeal Brief, para. 5. See also Appeal Brief, para. 6.

31. Paragraph 8 of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal<sup>80</sup> provides that appeals from decisions rendered under Rule 77 of the Rules are subject to paragraph (C)(2) of the Practice Direction on Length, which limits the length of an appellant's brief to 9,000 words. Additionally, paragraph (C)(7) of the Practice Direction on Length provides that a party must seek authorisation in advance from the Chamber to exceed the prescribed word limits, and must provide an explanation of the exceptional circumstances that necessitate the oversized filing. Where a party fails to comply with the above-mentioned requirements, the Appeals Chamber may order clarification or re-filing, or it may reject a filing or dismiss submissions contained therein, where the filing is not in compliance with the said requirements.<sup>81</sup>

32. The Appeals Chamber notes that Šešelj's Appeal Brief purports by its word count to contain 11,788 words, which is 2,788 words above the limit provided for in the Practice Direction on Length. Most of these excess words are spent arguing for an exemption to the word limit, when they might have been contained in a proper motion seeking extension of the word limit in advance. The Appeals Chamber is mindful that in proceeding under Rule 77(D) of the Rules, Šešelj is effectively the only party in this case, and therefore his excessive words result in no prejudice to a party, and neither do they unduly burden the Chamber. In view of these factors, and considering the interest of judicial economy, the Appeals Chamber sees no need to address the proffered exceptional circumstances justifying the oversized filing. The Appeals Chamber grants Šešelj's request and accepts his Appeal Brief as filed.

## **B. Alleged Violation of Šešelj's Fair Trial Rights**

### **1. Submissions**

33. In alleging that his fair trial rights were violated, Šešelj submits that the Contempt Trial Chamber committed multiple errors of law in: (i) refusing him the assistance of Sarović in the present case and failing to provide a clear and reasonable answer to his request for a case manager, thereby violating the principle of equality of arms and thus his right to a fair trial; (ii) infringing his right to communicate with his legal advisor and his case manager; and (iii) issuing an unfair sentence.<sup>82</sup>

<sup>80</sup> Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal, Case No. IT/155 Rev. 3, 16 September 2005 ("Practice Direction for Filing Written Submissions").

<sup>81</sup> Practice Direction for Filing Written Submissions, para. 20.

<sup>82</sup> Appeal Brief.

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34. In his first sub-ground of appeal, Šešelj submits that the Contempt Trial Chamber preemptively and improperly assumed that the case was simple, and therefore erroneously concluded that there was no need for a case manager.<sup>83</sup> He claims that the Contempt Trial Chamber did not provide a “clear and reasonable answer” as to why Sarović could not participate at trial in the present case.<sup>84</sup> Šešelj also submits that due to the denial of his right to a case manager, he was unable to present his defence during the trial held on 12 and 18 June 2012<sup>85</sup> and that this denial violated the principle of equality of arms.<sup>86</sup> He asserts that Mirović and Sarović could not visit him because the latter was denied the status of case manager, and that therefore the proofing session for his testimony could not take place. In this regard, Šešelj claims that the failure to register a case manager simultaneously prevented him contact with his legal advisor and made it impossible to prepare a proper defence.<sup>87</sup> Consequently, Šešelj contends that he “did not have a defence at all because of this flagrant violation of his rights” by the Contempt Trial Chamber.<sup>88</sup> In his second sub-ground of appeal, Šešelj submits that the Contempt Trial Chamber prevented him from communicating with his legal team,<sup>89</sup> thereby infringing his right to freedom of expression, and, more precisely, his freedom to testify, which denied him the opportunity to express “the flagrant violation of his human and procedural rights during the almost 10 years of detention”.<sup>90</sup> In his third sub-ground of appeal, Šešelj submits that the two-year sentence of imprisonment is “draconian” and was imposed under circumstances which prevented him from presenting his defence, thereby violating his right to a fair trial and to a defence.<sup>91</sup>

35. For the aforementioned reasons, Šešelj requests that the Appeals Chamber overturn the Contempt Trial Judgement and acquit him, or alternatively, order a re-trial to give him the opportunity to present his defence.<sup>92</sup>

## 2. Discussion

### (a) Whether the Refusal to Allow Šešelj a Case Manager to Assist at Trial Violated his Fair Trial Rights

36. The Appeals Chamber recalls that Article 21 of the Statute, which finds its origin in the International Covenant on Civil and Political Rights (Article 14) and the European Convention on

<sup>83</sup> Appeal Brief, para. 9. *See also* Appeal Brief, paras 12, 30.

<sup>84</sup> Appeal Brief, para. 9.

<sup>85</sup> Appeal Brief, para. 7.

<sup>86</sup> Appeal Brief, para. 11.

<sup>87</sup> Appeal Brief, paras 8, 12.

<sup>88</sup> Appeal Brief, para. 8. *See also* Appeal Brief, para. 12.

<sup>89</sup> Appeal Brief, paras 12-13.

<sup>90</sup> Appeal Brief, para. 34. *See also* Appeal Brief, paras 12, 27, 35.

<sup>91</sup> Appeal Brief, para. 27.

Human Rights (Article 6), sets out the rights of the accused.<sup>93</sup> Article 21(1) of the Statute which provides that “[a]ll persons shall be equal before the International Tribunal”,<sup>94</sup> embodies the principle of equality of arms between the prosecution and the defence.<sup>95</sup> The Appeals Chamber recalls that “the equality of arms principle requires a judicial body to ensure that neither party is put at a disadvantage when presenting its case”,<sup>96</sup> and is applicable to both the prosecution and defence.<sup>97</sup> In considering the scope of the application of this principle, the Appeals Chamber has held that a fair trial entitles the accused to adequate time and facilities for his defence under conditions which do not place him at a substantial disadvantage as regards his opponent.<sup>98</sup>

37. The Appeals Chamber is mindful that the principle of equality of arms must be interpreted in light of the particular circumstances surrounding cases of contempt under Rule 77(D) of the Rules<sup>99</sup> where there is no opposing party to an accused and where a trial chamber prosecutes the alleged contempt itself. As the prosecuting authority, a trial chamber acting pursuant to Rule 77(D) of the Rules drafts the charges contained in the order in lieu of indictment, may present evidence on those charges and examine witnesses led by the defence. As the judicial authority, a trial chamber acting pursuant to Rule 77(D) of the Rules decides on defence motions and objections during the pre-trial and trial stages, and delivers a judgement after the close of the evidence and the hearing of defence arguments. Notwithstanding the dual prosecutorial and judicial roles contemplated under Rule 77(D) of the Rules, the Appeals Chamber recalls that a trial chamber continues to abide by the principle of equality of arms in ensuring that the accused is not substantially disadvantaged in the presentation of his case and that he likewise benefits from the fair trial guarantees embodied in the Statute.<sup>100</sup>

<sup>92</sup> Appeal Brief, para. 37.

<sup>93</sup> *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-AR73.3, Decision on Appeal by Dragan Papić Against Ruling to Proceed by Deposition, 15 July 1999, para. 24.

<sup>94</sup> Article 21(1) of the Statute.

<sup>95</sup> *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgement, 15 July 1999, (“*Tadić* Appeal Judgement”), paras 46-48.

<sup>96</sup> *Callixte Kalimanzira v. The Prosecutor*, Case No. ICTR-05-88-A, Judgement, 20 October 2010, para. 34; *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Judgement, 28 November 2007, para. 173.

<sup>97</sup> See *Prosecutor v. Aleksovski*, Decision on Prosecutor’s Appeal on Admissibility of Evidence, Case No. IT-95-14/1-AR73, 16 February 1999, para. 25.

<sup>98</sup> *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Appeal Judgement, 17 December 2004, (“*Kordić and Čerkez* Appeal Judgement”), para. 175; *Tadić* Appeal Judgement, para. 48.

<sup>99</sup> If a Chamber considers that there are sufficient grounds to proceed against a person for contempt, the Chamber may: (i) in circumstances described in paragraph (C)(i), direct the Prosecutor to prosecute the matter; or (ii) in circumstances described in paragraph (C)(ii) or (iii), issue an order in lieu of indictment and either direct *amicus curiae* to prosecute the matter or *prosecute the matter itself* (emphasis added).

<sup>100</sup> See *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-AR77, Judgment on Appeal by Anto Nobile Against Finding of Contempt, 30 May 2001, para. 56, referring to *Prosecutor v. Simić et al.*, Case No. IT-95-9-R77, Scheduling Order in the Matter of Allegations Against Accused Milan Simić and his Counsel, 7 July 1999, pp. 3-6, “It is therefore essential that, where a chamber initiates proceedings for contempt itself, it formulates at an early stage the nature of the charge with the precision expected of an indictment, and that it gives the parties the opportunity to debate what is required to be proved. It is the only way that the alleged contemnor can be afforded a fair trial.”

38. The record shows that the Contempt Trial Chamber considered that it was unnecessary to afford Šešelj the assistance of a case manager at trial, given the simplicity of the case. Indeed, the Contempt Trial Chamber stated in the Order Scheduling Trial that “the nature of the case is straightforward”,<sup>101</sup> and consequently denied “Mr. Sarović to be brought along because this is such a simple case that there is no justification and certainly no need for a case manager”.<sup>102</sup> Nonetheless, it allowed Šešelj to be assisted by Mirović, his legal advisor, for the purpose of conducting the examination-in-chief.<sup>103</sup> Therefore, the Appeals Chamber needs to assess, Judge Güney and Judge Tuzmukhamedov dissenting, whether the Contempt Trial Chamber substantially disadvantaged Šešelj in the presentation of his case when it denied his request for the assistance of a case manager.

39. The Appeals Chamber recalls that Article 21(4)(d) of the Statute does not support the right to legal assistance for an accused who elects to self-represent.<sup>104</sup> The principle of equality of arms referenced in Article 21(1) of the Statute does not imply that an indigent self-represented accused should necessarily be provided with funded legal aid. By his very choice to self-represent, he is asserting his ability to conduct his case without legal assistance and therefore “must accept responsibility for the disadvantages this choice may bring”.<sup>105</sup> The Appeals Chamber observes that Šešelj has not been declared indigent by the Registry.<sup>106</sup> In the present case, the Registry declined to allocate legal aid funds to Šešelj “absent an order to that effect” from the Contempt Trial Chamber, considering that the Decision on Financing was only applicable to the Main Case.<sup>107</sup> Furthermore, the Appeals Chamber notes that Šešelj did not seek legal aid funding for any assistance provided by Mirović and Sarović, but sought only reimbursement of their travel expenses.<sup>108</sup> In this regard, the Registry indicated on multiple occasions that reimbursement of the travel costs of Šešelj’s legal support staff would be covered by the Registry should the Trial Chamber require their presence in court.<sup>109</sup>

<sup>101</sup> Order Scheduling Trial, p. 2.

<sup>102</sup> Pre-Trial Conference, 12 June 2012, p. 68. *See also* Pre-Trial Conference, 12 June 2012, p. 71.

<sup>103</sup> *See* Order Scheduling Trial, p. 2.

<sup>104</sup> *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, “Decision on Krajišnik Request and on Prosecution Motion, 11 September 2007, (“Krajišnik Decision”), para. 40.

<sup>105</sup> *Krajišnik Decision*, para. 41.

<sup>106</sup> With respect to the Main Case, the Appeals Chamber recalls that the Registry was unable to determine Šešelj’s indigence status due to his failure to cooperate with the Registry. The Trial Chamber then ordered in the Decision on Financing a *sui generis* remuneration system whereby the Registry provides 50% of the resources usually allocated to a totally indigent accused to Šešelj’s defence team. This decision of the Trial Chamber was confirmed by the Appeals Chamber. *See Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Registry Decision, 6 July 2010.

<sup>107</sup> 12 July 2011 Registry Submission, para. 7.

<sup>108</sup> *See* Pre-Trial Conference, 12 June 2012, p. 67 where Šešelj stated: “I never asked for any money for these auxiliary contempt of court proceedings. All I’m asking is for the travel expenses to be covered”.

<sup>109</sup> *See* First and Third OLAD Letters.

40. The Appeals Chamber notes that Šešelj requested, on several occasions, that the Contempt Trial Chamber issue a decision regarding Sarović's assistance in this contempt trial.<sup>110</sup> An implicit answer to Šešelj's request prior to the pre-trial conference is contained in the Order Scheduling Trial, in which the Contempt Trial Chamber decided to allow Mirović to conduct the examination-in-chief.<sup>111</sup> Apart from this, the Appeals Chamber cannot find anywhere in the record a clear and comprehensible decision<sup>112</sup> taken prior to the beginning of the contempt trial dealing with Šešelj's request with regard to the assistance of a case manager. Moreover, the Appeals Chamber is of the view that the Contempt Trial Chamber characterized the present case as "so very simple" without providing Šešelj the factual information relied upon to reach this determination.

41. In light of the above, the Appeals Chamber considers that the Contempt Trial Chamber did not provide a timely, clear and sufficient explanation to Šešelj regarding the assistance of a case manager at trial. In particular, the Appeals Chamber considers that referring to the "simplicity" of the case alone does not constitute sufficient explanation for rejecting Šešelj's request. The Appeals Chamber is of the view that the Contempt Trial Chamber, in light of its dual role as prosecutor and judge, should have provided Šešelj with more explanation as to its determination that a case manager at trial was not needed.<sup>113</sup>

42. Further, the Appeals Chamber is of the view that it is unclear whether the Contempt Trial Chamber refused the assistance of a case manager in a generic sense or the assistance of Sarović in particular. It is also unclear whether the Contempt Trial Chamber considered Sarović's lack of recognition by the Registry in reaching its decision.<sup>114</sup> The language used by the Contempt Trial

<sup>110</sup> On 6 July 2011, 11 November 2011 and 19 March 2012 (*See supra* paras 8, 12-13). *See generally* 12 July 2011 Submission, para. 7, whereby the Registry informs the Contempt Trial Chamber that "[...] the Accused will not receive public legal aid funds in this case absent an order to that effect from this Trial Chamber". *See also* First OLAD Letter, which reads: "the Registry is generally not in a position to cover travel costs for case managers to the seat of the Tribunal, absent a decision by the Trial Chamber or the President to the contrary".

<sup>111</sup> Order Scheduling Trial, p. 2.

<sup>112</sup> *See supra* paras 18-20. The Appeals Chamber notes that the Contempt Trial Chamber refers to the Order Scheduling Trial during the Pre-Trial Conference dated 12 June 2012.

<sup>113</sup> The Appeals Chamber notes that the case manager's duties are to assist an accused with the overall administration of the defence case file. *See* Remuneration Scheme, para. 20(b), which defines the duties of a case manager for a self-represented accused as follows: "[a] case manager assists the self-represented accused with the overall administration of the defence case file. In particular, he/she liaises on behalf of the accused with various organs of the Tribunal and third parties as necessary to ensure the smooth running of the case, which includes the coordination of tasks performed by different team members as requested by the self-represented accused. He/She maintains the defence filing system by recording and classifying evidence and disclosure material. In addition, the defence case manager submits defence documents for translation through the Tribunal's Translation Tracking System and receives translations upon their completion, scans defence exhibits and uploads them to the e-Court system used in trial, or otherwise ensures that all the relevant documents are available for trial, and organises and provides assistance to the accused in all logistical matters related to the accused's access, including the distribution and management of case-related material. If a language assistant has not been assigned, the case manager may also act as a language assistant for the accused as necessary".

<sup>114</sup> [REDACTED]. *See* 6 July 2011 Decision and *supra* paras 6, 8, fn. 10, 16.

Chamber seems to indicate that Sarović in particular was not allowed to appear in court.<sup>115</sup> However, the Appeals Chamber is of the view that the central issue, Judge Güney and Judge Tuzmukhamedov dissenting, before the Contempt Trial Chamber was not whether Sarović could appear in court, but whether the assistance of a case manager was necessary at trial, thereby triggering the requirement for reimbursement of his travel expenses, as set by the Registry.<sup>116</sup>

43. Accordingly, the Appeals Chamber finds that the Contempt Trial Chamber committed an error of law in failing to provide a reasoned opinion to Šešelj regarding its refusal of his request with regard to the assistance of a case manager.

44. The Appeals Chamber turns to analyse whether this error invalidates the Contempt Trial Judgement. In this respect, the Appeals Chamber recalls that where a party alleges on appeal that its right to a fair trial has been infringed, it must prove that the trial chamber violated a provision of the Statute and/or the Tribunal's Rules of Procedure and Evidence and that this caused prejudice to the alleging party, such as to amount to an error of law invalidating the trial judgement.<sup>117</sup> In this respect, the Appeals Chamber notes that Šešelj sought the assistance of Mirović and Sarović for the purpose of establishing a list of questions to be asked to him during his examination-in-chief as a witness,<sup>118</sup> and to prepare in advance for the filing of an appeal.<sup>119</sup> The Appeals Chamber also notes that Šešelj intended neither to call witnesses apart from his own testimony,<sup>120</sup> nor to tender exhibits at trial. Therefore, the Appeals Chamber is of the view that Šešelj did not demonstrate how a legal advisor was insufficient to accomplish the above-mentioned tasks, which are more befitting a legal advisor than a case manager.<sup>121</sup>

45. Moreover, Šešelj fails to show that the assistance of a case manager would have impacted the presentation of his defence or the existence of a substantial disadvantage to the presentation of his prospective case due to the absence of a case manager. The record provides the Appeals Chamber with evidence that Šešelj was afforded legal assistance and was provided with adequate

<sup>115</sup> The Contempt Trial Chamber referred to Mirović's presence at trial by indicating that he "is welcome in the courtroom" (see Pre-Trial Conference, 12 June 2012, p. 76) and again, "Mr. Mirović is allowed to be here, but not Mr. Sarović" (see Pre-Trial Conference, 12 June 2012, p. 71).

<sup>116</sup> See *supra* paras 16, 39, fn. 14. Šešelj, at the trial hearing, complained: "In these proceedings, I did not ask you to pay for the professional services they provide to me but you have to pay their travel expenses. Now, this is the problem here." See Trial, 18 June 2012, p. 80.

<sup>117</sup> *Krajišnik* Appeal Judgement, para. 28; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Appeal Judgement, 30 November 2006, para. 21; *Kordić and Čerkez* Appeal Judgement, para. 119.

<sup>118</sup> See Pre-Trial Conference, 12 June 2012, pp. 66-67.

<sup>119</sup> See Pre-Trial Conference, 12 June 2012, p. 67 (Šešelj stated: "I wanted both of them to be present here in the courtroom and to stay with me tomorrow so that we can agree about the possible appeals because we all know very well how this Court operates and what its intentions are").

<sup>120</sup> See List of witnesses submitted pursuant to Rule 65 *ter* (G) of the Rules of Procedure and Evidence of the ICTY, 15 May 2012, para. 2. The English translation of the B/C/S original was filed on 24 May 2012.

<sup>121</sup> As a guidance, see the Remuneration Scheme, para. 20(b)(ii).

facilities to prepare his defence in accordance with Article 21 of the Statute.<sup>122</sup> Furthermore, regarding Šešelj's argument that he was unable to present his defence during the trial due to the denial of his right to a case manager,<sup>123</sup> the Appeals Chamber observes that Šešelj elected on his own initiative not to testify or present a defence in reaction to the Contempt Trial Chamber's decision denying the participation of a case manager, which the Appeals Chamber considers to constitute obstructive behaviour.<sup>124</sup> Consequently, the Appeals Chamber is not convinced that Šešelj successfully demonstrated that he suffered prejudice as a result of this error.

46. Accordingly, the Appeals Chamber finds that the error does not invalidate the Contempt Trial Judgement and dismisses Šešelj's first sub-ground of appeal.

(b) Whether Šešelj's Right to Communicate with a Legal Advisor and Case Manager was Violated

47. Article 21(4)(b) of the Statute states:

In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

(b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing [...].

48. The Appeals Chamber notes that it is within the Registry's primary purview to "assign" or "recognise" counsel and other persons meant to provide support to counsel.<sup>125</sup> "Assigned" and "recognised" counsel and legal support staff — including case managers — assisting indigent self-represented accused must sign an undertaking in which they agree to be bound by relevant Tribunal protocols and confidentiality undertakings, in particular the Code of Conduct and the Rules on Detention, in order to be permitted privileged communication with a client in detention and access to confidential information pertaining to the case.<sup>126</sup>

49. The Appeals Chamber will distinguish the alleged infringement of Šešelj's right to communicate with Mirović and Sarović. With respect to Mirović, it is clear from the record that Šešelj could communicate with him under a privileged setting. Indeed, Mirović was recognised as

<sup>122</sup> See *supra* para. 36.

<sup>123</sup> Appeal Brief, para. 7.

<sup>124</sup> See *supra* paras 19-20. Moreover, Šešelj stated during the pre-trial conference: "The minimum concession should be that you pay for the travel expenses for my Case Manager. I'm the only one whose Case Manager was facing this kind of problems, and I'm not going to allow that; or, if you decide to pursue that course, then you're going to try me in absentia". See Pre-Trial Conference, 12 June 2012, p. 69.

<sup>125</sup> Rule 45 of the Rules. See as a guidance Article 16 of the Directive on the Assignment of Defence Counsel. Article 16(E) specifically provides: "At the request of the lead counsel, the Registrar may assign other persons such as legal assistants, consultants, investigators and interpreters, as required, to provide support to counsel. Only persons assigned or approved by the Registrar may assist counsel with the defence of the suspect or accused". The Appeals Chamber notes that case managers fit within the non-exhaustive term "other persons". See also Remuneration Scheme, point G.

<sup>126</sup> See *supra* fn. 31.

Šešelj's legal advisor and accordingly granted privileged communication with Šešelj to prepare for the present contempt case.<sup>127</sup> Moreover, the Appeals Chamber sees no reason why the lack of privileged communication between Šešelj and Sarović could have precluded privileged communication between Šešelj and Mirović, his recognised legal advisor. The Appeals Chamber considers that Šešelj fails to substantiate how this right was violated and therefore rejects this argument as being without merit.

50. With respect to his alleged violation of privileged communication with Sarović, the Appeals Chamber observes that the question of access by legal support staff to confidential information lies with the Registry and requires that it conduct necessary background checks before granting access. A decision of the Registry in this regard may be subject to an appeal before the President of the Tribunal. In this regard, the Appeals Chamber observes that Šešelj appealed the decisions of the Registrar regarding privileged communications with Mirović and Sarović before the President of the Tribunal. On both occasions, the President of the Tribunal upheld the Registrar's decisions and determined that he acted reasonably and within the scope of its discretion.<sup>128</sup> Therefore, it is not within the Appeals Chamber's jurisdiction to review the decisions taken by the Registry with respect to access to confidential material and the successful completion of background checks as a pre-condition for such access. [REDACTED].<sup>129</sup> In any event, the Appeals Chamber notes that Šešelj could meet with Sarović in a non-privileged setting.<sup>130</sup>

51. In light of the foregoing, the Appeals Chamber dismisses Šešelj's second sub-ground of appeal.

(c) Severity of Sentence

52. Šešelj argues that the sentence he was given is unduly severe.<sup>131</sup> The Appeals Chamber is of the view that the Contempt Trial Chamber acted within its discretion as provided by the Statute in issuing a sentence based on the facts underlying the charges. Šešelj fails to demonstrate how the Contempt Trial Chamber committed an error or violated his right to a fair trial in exercising its discretion. Therefore, the Appeals Chamber finds no merit in Šešelj's contention and rejects this argument.

<sup>127</sup> Second OLAD Letter. See also Contempt Trial Judgement, para. 30.

<sup>128</sup> See 6 July 2011 Decision, paras 20, 24 and *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Decision on Vojislav Šešelj's Request for Review of Decision to Monitor his Privileged Communications, 14 December 2011 (confidential), paras 12-13.

<sup>129</sup> [REDACTED].

<sup>130</sup> See 6 July 2011 Decision, para. 24.

<sup>131</sup> Appeal Brief, para. 27.

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53. For all the foregoing reasons, the Appeals Chamber dismisses Šešelj's third sub-ground ground of appeal in its entirety.



**IV. DISPOSITION**

54. For the foregoing reasons, the Appeals Chamber,

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

**DISMISSES** Vojislav Šešelj's appeal in its entirety; and

**AFFIRMS** Vojislav Šešelj's sentence of two years' imprisonment.

Judge Güney and Judge Tuzmukhamedov append a joint separate and partially dissenting opinion.

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



Judge Arlette Ramarosan, Presiding



Judge Mehmet Güney



Judge Andréia Vaz



Judge Khalida Rachid Khan



Judge Bakhtiyar Tuzmukhamedov

Dated this 30<sup>th</sup> day of May 2013,  
At The Hague,  
The Netherlands

[Seal of the Tribunal]

**SEPARATE AND PARTIALLY DISSENTING OPINION OF JUDGE GÜNEY  
AND JUDGE TUZMUKHAMEDOV**

1. In this Judgement the Appeals Chamber, by majority, finds that the Contempt Trial Chamber committed an error of law by failing to provide a reasoned opinion to Šešelj regarding its refusal of his request for a case manager.<sup>1</sup> However, it concludes that Šešelj failed to demonstrate that he suffered a prejudice as a result of this error.<sup>2</sup> While we concur with the overall conclusion of the Majority that the Contempt Trial Chamber committed an error of law that did not invalidate Šešelj's conviction, we respectfully disagree with the reasoning and the conclusion of the present Judgement on the following specific grounds: i) the standard of review formulated and applied;<sup>3</sup> ii) the nature and extent of the error of law committed by the Contempt Trial Chamber;<sup>4</sup> and iii) the absence of prejudice warranting an effective remedy.<sup>5</sup>

(i) The Standard of Review Formulated and Applied

2. It is our view that the Majority fails to properly articulate the legal standard on appeal regarding the issue at stake, namely: was it reasonable for the Contempt Trial Chamber to deny Šešelj's request for the assistance of a case manager?<sup>6</sup>

3. First, we recall that according to our jurisprudence, issues related to legal assistance to self-represented accused fall within the discretion of the trial chamber, drawing upon their "organic familiarity with the day-to-day conduct of the parties and practical demands of the case."<sup>7</sup> Consequently, the Appeals Chamber should have applied the following standard:

In order to successfully challenge a discretionary decision, a party must demonstrate that the trial chamber has committed a discernible error resulting in prejudice to that party.<sup>8</sup> The Appeals Chamber will only overturn a trial chamber's discretionary decision where it is found to be: (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the trial chamber's discretion.<sup>9</sup> The Appeals Chamber will also consider whether the trial chamber has given weight to

<sup>1</sup> Appeal Judgement, para. 43.

<sup>2</sup> Appeal Judgement, para. 45.

<sup>3</sup> Appeal Judgement, paras. 24-29.

<sup>4</sup> Appeal Judgement, paras. 41-46.

<sup>5</sup> Appeal Judgement, paras. 45-46.

<sup>6</sup> Appeal Judgement, para. 38.

<sup>7</sup> *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R33B, Decision on the Registry Submissions Pursuant to Rule 33(B) Regarding the Trial Chamber's Decision on Financing of Defence, 8 April 2011, para. 17; see *Prosecutor v. Šešelj*, Case No. IT-03-67-AR73.3, Decision on Appeal Against the Trial Chamber's Decision on Assignment of Counsel, 20 October 2006, para. 7; see also *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR73.2, Decision on Interlocutory Appeal of the Trial Chamber's Decision on Adequate Facilities, 7 May 2009, para. 5.

<sup>8</sup> *Lukić & Lukić* Appeal Judgement, para. 17; *Krajišnik* Appeal Judgement, para. 81.

<sup>9</sup> *Lukić & Lukić* Appeal Judgement, para. 17; *Krajišnik* Appeal Judgement, para. 81.

extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations in reaching its decision.<sup>10</sup>

Consequently, in the circumstances of the present case, the issue central to this appeal should have been whether the Contempt Trial Chamber's decision to dismiss Šešelj's request for a case manager was so unreasonable as to constitute an abuse of its discretion.

4. Second, we believe the Majority does not adequately explain its conclusion that the dismissal of Šešelj's request for a case manager did not substantially disadvantage the presentation of his case.<sup>11</sup> Rather, in concluding that the Contempt Trial Chamber erred by failing to provide a reasoned opinion, the Majority deems it sufficient to state that Šešelj failed to demonstrate any prejudice as a consequence of the error of failing to provide a reasoned opinion.<sup>12</sup> While the Majority characterises the core issue as "not whether Sarović could appear in court, but whether the assistance of a case manager was necessary at trial, thereby triggering the requirement for reimbursement of travel expenses,"<sup>13</sup> it also does not directly address this question.

(ii) The Nature and Extent of the Error of Law Committed by the Contempt Trial Chamber

5. We respectfully disagree with the Majority that the Contempt Trial Chamber's legal error was limited to its failure to provide a reasoned opinion. In our view, the procedural circumstances surrounding the impugned decision – involving a self-represented accused being tried by a trial chamber acting as prosecutor – required that the Contempt Trial Chamber be particularly attentive in determining the impact upon the exercise of Šešelj's right to legal assistance of his choosing under Article 21(4)(d) of the Statute of the Tribunal, given the very vulnerable position of the Accused. Indeed, in *Nobilo*, the Appeals Chamber specified that where a trial chamber initiates proceedings for contempt itself, it carries an obligation to ensure that the accused was afforded a fair trial by formulating the charges at an early stage and debating what is required to be proven.<sup>14</sup> Moreover, as the Appeals Chamber affirmed in *Milošević*, this is all the more salient in the case of a self-represented accused:

<sup>10</sup> *Lukić & Lukić* Appeal Judgement, para. 17; *Krajišnik* Appeal Judgement, para. 81.

<sup>11</sup> Appeal Judgement, para. 45.

<sup>12</sup> Appeal Judgement, paras. 44-45.

<sup>13</sup> Appeal Judgement, para. 42.

<sup>14</sup> *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-AR77, Judgement on Appeal by Anto Nobilo Against Finding of Contempt, 30 May 2001 ("*Nobilo* Case"), para. 56.

Where an accused elects self-representation, the concerns about the fairness of the proceedings are, of course, heightened, and a Trial Chamber must be particularly attentive to its duty of ensuring that the trial be fair.<sup>15</sup>

6. In this context, the Contempt Trial Chamber's characterisation of the case against Šešelj as "so very simple"<sup>16</sup> not only fails to provide a reasoned opinion but also fails to comply with the obligations owed to the Accused that ensure his fair trial rights. In our view, in a case where a self-represented accused is being tried by a chamber that is prosecuting the matter itself, the Contempt Trial Chamber had an obligation to provide Šešelj with all of the information regarding the charges, the evidence to be tendered and the alternatives available to him regarding the preparation of his defence before resuming the proceedings as it did, and thereby accepting Šešelj's waiver to present a defence.<sup>17</sup>

7. Moreover, outside the application of the legal aid scheme, a self-represented accused is entitled to "certain technical and logistical support" pursuant to Art. 21(4)(b) of the Statute. Previous examples of such assistance have included the assignment of an investigator and/or expert(s), as well as translation assistance,<sup>18</sup> and we believe that the technical assistance offered by a case manager may also be encompassed by this provision. To that end, we believe that although it may have been permissible to exclude Sarović from assisting Šešelj in the presentation of his defence [REDACTED],<sup>19</sup> under such circumstances it was incumbent upon the Contempt Trial Chamber to enquire into possible alternatives that would have satisfied Šešelj's reasonable requests.

8. Consequently, in light of the above, we believe that the Contempt Trial Chamber not only failed to provide a reasoned opinion thereby committing an error of law, but also committed a discernable error when failing to comply with its informative obligation towards the Accused, which, in our view, amounted to an abuse of its discretion.

(iii) The Absence of Prejudice Warranting an Effective Remedy

9. We respectfully disagree with the Majority that the Contempt Trial Chamber's error did not constitute sufficient prejudice to warrant an effective remedy.

<sup>15</sup> *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR73.6, Decision on the Interlocutory Appeal by the *Amici Curiae* Against the Trial Chamber Order Concerning the Presentation and Preparation of the Defence Case, 20 January 2004, para. 19.

<sup>16</sup> See Appeal Judgement, para. 18, citing Pre-Trial Conference, 12 June 2012, p. 71.

<sup>17</sup> See *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-AR73.3, Decision on Appeal Against the Trial Chamber's Decision on Assignment of Counsel, 20 October 2006, para. 26, where the Appeals Chamber imposed the obligation to the Trial Chamber to warn the self-represented accused in writing or orally with regard to a possible assignment of counsel before proceeding with the restriction of his right to self-representation.

<sup>18</sup> *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Request for Review of OLAD Decision on Trial Phase Remuneration, 19 February 2010, para. 54.

<sup>19</sup> See Appeal Judgement, para. 16.

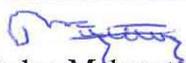
10. We recall the principle articulated by the ICTR Appeals Chamber “that any violation of the accused’s rights entails the provision of an effective remedy pursuant to Article 2(3)(a) of the ICCPR”,<sup>20</sup> a treaty that the Majority has observed lies at the foundation of Article 21 of the Statute of the ICTY.<sup>21</sup> In furtherance of this principle, the ICTR Appeals Chamber has on several occasions held that where “an accused’s rights have been violated, but not egregiously so, it will order the Trial Chamber to reduce the accused’s sentence if the accused is found guilty at trial.”<sup>22</sup> We find this authority persuasive and believe that this appeal presents an error by the Contempt Trial Chamber impacting the rights of the Accused in a way that warrants corrective action that exceeds a mere reprimand by the Appeals Chamber.

11. In sum, while we agree with the Majority that the Contempt Trial Chamber’s error was not so egregious as to invalidate Šešelj’s conviction, particularly in view of Šešelj’s election not to present a defence despite having been afforded significant legal support,<sup>23</sup> we nevertheless are of the opinion that the errors in law we have identified above would warrant a reduction in sentence, in order to provide an effective and proportionate remedy.

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




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Judge Mehmet Güney

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Judge Bakhtiyar Tuzmukhamedov

Dated this 30<sup>th</sup> day of May 2013,  
At The Hague,  
The Netherlands

[Seal of the Tribunal]

<sup>20</sup> *Juvénal Kajelijeli v. Prosecutor*, Case No. ICTR-98-44A-A, Judgement, 23 May 2005, para. 255 (“*Kajelijeli Appeal Judgement*”).

<sup>21</sup> *Appeal Judgement*, para. 36.

<sup>22</sup> *Kajelijeli Appeal Judgement*, para. 255. See also *Kajelijeli Appeal Judgement*, paras. 323-324; *Semanza v. Prosecutor*, ICTR-97-20-A, Judgement, 20 May 2005, paras. 325-328; *Nahimana et al. v. Prosecutor*, Case No. ICTR-99-52-A, Judgement, 28 November 2007, paras. 1072-1075.

<sup>23</sup> *Appeal Judgement*, paras. 44-46.