

**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-R77.3  
Date: 4 February 2010  
Original: English

**IN TRIAL CHAMBER II**

**Before:** Judge O-Gon Kwon, Presiding  
Judge Kevin Parker  
Judge Burton Hall

**Registrar:** Mr John Hocking

**Decision:** 4 February 2010

**PROSECUTOR**

v.

**VOJISLAV ŠEŠELJ**

***PUBLIC***

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**PUBLIC REDACTED VERSION OF SECOND DECISION ON  
PROSECUTION'S MOTION UNDER  
RULE 77 CONCERNING FURTHER BREACHES OF  
PROTECTIVE MEASURES (THREE BOOKS) ISSUED ON  
3 FEBRUARY 2010**

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**The Office of the Prosecutor:**

Mr. Norman Farrell  
Mr. Mathias Marcussen

**The Respondent:**

Mr. Vojislav Šešelj

## 1. Background

1. On 17 December 2009, the Appeals Chamber of the Tribunal (“Appeals Chamber”) issued its “Decision on the Prosecution’s Appeal against the Trial Chamber’s Decision of 21 August 2009” (“Appeal Decision”) wherein it found that

with respect to the 11 witnesses, the evidence before the Trial Chamber gave rise to a *prima facie* case that Šešelj knowingly disclosed their identifying information in violation of the Šešelj Trial Chamber’s orders. Therefore, no reasonable trier of fact could have concluded that insufficient grounds exist to prosecute Šešelj pursuant to Rule 77(D) of the Rules for having disclosed the said information.<sup>1</sup>

2. The Appeals Chamber thus granted the Prosecution’s appeal and ordered “the Trial Chamber to proceed against Šešelj for contempt pursuant to Rule 77(D)(ii) of the Rules [of Procedure and Evidence of the Tribunal (“Rules”)] by issuing an order in lieu of indictment to prosecute him for having disclosed information which may identify the 11 protected witnesses in violation of the Šešelj Trial Chamber’s orders”.<sup>2</sup> For ease of reference, the Trial Chamber will provide below a summary of the procedural history leading up to the Appeal Decision.

### (a) The 26 January Motion

3. On 26 January 2009, the Prosecution filed, confidentially and *ex parte*, the “Prosecution’s Motion under Rule 77 Concerning Further Breaches of Protective Measures” (“26 January Motion”), in which it generally submitted that Vojislav Šešelj had knowingly violated orders of the Trial Chamber hearing the case of *Prosecutor v. Vojislav Šešelj* (“Šešelj Trial Chamber” and “Šešelj case”, respectively) by disclosing eight confidential submissions in three books allegedly authored by him (together, “Three Books”) [REDACTED].<sup>3</sup> In relation to the Third Book, the Prosecution further alleged that Šešelj had knowingly violated decisions of the Šešelj Trial Chamber by publishing the statements of 13 protected witnesses, which included information enabling their identification.<sup>4</sup> For the Prosecution, these circumstances presented a *prima facie* case of contempt against Šešelj, and they justified the immediate issuance of an order in lieu of an indictment pursuant to Rule 77(D)(ii) of the Rules.<sup>5</sup>

4. In its 26 January Motion, the Prosecution contended that Šešelj knew that he was disclosing confidential information in the Three Books, as he had been put on notice of the confidential status

<sup>1</sup> Appeal Decision, para. 27.

<sup>2</sup> *Id.*, para. 28. *See also* “Order Assigning Judges to a Case Before a Trial Chamber and Replacing a Judge” issued confidentially and *ex parte* by the President of the Tribunal on 18 December 2009, p. 3, ordering that the Bench in this matter shall be composed of Judges O-Gon Kwon, Kevin Parker and Burton Hall.

<sup>3</sup> 26 January Motion, paras 1-2.

<sup>4</sup> *Id.*, paras 21-22.

<sup>5</sup> *Id.*, para. 4.

of the submissions reprinted therein through several *procès-verbaux* sent to him by the Registry. With particular regard to the allegations pertaining to the Third Book, it was also alleged that Šešelj was present in court when protective measures were granted to the 13 witnesses whose identity was allegedly disclosed in this book.<sup>6</sup> Moreover, the Prosecution submitted that Šešelj is responsible for the contents of the Three Books, as he authored them.<sup>7</sup> It was therefore requested that an order in lieu of an indictment be issued against Šešelj, pursuant to Rule 77(D)(ii) of the Rules, for knowingly disclosing confidential information in violation of an order of a Chamber.<sup>8</sup>

5. The Prosecution added that Šešelj's publication of confidential information in the Three Books had created "a hostile environment that demonstrates an intention to interfere with witnesses".<sup>9</sup> The Prosecution submitted that this constitutes a sufficient basis on which to issue an order, pursuant to Rule 77(C)(ii) of the Rules, directing an investigation to determine whether Šešelj and his associates acted with the requisite intent to interfere with witnesses.<sup>10</sup>

6. The Prosecution further contended that Šešelj was assisted "by every member of his defence team accredited by the Registrar" as well as other individuals in publishing the Three Books.<sup>11</sup> The Prosecution thus argued that these circumstances should be investigated pursuant to Rule 77(C)(ii) to determine whether there are sufficient grounds for instigating contempt proceedings against those individuals who helped Šešelj publish the Three Books,<sup>12</sup> and that the relevant individuals should be removed from the case.<sup>13</sup>

7. Finally, the Prosecution requested that the Chamber order Šešelj to take steps to remove the Three Books from publication.<sup>14</sup>

(b) The Trial Chamber Decision

8. On 21 August 2009, the Trial Chamber issued, confidentially and *ex parte*, a "Decision on Prosecution's Motion under Rule 77 Concerning Further Breaches of Protective Measures (Three Books)" ("Trial Chamber Decision"), wherein it found that:

- i) It did not have sufficient grounds to proceed by issuing an order in lieu of an indictment against Šešelj for having reprinted Submission [REDACTED] in the First Book;<sup>15</sup>

<sup>6</sup> *Id.*, paras 2-3, 10, 13.

<sup>7</sup> *Id.*, paras 3, 13, referring to [REDACTED]. See also 26 January Motion, para. 29.

<sup>8</sup> *Id.*, paras. 4, 35.

<sup>9</sup> *Id.*, para. 31.

<sup>10</sup> *Id.*, para. 34.

<sup>11</sup> *Id.*, para. 5; *see also Id.*, paras 17, 19, 24-25.

<sup>12</sup> *Id.*, paras 5-7.

<sup>13</sup> *Id.*, para. 36.

<sup>14</sup> *Id.*, para. 37.

- ii) While the publication of Submissions [REDACTED] in the Second Book disclosed information in knowing violation of an order of a Chamber and therefore constituted contempt under Rule 77(A)(ii), it was not persuaded that, in the circumstances of the present case, this disclosure attained such a level of gravity that the Chamber should exercise its discretion, pursuant to Rule 77(D), to instigate proceedings against Šešelj for having reprinted these submissions in the Second Book;<sup>16</sup>
- iii) While it had sufficient grounds to believe that the publication in the Third Book of statements included in Submission [REDACTED] disclosed confidential information in knowing violation of an order of a Chamber and therefore may have constituted contempt under Rule 77(A)(ii), the Chamber was not persuaded that, in the circumstances of the present case, this disclosure attained such a level of gravity that it should exercise its discretion, pursuant to Rule 77(D), to instigate proceedings against Šešelj for having printed excerpts of Submission [REDACTED] in the Third Book, in the form of statements included therein;<sup>17</sup>
- iv) While it had reason to believe that, at the time the Third Book was published, Šešelj knew that nine of the 13 individuals referred to in this book were protected Prosecution witnesses and that they had been granted protective measures,<sup>18</sup> the Chamber did not have sufficient grounds to believe that Šešelj may be in contempt of the Tribunal for having disclosed information in the Third Book that might identify or lead to the identification of protected Prosecution witnesses as such, in contravention of orders issued by the *Šešelj* Trial Chamber. The Trial Chamber indeed found that the information provided in the Third Book only referred to these individuals as “defence witnesses”, not as Prosecution witnesses, and did not contain any references to the pseudonyms assigned to them;<sup>19</sup>
- v) The Trial Chamber further considered that the same reasoning also applied to Šešelj’s “accredited associates” and therefore dismissed the 26 January Motion in this respect;<sup>20</sup> and
- vi) In light of its previous findings, the Trial Chamber considered moot the remaining Prosecution requests set forth in the 26 January Motion.<sup>21</sup>

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<sup>15</sup> Trial Chamber Decision, para. 15.

<sup>16</sup> *Id.*, para. 22.

<sup>17</sup> *Id.*, para. 28.

<sup>18</sup> *Id.*, para. 30.

(c) The Prosecution Appeal

9. The “Prosecution’s Notice of Appeal” was filed confidentially and *ex parte* on 7 September 2009 pursuant to Rule 77(J) of the Rules. On 22 September 2009, the Prosecution filed, also confidentially and *ex parte*, the “Prosecution’s Appeal Brief”, followed by the “Corrigendum to Prosecution’s Appeal Brief” the next day (together, “Prosecution Appeal”).

10. The Prosecution did not appeal against the Trial Chamber’s findings in relation to the disclosure of [REDACTED] submissions in the Three Books and in relation to the participation of Šešelj’s “accredited assistants” and others in publishing these books.<sup>22</sup> In the Prosecution Appeal, the Prosecution withdrew its assertion that Šešelj breached protective measure orders in relation to Witness [REDACTED] and clarified that it did not allege that Šešelj violated protective measure orders in relation to Witness [REDACTED].<sup>23</sup> What remained in the Prosecution Appeal was therefore its allegation that Šešelj violated protective measure orders issued by the Šešelj Trial Chamber in relation to 11 witnesses by publishing identifying information in their regard in the Third Book.<sup>24</sup>

11. The Prosecution first submitted that the Trial Chamber erred in concluding there were insufficient grounds to initiate contempt proceedings once it had found that Šešelj had knowingly violated the terms of protective measure orders issued by the Šešelj Trial Chamber in relation to eight protected Prosecution witnesses (“the First Ground Witnesses”) and erroneously considered whether Šešelj had revealed that they were protected “Prosecution witnesses”.<sup>25</sup> Second, the Prosecution argued that, in relation to the three remaining witnesses (“Second Ground Witnesses”), the Trial Chamber erred in concluding that it could not identify the specific date on which Šešelj published the Third Book [REDACTED]. It is the Prosecution’s submission that the only reasonable conclusion available on the evidence before the Trial Chamber was that Šešelj published the Third Book at least [REDACTED] months after having been informed that the Second Ground Witnesses benefited from protective measures.<sup>26</sup>

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<sup>19</sup> *Id.*, para. 31.

<sup>20</sup> *Id.*, para. 34.

<sup>21</sup> *Id.*, paras 33-36.

<sup>22</sup> See Appeal Decision, para. 7.

<sup>23</sup> *Id.*, fn. 7.

<sup>24</sup> *Id.*, para. 12.

<sup>25</sup> *Id.*, para. 13.

<sup>26</sup> *Id.*, para. 14.

(d) The Appeal Decision

12. In relation to the First Ground Witnesses, the Appeals Chamber notes that the Trial Chamber took into account whether the Third Book referred to them as Prosecution or Defence witnesses and considered that “in light of the wording of the orders issued by the Šešelj Trial Chamber which did not differentiate between Prosecution and Defence witnesses, the standard applied by the Trial Chamber was incorrect”<sup>27</sup>.

13. The Appeals Chamber goes on to consider whether there were sufficient grounds to proceed against Šešelj for contempt for having disclosed information in violation of orders issued by the Šešelj Trial Chamber. It first notes that the “Decision on Adopting Protective Measures” issued confidentially by the Šešelj Trial Chamber on 30 August 2007 (“30 August 2007 Protective Measures Decision”) assigned pseudonyms to ten of the 11 witnesses and ordered the non-disclosure of their identifying information to the public.<sup>28</sup> While the Appeals Chamber notes that the Third Book does not make any reference to the pseudonyms assigned to the relevant individuals, it nonetheless considers that

the revelation of the information that those individuals could be involved in the proceedings before the Tribunal as Prosecution witnesses would put their security at risk. This is precisely what the Protective Measures Decisions intended to prevent by ordering the non-disclosure of their identifying information. By publishing detailed identifying information of individuals whose identities are protected, and by suggesting that they could be Prosecution witnesses, Šešelj disclosed the identifying information of “protected witnesses” within the meaning of the Protective Measures Decisions. This leads to the conclusion that, at least *prima facie*, Šešelj breached a court order.<sup>29</sup>

14. In this regard, the Appeals Chamber specified that the relevant protective measure orders issued by the Šešelj Trial Chamber do not specify that the witnesses’ identities must be protected only as Prosecution witnesses and that without leave of a Chamber, neither the Prosecution nor the Defence can re-assess and modify protective measures granted by a Chamber.<sup>30</sup>

15. In relation to the Second Ground Witnesses, [REDACTED], for whom the Trial Chamber had considered that it had no evidence before it to establish that Šešelj knew they were protected when the Third Book was published, the Appeals Chamber considered that

contrary to the Trial Chamber’s finding, the reference to the discontinuance of the proceedings in the Book indicates that it was published sometime after [REDACTED]. This evidence establishes,

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<sup>27</sup> *Id.*, para. 17.

<sup>28</sup> *Id.*, para. 19. The Trial Chamber notes that witness [REDACTED] was assigned a pseudonym in the “Decision on Prosecution’s Third and Fourth Motion for Protective Measures for Witnesses during the Pre-Trial Phase with Confidential and *Ex Parte* Annex”, 1 June 2005.

<sup>29</sup> *Id.*, para. 21.

<sup>30</sup> *Id.*, para. 22.

at least *prima facie*, that by the time the [Third] Book was published, Šešelj had knowledge that witnesses [REDACTED] were subject to protective measures.<sup>31</sup>

16. For these reasons, the Appeals Chamber concluded, as previously mentioned in this decision,<sup>32</sup> that the Trial Chamber had erred in its finding that there existed insufficient grounds to prosecute Šešelj pursuant to Rule 77(D) for having disclosed information in contravention of Rule 77(A)(ii) and thus ordered the Trial Chamber to proceed against him “for contempt pursuant to Rule 77(D)(ii) of the Rules by issuing an order in lieu of indictment to prosecute him for having disclosed information which may identify the 11 protected witnesses in violation of the Šešelj Trial Chamber’s orders”.<sup>33</sup>

## 2. Law

17. The Appeals Chamber ordered the Trial Chamber to proceed against Šešelj for contempt pursuant to Rule 77(D)(ii) of the Rules for having disclosed information which may identify 11 protected witnesses in violation of the Šešelj Trial Chamber’s orders and of Rule 77(A)(ii) of the Rules. In this respect, the Appeals Chamber recalled that the *actus reus* under Rule 77(A)(ii) is “the disclosure of information relating to proceedings before the Tribunal where such disclosure would be in violation of an order of a Chamber”.<sup>34</sup>

## 3. Role of the Trial Chamber in the Present Circumstances

18. By paragraph 28 of the Appeal Decision, the Chamber is ordered to issue an order in lieu of indictment in respect of 11 protected witnesses. There is therefore no reason for the Chamber to consider, or to further consider, whether there are sufficient grounds to proceed for contempt and whether to exercise its discretion under Rule 77(D).

## 4. Prevention of further disclosure

19. In light of the Appeal Decision, as in so far as the Third Book is concerned, the Trial Chamber considers it necessary to re-examine its previous finding according to which this part of the 26 January Motion was moot.<sup>35</sup> The Prosecution had initially requested that the Chamber issue an order to Šešelj (i) to direct the Serbian Radical Party, as the publisher of Šešelj’s books, to withdraw the Three Books from sale and to destroy any remaining copies; and (ii) to remove the Second Book from any websites, and to refrain from distributing the book either electronically or in

<sup>31</sup> *Id.*, paras 25-26.

<sup>32</sup> *See* para. 1 *supra*.

<sup>33</sup> Appeal Decision, para. 28; *see also Id.*, para. 27.

<sup>34</sup> Appeal Decision, para. 16.

<sup>35</sup> Trial Chamber Decision, para. 36.

hard copies.<sup>36</sup> However, considering the presumption of innocence, the fact that the Third Book has been published [REDACTED] and for the sake of consistency with previous decisions issued by this Trial Chamber<sup>37</sup>, the Trial Chamber finds that the measures requested by the Prosecution are, for the time being, too stringent and shall reconsider them, if necessary, at a later stage of these proceedings.

## 5. Disposition

20. For the foregoing reasons, pursuant to Rule 77 of the Rules, the Chamber hereby:

(a) **INITIATES** contempt proceedings against **VOJISLAV ŠEŠELJ** for having disclosed information which may identify the 11 protected witnesses in violation of orders of a Chamber;

(b) **ISSUES** an order in lieu of an indictment, appended in the Annex to this Decision, against **VOJISLAV ŠEŠELJ** on one count of contempt of the Tribunal, punishable under Rule 77(A)(ii) of the Rules, for having disclosed information which may identify the 11 protected witnesses in violation of orders of a Chamber;

(c) **DIRECTS** the Registrar to appoint an *amicus curiae* prosecutor to prosecute the charge set out in the Annex to this Decision;

(d) **DECLARES** that at a time to be determined **VOJISLAV ŠEŠELJ** shall appear before this Chamber to enter a plea with respect to that charge; and

(e) **DIRECTS** the Registrar to make available to the *amicus curiae* prosecutor:

- copies of the 26 January Motion;
- copies of the Trial Chamber Decision;
- copies of the Prosecution Appeal;
- copies of the Appeal Decision; and
- copies of all material referred to therein.

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<sup>36</sup> Motion, para. 37.

<sup>37</sup> *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.2, Decision on Allegations of Contempt, confidential, 21 January 2009, para. 13; *Prosecutor v. Vojislav Šešelj*, Case. No. IT-03-67-R77.2, Public Edited Version of “Judgement on Allegations of Contempt” Issued on 24 July 2009, 24 July 2009, para. [31].



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

Dated this fourth day of February 2010  
At The Hague  
The Netherlands



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Judge O-Gon Kwon  
Presiding

**[Seal of the Tribunal]**

## ANNEX

### ORDER IN LIEU OF AN INDICTMENT

**VOJISLAV ŠEŠELJ**, born in 1954 in Sarajevo, Republic of Bosnia and Herzegovina, and currently on trial before the Tribunal, is charged with one count of contempt of the Tribunal pursuant to Rule 77(A)(ii) of the Rules, as detailed below:

#### FACTUAL ALLEGATIONS

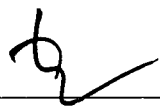
1. In its decisions of 1 June 2005, 30 August 2007 and 16 October 2007, the Trial Chamber trying the case of *Prosecutor v. Vojislav Šešelj* ordered various protective measures in respect of witnesses [REDACTED]. In its “Decision on Prosecution’s Third and Fourth Motion for Protective Measures for Witnesses During the Pre-trial Phase with Confidential and *Ex Parte* Annex” of 1 June 2005, the *Šešelj* Trial Chamber “assigned a pseudonym for use when referring to the protected witness in public until such time when the witness is called to testify and protection set out in the present Decision shall apply to the protected witnesses until further Order: [REDACTED]”. In its “Decision on Adopting Protective Measures” of 30 August 2007, the *Šešelj* Trial Chamber assigned pseudonyms in respect of ten of the remaining eleven witnesses and also prohibited the disclosure of “the names, addresses, places of residence or any other information which may identify the protected witnesses, and from disclosing this information to any third party except when this information is directly and specifically necessary for the preparation and the presentation of the Defence case”.
2. Sometime after [REDACTED], a book [REDACTED], authored by Vojislav Šešelj, was published. The book contains numerous references to witnesses [REDACTED], including their real names, occupations and places of residence, which enable the identification of these witnesses.
3. At the time of the publication of the book, Vojislav Šešelj had knowledge of the orders adopting protective measures in respect of, and orders specifically prohibiting the disclosure of information which may identify the protected witnesses [REDACTED].

#### CHARGES

By his acts and omissions, **VOJISLAV ŠEŠELJ** committed **Contempt of the Tribunal**, punishable under this Tribunal’s inherent power and Rule 77(A)(ii) of the Rules, for having disclosed information which may identify the 11 protected witnesses in violation of orders of a Chamber in a book [REDACTED].

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

Dated this fourth day of February 2010  
At The Hague  
The Netherlands



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Judge O-Gon Kwon  
Presiding

**[Seal of the Tribunal]**