



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-R77.2-A
Date: 19 May 2010
Original: English

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Andréia Vaz
Judge Christoph Flügge

Registrar: Mr. John Hocking

Judgement of: 19 May 2010

**IN THE CASE
AGAINST
VOJISLAV ŠEŠELJ**

PUBLIC REDACTED VERSION

JUDGEMENT

Amicus Curiae Prosecutor:

Mr. Bruce MacFarlane, Q.C.

The Accused *pro se*:

Mr. Vojislav Šešelj

CONTENTS

I. INTRODUCTION	1
A. BACKGROUND	1
B. ŠEŠELJ'S APPEAL	3
II. STANDARD OF REVIEW ON APPEAL	3
III. APPEAL ON THE MERITS.....	5
A. JURISDICTION OF THE TRIBUNAL WITH RESPECT TO CONTEMPT (GROUND 1)	5
B. INTERFERENCE WITH ADMINISTRATION OF JUSTICE (GROUND 2 IN PART)	6
C. NECESSITY OF TRANSLATING ENTIRE BOOK (GROUND 3)	7
D. <i>MENS REA</i> (GROUND 4)	8
E. SCOPE OF CONFIDENTIAL INFORMATION (GROUND 5)	9
F. EXISTENCE OF A CONFIDENTIAL VERSION OF THE TRIAL JUDGEMENT (GROUND 8)	10
G. THE SENTENCE AND ORDER WITHDRAWING THE BOOK (GROUND 6 IN PART; GROUND 7).....	12
IV. APPEAL AGAINST SENTENCE	13
A. SERIOUSNESS OF CRIME (GROUND 2 IN PART)	13
B. PROPORTIONATE NATURE OF SENTENCE (GROUND 6 IN PART).....	14
V. DISPOSITION	16

TM

I. INTRODUCTION

A. 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 appeal¹ from the Judgement on Allegations of Contempt, rendered by Trial Chamber II (“Trial Chamber”) on 24 July 2009 in the case of *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.2 (“Trial Judgement”).²

2. Vojislav Šešelj (“Šešelj”) was born on 11 October 1954 in Sarajevo, Republic of Bosnia and Herzegovina. He is currently being tried before Trial Chamber III in the case of *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T (“Šešelj Trial Chamber”), on 14 counts of crimes against humanity and violations of the laws or customs of war.³

3. On 21 January 2009, granting a motion by the Office of the Prosecutor (“Prosecution”),⁴ the Trial Chamber issued an order in lieu of an indictment, charging Šešelj with one count of contempt of the Tribunal under Rule 77(A)(ii) of the Rules of Procedure and Evidence (“Rules”).⁵ More specifically, the Indictment alleged that Šešelj had knowingly and wilfully interfered with the administration of justice by disclosing confidential information regarding three witnesses (together, the “Protected Witnesses”), as well as excerpts of a confidential written statement of one of the three witnesses (“Confidential Statement”) in a book authored by him (“Book”), in violation of the Šešelj Trial Chamber’s orders granting protective measures.⁶

TM

¹ Notice of Appeal and Appellant’s Brief Against the Judgment [sic] on Allegations of Contempt Pursuant to the Decision on the Prosecution’s Motion for Order Striking Appellant’s Notice of Appeal and Appeal Brief and Closing the Case Issued by the Appeals Chamber on 16 December 2009, filed in B/C/S on 12 January 2010 (confidential); English translation filed on 18 January 2010 (“Combined Filing”).

² *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.2, Judgement on Allegations of Contempt, 24 July 2009 (confidential; public version filed on the same day).

³ See *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Third Amended Indictment, 7 December 2007, p. 1.

⁴ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Prosecution’s Motion Under Rule 77 Concerning the Breach of Protective Measures, 13 October 2008 (confidential and *ex parte*). The Motion was originally filed before the Šešelj Trial Chamber, *see id.*, cover. It was subsequently assigned to the Trial Chamber by the President of the Tribunal, *see* Trial Judgement, para. 1.

⁵ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.2, Decision on Allegations of Contempt, 21 January 2009 (confidential; public version filed on the same day), Annex (“Indictment”).

⁶ *Id.*

4. On 11 February 2009, Bruce MacFarlane, Q.C., was appointed as *Amicus Curiae* Prosecutor in the case (“*Amicus* Prosecutor”).⁷ Šešelj pleaded not guilty and chose to represent himself; his trial was conducted on 29 May 2009.⁸

5. On 24 July 2009, the Trial Chamber found Šešelj guilty of contempt for knowingly disclosing confidential information regarding the Protected Witnesses along with portions of the Confidential Statement in violation of the Šešelj Trial Chamber’s orders,⁹ and sentenced Šešelj to fifteen months imprisonment.¹⁰ The Trial Chamber also ordered Šešelj to “secure the withdrawal of the Book from his internet website and to file a report with the Registrar on the actions taken to this effect by 7 August 2009”.¹¹

6. Šešelj filed an initial notice of appeal on 18 August 2009¹² and an initial Appellant’s brief on 6 October 2009.¹³ The *Amicus* Prosecutor filed a Respondent’s brief on 9 November 2009.¹⁴ However, on 16 December 2009, the Appeals Chamber, acting upon motions filed by the *Amicus* Prosecutor,¹⁵ found that both Šešelj’s initial notice of appeal and his initial Appellant’s brief were so flawed that they needed to be re-filed.¹⁶ On 12 January 2010, pursuant to the Decision of 16 December 2009, Šešelj filed the Combined Filing containing both a new notice of appeal and Appellant’s brief. The *Amicus* Prosecutor filed a new Respondent’s brief on 28 January 2010 (“Response”).¹⁷ Šešelj filed an oversized brief in reply on 19 March 2010 (“Oversized Reply”).¹⁸ The Appeals Chamber ordered Šešelj to refile a brief in reply not exceeding 3,000 words within

TM

⁷ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.2, Public Decision, 11 February 2009, p. 2 (acting Registrar’s decision appointing Bruce MacFarlane as *Amicus Curiae* Prosecutor).

⁸ Trial Judgement, para. 5, *citing* Initial Appearance, T. 2, 9, 6 March 2009; T. 14, 7 May 2009. The *Amicus* Prosecutor submitted 32 exhibits to support his case, while Šešelj submitted five press articles. No witnesses were called during the trial, *see* Trial Judgement, para. 6.

⁹ Trial Judgement, paras 31, 35, 41, 49 (confidential version); paras 21-23, 30 (public redacted version).

¹⁰ *Id.*, para. 59 (confidential version); para. 40 (public redacted version).

¹¹ *Id.*

¹² Notice of Appeal Against the Judgement on Allegations of Contempt of 24 July 2009, 18 August 2009 (confidential); English translation filed on 25 August 2009.

¹³ Appellant’s Brief Against the Judgement on Allegations of Contempt of 24 July 2009, 6 October 2009 (confidential); English translation filed on 28 October 2009.

¹⁴ Respondent’s Brief, 9 November 2009 (confidential).

¹⁵ Prosecutor’s Motion for Order Striking Notice of Appeal and Closing the Case, 5 October 2009 (confidential); Prosecutor’s Motion for Order Striking Appellant’s Brief and Closing the Case, 30 October 2009 (confidential).

¹⁶ *See* Decision on Prosecution’s Motions for Order Striking Appellant’s Notice of Appeal and Appeal Brief and Closing the Case, 16 December 2009 (“Decision of 16 December 2009”), pp. 1, 3, 4.

¹⁷ Respondent’s Brief Refiled Pursuant to 16 December 2009 Order, 28 January 2010 (confidential); Procès-Verbal of Reception of B/C/S translation of “Respondent’s [*sic*] Brief Refiled Pursuant to 16 December 2009 Order”, signed on 15 March 2010.

¹⁸ Reply to the Respondent’s Brief Refiled Pursuant to 16 December 2009 Order, 19 March 2010 (confidential); English translation filed on 26 March 2010.

four days of receiving the B/C/S translation of its order.¹⁹ However Šešelj did not resubmit any brief in reply.

7. The Appeals Chamber notes that the present Judgement is based on the contentions Šešelj advances in the Combined Filing and on the *Amicus* Prosecutor's refiled Response, rather than on the earlier notice of appeal, Appellant's brief and Respondent's brief.²⁰ It has also not considered any arguments set out in the Oversized Reply that was rejected by the Appeals Chamber and which Šešelj did not refile, despite an order to do so.²¹

B. Šešelj's Appeal

8. In the Combined Filing, Šešelj advances eight grounds of appeal against his conviction,²² maintaining that the Appeals Chamber should set aside the Trial Judgement in its entirety on the basis of errors of law and fact.²³ The *Amicus* Prosecutor responds that all the grounds of appeal should be dismissed.²⁴

II. STANDARD OF REVIEW ON APPEAL

9. On appeal, the 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"). The settled standard of review for appeals against judgements also applies to appeals against convictions for contempt.²⁵

¹⁹ See Decision on Vojislav Šešelj's Request to Submit an Oversized Reply Brief, 9 April 2010 ("Decision of 9 April 2010"), p. 2; Procès-Verbal of Reception of B/C/S translation of "Decision on Vojislav Seselj's [*sic*] request to submit an oversized reply brief", signed on 13 April 2010.

²⁰ On 27 January 2010, Šešelj filed a brief in reply to the *Amicus* Prosecutor's initial Respondent's brief, see Reply to the Respondent's Brief of 9 November 2009, 27 January 2010 (confidential); English translation filed on 5 February 2010. The *Amicus* Prosecutor filed a motion requesting the Appeals Chamber to strike this brief in reply or, alternatively, to ignore it, see Prosecutor's Motion for Order Striking Appellant's Reply to Original Respondent's Brief, 17 February 2010 (confidential). Šešelj did not respond to this motion. The Appeals Chamber will disregard Šešelj's brief in reply of 27 January 2010, in light of its Decision of 16 December 2009 ordering him to file his brief in reply within four days of the filing of the *Amicus* Prosecutor's re-filed Respondent's brief (*id.*, p. 5). For the same reason, the Appeals Chamber will disregard the "Response to the Book of Authorities of 9 November 2009" filed by Šešelj on 3 March 2010 (English translation filed on 15 March 2010).

²¹ Decision of 9 April 2010, p. 2.

²² Combined Filing, paras 2-9, 11-18.

²³ *Id.*, para. 19.

²⁴ Response, para. 77.

²⁵ *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; *Léonidas Nshogoza v. The Prosecutor*, Case No. ICTR-2007-91-A, Judgement, 15 March 2010, para. 12; See also, *inter alia*, *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.

T M

10. The Appeals Chamber reviews the Trial Chamber's findings of law to determine whether or not they are correct.²⁶ 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.²⁷ An allegation of an error of law which has no chance of changing the outcome of a judgement may be rejected on that ground.²⁸ 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.²⁹

11. When considering alleged errors of fact, the Appeals Chamber will apply a standard of reasonableness. Only an error of fact which has occasioned a miscarriage of justice will cause the Appeals Chamber to overturn a decision by the Trial Chamber.³⁰ 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.³¹ 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".³²

12. 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.³³ Arguments of a party which do not have the 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.³⁴

T M

²⁶ *Jović* Appeal Judgement, para. 12; *Marijačić and Rebić* Appeal Judgement, para. 16. See also, *inter alia*, *Milošević* Appeal Judgement, para. 14; *Mrkšić and Šljivančanin* Appeal Judgement, para. 12; *Krajišnik* Appeal Judgement, para. 13; *Martić* Appeal Judgement, para. 10.

²⁷ *Jović* Appeal Judgement, para. 12; *Marijačić and Rebić* Appeal Judgement, para. 15. See also, *inter alia*, *Milošević* Appeal Judgement, para. 13; *Mrkšić and Šljivančanin* Appeal Judgement, para. 11; *Krajišnik* Appeal Judgement, para. 12; *Martić* Appeal Judgement, para. 9.

²⁸ *Jović* Appeal Judgement, para. 12; *Marijačić and Rebić* Appeal Judgement, para. 17. See also, *inter alia*, *Milošević* Appeal Judgement, para. 13; *Mrkšić and Šljivančanin* Appeal Judgement, para. 11; *Krajišnik* Appeal Judgement, para. 12; *Martić* Appeal Judgement, para. 9.

²⁹ *Inter alia*, *Milošević* Appeal Judgement, para. 14; *Mrkšić and Šljivančanin* Appeal Judgement, para. 12; *Krajišnik* Appeal Judgement, para. 13; *Martić* Appeal Judgement, para. 10.

³⁰ *Inter alia*, *Milošević* Appeal Judgement, para. 15; *Mrkšić and Šljivančanin* Appeal Judgement, para. 13; *Krajišnik* Appeal Judgement, para. 14; *Martić* Appeal Judgement, para. 11.

³¹ *Jović* Appeal Judgement, para. 13; *Marijačić and Rebić* Appeal Judgement, para. 16. See also, *inter alia*, *Milošević* Appeal Judgement, para. 15; *Mrkšić and Šljivančanin* Appeal Judgement, para. 13; *Krajišnik* Appeal Judgement, para. 14.

³² *Jović* Appeal Judgement, para. 13; *Marijačić and Rebić* Appeal Judgement, para. 16. See also, *inter alia*, *Milošević* Appeal Judgement, para. 15; *Mrkšić and Šljivančanin* Appeal Judgement, para. 14; *Martić* Appeal Judgement, para. 11.

³³ *Jović* Appeal Judgement, para. 14; *Marijačić and Rebić* Appeal Judgement, para. 17. See also, *inter alia*, *Mrkšić and Šljivančanin* Appeal Judgement, para. 16; *Krajišnik* Appeal Judgement, para. 24.

³⁴ *Jović* Appeal Judgement, para. 14; *Marijačić and Rebić* Appeal Judgement, para. 17. See also, *inter alia*, *Mrkšić and Šljivančanin* Appeal Judgement, para. 16; *Krajišnik* Appeal Judgement, para. 20; *Martić* Appeal Judgement, para. 17.

13. 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.³⁵ 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".³⁶

14. 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 which are evidently unfounded without providing detailed reasoning.³⁷

III. APPEAL ON THE MERITS

A. Jurisdiction of the Tribunal with Respect to Contempt (Ground 1)

15. Šešelj contends that the Trial Chamber exceeded its jurisdiction in convicting him for contempt.³⁸ More specifically, he maintains that the Tribunal lacks the authority under international law to exercise the "inherent power" referred to in Rule 77 of the Rules, which addresses contempt proceedings.³⁹ He also compares the legal status of the Tribunal unfavourably to that of the International Criminal Court ("ICC"), and asserts that "[t]he offences listed in [Articles] 70, 71 and 72 [...] (offences against the administration of justice and misconduct before the Court)" of the Rome Statute of the ICC are different from Rule 77 of the Rules, demonstrating the problematic basis of the latter.⁴⁰

16. The *Amicus* Prosecutor responds that Šešelj failed to file a motion challenging the jurisdiction at trial.⁴¹ He also contends that had he brought such a motion, it would have been dismissed as the Tribunal does possess the jurisdiction to prosecute cases of contempt.⁴² He asserts that this jurisdiction is firmly established in the case law of the Tribunal, and reviews the development of the concept of contempt in common law.⁴³

TM

³⁵ *Jović* Appeal Judgement, para. 15. See also, *inter alia*, *Mrkšić and Šljivančanin* Appeal Judgement, para. 17; Practice Direction on Formal Requirements for Appeals from Judgement, Doc. IT/201, 7 March 2002, para. 4(b).

³⁶ *Milošević* Appeal Judgement, para. 16; *Mrkšić and Šljivančanin* Appeal Judgement, para. 17. See also, *inter alia*, *Marijačić and Rebić* Appeal Judgement, para. 18.

³⁷ *Jović* Appeal Judgement, para. 15. See also, *inter alia*, *Milošević* Appeal Judgement, para. 16; *Mrkšić and Šljivančanin* Appeal Judgement, para. 18.

³⁸ Combined Filing, paras 2, 11.

³⁹ *Id.*

⁴⁰ *Id.*, para. 11.

⁴¹ Response, para. 9.

⁴² *Id.*, paras 9, 11.

⁴³ *Id.*, paras 11, 13-16.

17. The Appeals Chamber recalls that Šešelj did not raise any jurisdictional challenge before the Trial Chamber. Thus, he may be deemed to have waived his right to raise such an issue on appeal.⁴⁴ In any event, the Appeals Chamber considers that the Trial Chamber did not exceed its jurisdiction in deciding upon the allegations of contempt in the present case. The Appeals Chamber recalls that the Tribunal possesses inherent jurisdiction to ensure that its exercise of judicial functions is safeguarded.⁴⁵ As the Trial Chamber explained and the Appeals Chamber has explicitly held, this inherent power extends to Rule 77 of the Rules governing contempt proceedings against conduct interfering with the Tribunal's administration of justice.⁴⁶ Accordingly, this ground of appeal is dismissed.

B. Interference with Administration of Justice (Ground 2 in part)

18. The Trial Chamber based Šešelj's conviction for contempt on his knowing publication of confidential information related to protected witnesses, rather than on any particular injury or discouragement suffered by a witness.⁴⁷ Šešelj appears to contend that one element of the offence of contempt is "material" interference with the administration of justice, such as adjournment of trial, witness intimidation, or a demonstrated "decline in confidence in the [Tribunal]".⁴⁸ He asserts that the Trial Chamber failed to find how his conduct actually constituted such interference.⁴⁹ Šešelj notes that one of the witnesses, whose identity the Trial Chamber found compromised by the Book, explicitly stated that he was not threatened.⁵⁰ Šešelj further asserts that "[t]here is no evidence [...] that anyone has read the entire [B]ook, let alone acted illicitly against a witness subsequent to reading it".⁵¹ He concludes that the Trial Judgement should be set aside in its entirety.⁵²

19. The *Amicus* Prosecutor contends that a Trial Chamber need only find disclosure of information in violation of a Chamber's order to enter a conviction for contempt under Rule 77(A)(ii).⁵³

20. The Appeals Chamber notes that as relevant, Rule 77(A) of the Rules provides:

⁴⁴ *Krajišnik* Appeal Judgement, para. 654; *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-A, Judgement, 29 July 2004, para. 222. The Appeals Chamber further notes that Šešelj should have brought his jurisdictional challenge pursuant to Rules 72(A)(i) and 77(E) of the Rules at the pre-trial stage.

⁴⁵ See e.g. *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A-R77, Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 January 2000 ("*Vujin* Appeal Judgement"), paras 13-18; *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-AR77, Judgment on Appeal by Anto Nobile Against Finding of Contempt, 30 May 2001 ("*Nobile* Appeal Judgement"), paras 30, 36; *Marijačić and Rebić* Appeal Judgement, para. 23.

⁴⁶ See Trial Judgement, para. 7. See also *Vujin* Appeal Judgement, paras 13-18; *Nobile* Appeal Judgement, paras 30, 36.

⁴⁷ See Trial Judgement, paras 31, 35, 41, 49 (confidential version); paras 20-23, 30 (public redacted version).

⁴⁸ Combined Filing, paras 3, 12.

⁴⁹ *Id.*

⁵⁰ *Id.*, para. 12.

⁵¹ *Id.*

⁵² *Id.*

⁵³ Response, paras 20-23.

The Tribunal in the exercise of its inherent power may hold in contempt those who knowingly and wilfully interfere with its administration of justice, including any person who

[...]

- (ii) discloses information relating to those proceedings in knowing violation of an order of a Chamber[.]

The Appeals Chamber recalls its previous holding that once a knowing violation of a Chamber's order is proved, "[n]o additional proof of harm to the [...] Tribunal's administration of justice is required" in order to sustain a conviction for contempt.⁵⁴ A violation of a court order *as such* constitutes an interference with the Tribunal's administration of justice.⁵⁵ The Trial Chamber thus did not err in law in not requiring additional proofs of harm beyond its finding of knowing violations of a Chamber's order. Šešelj's analysis of the essential elements required for a contempt conviction is mistaken. Accordingly, this ground of appeal against conviction is dismissed.

C. Necessity of Translating Entire Book (Ground 3)

21. The Trial Chamber did not obtain a full translation of the Book, and based its analysis on certain translated excerpts.⁵⁶ Šešelj contends that the Trial Chamber erred in basing its conclusions on a partial rather than a full translation of the Book. He asserts that the Trial Chamber's analysis is based on combining individual excerpts, often widely separated within the Book, and interpreting them out of context.⁵⁷ As a result of its approach, Šešelj believes that the Trial Chamber was unaware of the Book's structure or of the authorship of the individual texts contained within the Book.⁵⁸ He maintains that the Trial Chamber was thus not in a position to determine whether he indeed disclosed confidential information, and that this failure to appreciate "context" is inconsistent with the jurisprudence of the Tribunal and the European Court of Human Rights ("ECtHR") as well as "[m]odern legal science".⁵⁹

22. The *Amicus* Prosecutor contends that it is not necessary to read the entire Book to establish whether Šešelj published confidential witness information.⁶⁰ He asserts that the Book published: (i) excerpts or nearly-exact summaries of confidential materials;⁶¹ (ii) details of information that reveal witness identities;⁶² and (iii) documents in the public domain which, in juxtaposition to the

TM

⁵⁴ *Jović* Appeal Judgement, para. 30. See also *Marijačić and Rebić* Appeal Judgement, para. 44.

⁵⁵ *Id.*

⁵⁶ See *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.2, Exhibit P2.

⁵⁷ Combined Filing, paras 4, 13.

⁵⁸ *Id.*, para. 13.

⁵⁹ *Id.*

⁶⁰ Response, para. 24.

⁶¹ *Id.*, paras 25-29. See also *id.*, paras 27-28 nn. 47-48.

⁶² *Id.*, para. 30. See also *id.*, paras 31-34.

confidential information published by Šešelj, reveal protected witness identities.⁶³ He maintains that the Trial Chamber therefore acted reasonably in convicting Šešelj after reviewing only selected portions of the Book where this information is contained.⁶⁴ Finally, the *Amicus* Prosecutor notes certain statements by Šešelj where he asserted that it is possible to identify witnesses on the basis of reading the Book, refuting any claim that the Book is too dense to permit such identification.⁶⁵

23. The Appeals Chamber notes that the Trial Chamber carefully examined particular excerpts from the Book in order to determine whether these did indeed constitute violations of witness confidentiality.⁶⁶ It found that paragraphs of the Confidential Statement were published verbatim in the Book,⁶⁷ and that in various sections of the Book specific common details were linked to the Protected Witnesses and their witness pseudonyms.⁶⁸ These findings are sufficient to demonstrate that orders of the Šešelj Trial Chamber granting protective measures for the Protected Witnesses were violated. Thus it was within the scope of the Trial Chamber's discretion regarding factual issues to conclude that publication of these details constituted contempt, even without having reviewed the entire Book. Accordingly, this ground of appeal is dismissed.

D. Mens Rea (Ground 4)

24. The Trial Chamber concluded that Šešelj "knew he was disclosing information which identified three persons as protected witnesses before the Tribunal when he published the Book, and that [...] he did so intentionally, with the knowledge that by doing so he was violating" decisions of the Šešelj Trial Chamber.⁶⁹ Šešelj contends that the Trial Chamber erred in finding that he possessed the *mens rea* to violate an order of the Tribunal.⁷⁰ More specifically, he asserts that the material published in the Book was overwhelmingly made up of documents whose public filing the Šešelj Trial Chamber did not oppose, and that the only addition to these was an introduction by a different author, which stated that Šešelj specifically asked that no protected witnesses' identities be revealed.⁷¹ Šešelj also denies making any statement that would suggest he possessed the *mens rea* to disclose protected witnesses' identities by publishing the Book.⁷²

TM

⁶³ *Id.*, para. 36. *See also id.*, paras 35, 37-40.

⁶⁴ *Id.*, para. 24.

⁶⁵ *Id.*, para. 39.

⁶⁶ *See generally*, Trial Judgement, paras 24-41 (confidential version).

⁶⁷ *Id.*, para. 35.

⁶⁸ *See, e.g.*, Trial Judgement, paras 28, 34, 38 (confidential version).

⁶⁹ Trial Judgement, para. 49 (confidential version); para. 30 (public redacted version).

⁷⁰ Combined Filing, paras 5, 14.

⁷¹ *Id.*, para. 14.

⁷² *Id.*

25. The *Amicus* Prosecutor contends that the Trial Chamber reasonably concluded that Šešelj was the author of the Book and responsible for its contents.⁷³ He also notes statements by Šešelj claiming responsibility for the Book,⁷⁴ and maintains that Šešelj's original intention as to the status of his filings is immaterial to his conviction.⁷⁵

26. The Appeals Chamber underscores that the requisite *mens rea* for a violation of Rule 77(A)(ii) of the Rules is knowledge that the disclosure in question is in violation of an order of a Chamber.⁷⁶ Such knowledge may be proven by evidence other than the accused's statement expressing a particular intent to disclose protected witness identities. As the Trial Chamber observed, Šešelj signed a receipt for the Confidential Statement, which explained that the statement was not a public document.⁷⁷ When he published the Book, he was also aware of the Šešelj Trial Chamber's order explicitly prohibiting the publication of identifying details related to the Protected Witnesses.⁷⁸ Šešelj admitted his authorship of the Book,⁷⁹ which published the confidential information in question. Finally, Šešelj made statements indicating that he was aware that it would be possible to unmask the identities of protected witnesses on the basis of the Book.⁸⁰ Given these circumstances, the Trial Chamber reasonably concluded that Šešelj possessed the *mens rea* to disclose information in violation of the Šešelj Trial Chamber's orders. Accordingly, this ground of appeal is dismissed.

E. Scope of Confidential Information (Ground 5)

27. Šešelj contends that the Trial Chamber erroneously applied Rule 77(A)(ii) of the Rules in that "no legal criterion for determining criminal offences [*sic*], consequences and responsibility is defined" by the Trial Judgement.⁸¹ Šešelj observes that the Trial Chamber's failure to explain "how it defines confidential information" is particularly blatant in light of the publication of another book by a different author ("Other Book"), which Šešelj asserts contains much more information concerning protected witnesses than the Book.⁸²

T M

⁷³ Response, para. 49.

⁷⁴ *Id.*, paras 44-45, 47.

⁷⁵ *Id.*, para. 48. *See also id.*, n. 64.

⁷⁶ *Jović* Appeal Judgement, para. 27.

⁷⁷ *See* Trial Judgement, para. 43 (confidential version). *See also Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.2, Exhibit P11, "Receipt 18".

⁷⁸ *See* Trial Judgement, paras 20, 22, 42 (confidential version). *See also Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Decision on Adopting Protective Measures, filed in French on 30 August 2007 ("Protective Measures Decision") (confidential), p. 9, item xiv; English translation filed on 10 September 2007.

⁷⁹ *See* Trial Judgement, para. 16 (confidential version); para. 13 (public redacted version).

⁸⁰ *See* Trial Judgement, para. 46, n. 96 (confidential version), citing *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-R77.2, Exhibits P20, P24, P28.

⁸¹ *See* Combined Filing, para. 15. *See also id.*, para. 6.

⁸² *Id.*, para. 15.

28. The *Amicus* Prosecutor responds that the scope of the term “confidential information” was sufficiently defined in the Protective Measures Decision of the *Šešelj* Trial Chamber.⁸³ He further contends that the Other Book and other external publications referred to by *Šešelj* do not reveal that a particular individual is a witness before the Tribunal.⁸⁴ The *Amicus* Prosecutor observes that in any event, disclosures of confidential information by one party do not void the protective measures related to that information.⁸⁵ He also notes that this ground of appeal relates only to the disclosure of details concerning witness identity, not to the publication of the Confidential Statement.⁸⁶

29. The Appeals Chamber observes that the *Šešelj* Trial Chamber explicitly ordered that the Confidential Statement should not be provided to the public, and that information that could reveal the identity of the Protected Witnesses should not be published.⁸⁷ *Šešelj* thus received sufficient notice as to the scope of relevant confidential information. The Trial Chamber made no error in relying on these orders to determine the scope of confidentiality. *Šešelj*’s contention that others’ publication of similar information rendered orders for protective measures null is without merit. As the Appeals Chamber stated in *Jović*, “[t]he fact that some portions of [a w]itness’s written statement [has] been disclosed by another third party does not mean that this information [i]s no longer protected, that the court order ha[s] been *de facto* lifted or that its violation would not interfere with the Tribunal’s administration of justice”.⁸⁸ Therefore, this ground of appeal is dismissed.

F. Existence of a Confidential Version of the Trial Judgement (Ground 8)

30. *Šešelj* contends that the existence of both confidential and public versions of the Trial Judgement violates the principle that every judgement should be public, and thus that his conviction should be set aside.⁸⁹ He maintains that the existence of a confidential version of the Trial Judgement is not supported by either Article 23 of the Statute or Rule 98*ter* of the Rules, and violates Article 14(1) of the International Covenant on Civil and Political Rights (“ICCPR”).⁹⁰

31. The *Amicus* Prosecutor submits that the existence of both confidential and public versions of the Trial Judgement is in conformity with the requirements of the Statute, Rules and the ICCPR.⁹¹

⁸³ Response, para. 51.

⁸⁴ *Id.*, para. 52.

⁸⁵ *Id.*, para. 52, citing *Jović* Appeal Judgement, para. 30.

⁸⁶ *Id.*, para. 50.

⁸⁷ *See supra*, para. 26; *see also id.*, n. 78.

⁸⁸ *Jović* Appeal Judgement, para. 30.

⁸⁹ Combined Filing, paras 9, 18.

⁹⁰ *Id.*, para. 18. Article 14(1) of the ICCPR reads, in relevant part, “any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.”

⁹¹ Response, para. 71.

T M

He observes that the Trial Chamber's delivery of the Trial Judgement in an open court was sufficient to satisfy its legal obligations with regard to public rendering of a judgement, and notes that neither Article 23 of the Statute nor Rule 98ter of the Rules prohibit the concurrent existence of confidential and public versions of judgements.⁹² The *Amicus* Prosecutor further observes that the existence of a confidential redacted Judgement is sometimes necessary in order to meet the Tribunal's obligation to protect victims and witnesses.⁹³ He also contends that even if the Appeals Chamber finds that the existence of the confidential version of the Trial Judgement violated Šešelj's rights, the appropriate remedy would be to lift that document's confidential status, rather than set aside the conviction.⁹⁴

32. The Appeals Chamber notes that it is the established practice of the Tribunal to publish redacted public versions of documents that "[contain] information which, if disclosed, might cause prejudice, concerns about safety, or serious embarrassment to a party or a witness".⁹⁵ This practice extends to judgements.⁹⁶ Insofar as Šešelj contends that the established practice of the Tribunal violates the Statute, Rules or the ICCPR, he is incorrect. None of these states that the right to a public judgement is absolute. They recognize that it needs to be balanced against other interests.⁹⁷ In fact, publication of confidential witness or victim information would run counter to the explicit protection of witnesses and victims required by the Tribunal's Statute and implemented in the Rules.⁹⁸ Accordingly, this ground of appeal is dismissed.

⁹² *Id.*, paras 73-74.

⁹³ *Id.*, para. 74, citing Articles 15 and 22 of the Statute.

⁹⁴ *Id.*, para. 71.

⁹⁵ *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-A, Decision on the Defence Motion for Extension of Time, 26 April 2004, para. 6. See, e.g., *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-T, Order Issuing a Public Redacted Version of the Confidential "Decision on Motion for Provisional Release of Ivan Čermak" of 14 December 2009, 14 January 2010; *Prosecutor v. Jadranko Prlić et al.* Case No. IT-04-74-AR65.19, Order Issuing a Public Redacted Version of the "Decision on Prosecution's Appeal of the Trial Chamber's Decision to Provisionally Release Accused Praljak" Issued 17 December 2009, 11 February 2010.

⁹⁶ Compare *Contempt Proceedings Against Dragan Jokić*, Case No. IT-05-88-R77.1-A, Judgement on Allegations of Contempt, 25 June 2009 (confidential version), with *Contempt Proceedings Against Dragan Jokić*, Case No. IT-05-88-R77.1-A, Judgement on Allegations of Contempt, 3 July 2009 (public redacted version).

⁹⁷ See Article 23 of the Statute; Rules 78 and 98ter of the Rules; Article 14(1) of the ICCPR. Indeed, Article 14(1) of the ICCPR, providing for the right to a public judgement, enshrines certain exceptions. In interpreting this article, the Human Rights Committee stated that "the judgement must, with certain strictly defined exceptions, be made public". See CCPR General Comments, No. 13, 13 April 1984, para. 6 (emphasis added). Manfred Nowak writes in his commentary on the ICCPR that "[i]f, for example, the public was excluded from [a] trial in the interest of the private lives of the parties, then there is a legitimate need in keeping certain parts of the judgment secret, which can be accomplished by making the judgment anonymous or by publishing an abbreviated version". See Manfred Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary*, 1993, p. 253. The Appeals Chamber opines that the same logic must be applied to cases of witness protection. Further support for this position can be drawn from the jurisprudence of the ECtHR. The ECtHR held in *Campbell and Fell v. United Kingdom*, that "in each case the form of publication given to the 'judgment' under the domestic law of the respondent State must be assessed in the light of the special features of the proceedings in question and by reference to the object pursued by Article 6 para. 1 (art. 6-1) [of the European Convention on Human Rights] in this context, namely to ensure scrutiny of the judiciary by the public with a view to safeguarding the right to a fair trial". ECtHR, *Campbell and Fell v. The United Kingdom*, Application No. 7819/77; 7878/77, Judgment, 28 June 1984, para. 91.

⁹⁸ See Articles 15, 22 of the Statute; Rule 75 of the Rules.

T M

G. The Sentence and Order Withdrawing the Book (Ground 6 in Part; Ground 7)

33. The Trial Chamber sentenced Šešelj to fifteen months imprisonment, ordered him to remove the Book from his internet website and to file a report on his compliance with this order within two weeks.⁹⁹ Šešelj contends that his sentence was disproportionate in comparison to previous sentences in other contempt judgments.¹⁰⁰ He further contends that the Trial Chamber erred in ordering him to withdraw the Book before the Appeals Chamber delivered its judgement on his appeal.¹⁰¹ To support this latter proposition, he refers to, *inter alia*, a decision by the Appeals Chamber in the case of *Josip Jović*, which allowed Jović to suspend payment of a fine ordered by the Trial Chamber until a decision by the Appeals Chamber had been rendered,¹⁰² and to Rule 202 of the ICC's Rules of Procedure and Evidence, which states that individuals will not be rendered to the State where their sentence will be served until their convictions and appeals are final.¹⁰³ Šešelj concludes that each of these two alleged errors - the Trial Chamber's sentence and its order to withdraw the Book - individually justify setting aside the Trial Judgement.¹⁰⁴

34. The *Amicus* Prosecutor maintains that Šešelj's contentions have no merit and that he has failed to show that the Trial Chamber committed a discernable error in its sentencing.¹⁰⁵ He contends that the Trial Chamber took relevant factors into account¹⁰⁶ and appropriately determined the penalty in light of the gravity of the crime and the need to deter similar conduct.¹⁰⁷ The *Amicus* Prosecutor further maintains that the Trial Chamber's order that the Book be removed from Šešelj's internet website was separate from the judgement and sentence, and does not implicate or affect them.¹⁰⁸ Thus he contends that Šešelj's submissions on this latter issue should be summarily dismissed. In the alternative, he contends that the Trial Chamber exercised appropriate restraint in only deciding to order the removal of the Book from Šešelj's internet website after it concluded that redacting the Book would be an untenable option;¹⁰⁹ and that the filing of Šešelj's notice of appeal did not suspend non-custodial sentences, such as an order to remove the Book from his website.¹¹⁰

35. The Appeals Chamber notes that while the imposition of a sentence is necessarily dependent on a finding of guilt, the conviction itself stands entirely unaffected by the sentence eventually

⁹⁹ Trial Judgement, para. 59 (confidential version); para. 40 (public redacted version).

¹⁰⁰ Combined Filing, paras 7, 16.

¹⁰¹ *Id.*, paras 8, 17.

¹⁰² *Id.*, para. 17, citing *Prosecutor v. Josip Jović*, Case No. IT-95-14 & 14/2-R77-A, Decision on Motion of Josip Jović for Suspension of the Order on Payment of Fines, 29 September 2006, pp. 2-3.

¹⁰³ *Id.*

¹⁰⁴ *Id.*, paras 16, 17.

¹⁰⁵ Response, paras 54, 61.

¹⁰⁶ *Id.*, para. 59.

¹⁰⁷ *Id.*, para. 60.

¹⁰⁸ *Id.*, para. 62.

¹⁰⁹ *Id.*, paras 65-67.

imposed. It finds no basis or precedent in the jurisprudence of the Tribunal for setting aside a conviction on the basis of sentence, or on the basis of an order accompanying a sentence. Šešelj provides no reasoned explanation for why it should do so. Accordingly, these two grounds of appeal against conviction are summarily dismissed.¹¹¹

IV. APPEAL AGAINST SENTENCE

36. The Trial Chamber sentenced Šešelj to fifteen months imprisonment.¹¹² The Appeals Chamber notes that none of Šešelj's grounds of appeal request a reduction in sentence. However, the Appeals Chamber observes that Šešelj's appeal relating to the seriousness of his crime (Ground 2) makes explicit reference to the sentencing analysis in the Trial Judgement.¹¹³ In addition, his appeal regarding the allegedly disproportionate nature of his sentence (Ground 6) is typically associated with a request for a reduction in sentence,¹¹⁴ rather than with a challenge against a conviction. Given that Šešelj is self-represented, and in the interests of justice,¹¹⁵ the Appeals Chamber will consider these two grounds as appeals against sentence as well as against the conviction.¹¹⁶

37. The Appeals Chamber recalls that Trial Chambers are vested with broad discretion in determining an appropriate sentence. In general, the Appeals Chamber will not revise a sentence unless the appellant demonstrates that the Trial Chamber has committed a discernible error in exercising its discretion or has failed to follow the applicable law.¹¹⁷

A. Seriousness of Crime (Ground 2 in part)

38. Under his second ground of appeal, Šešelj contends that the Trial Chamber's failure to find that his actions actually compromised any witness's safety or testimony rebuts findings concerning

T M

¹¹⁰ *Id.*, para. 68.

¹¹¹ The Appeals Chamber notes that it has already upheld the Trial Chamber's order to remove the Book from the website, and dismissed Šešelj's contention that the non-custodial order should be set aside. *See* Decision on Urgent Motions to Remove or Redact Documents Pertaining to Protected Witnesses, 16 December 2009 (confidential) ("Decision on Removal of Protected Material"), pp. 3-5.

¹¹² Trial Judgement, para. 59 (confidential version); para. 40 (public redacted version).

¹¹³ *See* Combined Filing, para. 12, *citing* Trial Judgement, para. 56 (confidential version).

¹¹⁴ *See, e.g., Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001, para. 719; *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Judgement, 28 November 2007, para. 1046.

¹¹⁵ *See 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.

¹¹⁶ The discussion of these grounds of appeal with regard to Šešelj's conviction is found at *supra*, paras 18-20, 33-35.

¹¹⁷ *Prosecutor v. Astrit Haraqija & Bajrush Morina*, Case No. IT-04-84-R77.4-A, Judgement, 23 July 2009, para. 71 and references cited therein.

the seriousness of his crime made by the Trial Chamber in the context of sentencing.¹¹⁸ The *Amicus* Prosecutor does not explicitly respond to this assertion in the context of sentencing.¹¹⁹

39. The Appeals Chamber observes that the Trial Chamber carefully noted both Šešelj's explicit defiance of binding protective measure orders, and its concern that such defiance could undermine witnesses' trust in the Tribunal and its protective measure orders.¹²⁰ Šešelj's defiance of Tribunal orders could potentially disrupt the Tribunal's ability to obtain witness testimony and thus obstruct the Tribunal's administration of justice. This is a grave matter. The Trial Chamber's conclusion that Šešelj's contempt was "serious" in the context of sentencing was thus reasonable and within the scope of its discretion.¹²¹ Šešelj has failed to show any error on the part of the Trial Chamber which would justify altering Šešelj's sentence on the basis of this ground of appeal.

B. Proportionate Nature of Sentence (Ground 6 in part)

40. Under his sixth ground of appeal, Šešelj contends that his sentence was disproportionately severe.¹²² Specifically, Šešelj lists a number of other contempt convictions that resulted in acquittals, monetary fines or prison sentences that were less extensive than his own.¹²³ Šešelj considers that his own sentence reflects anti-Serb discrimination.¹²⁴ The *Amicus* Prosecutor responds that Šešelj fails to demonstrate that the Trial Chamber committed any discernable error in its sentencing.¹²⁵ In particular, he asserts that the Trial Chamber appropriately took into account Šešelj's disregard for any penalty he might suffer; deliberate violation of Trial Chamber orders; and the potential that Šešelj's conduct could reduce witnesses' confidence in the ability of the Tribunal to implement protective measures.¹²⁶

41. The Appeals Chamber recalls that:

T M

[S]entences of like individuals in like cases should be comparable. However, similar cases do not provide a legally binding tariff of sentences. While the Appeals Chamber does not discount the assistance that may be drawn from previous decisions, such assistance is often limited, as each case contains a multitude of variables. Differences between cases are often more significant than

¹¹⁸ Combined Filing para. 12, *citing* Trial Judgement, para. 56 (confidential version).

¹¹⁹ See Response, paras 19-23.

¹²⁰ Trial Judgement, para. 37 (public redacted version). See also Trial Judgement, para. 56 (confidential version).

¹²¹ *Id.*

¹²² Combined Filing, paras 7, 16.

¹²³ *Id.*, para. 16.

¹²⁴ *Id.*, para. 7. The Appeals Chamber notes that the allegation of anti-Serb bias is advanced only in the portions of the Combined Filing styled as Šešelj's notice of appeal, but not in the portions styled as Šešelj's appeal brief. Compare *id.*, with *id.*, para. 16.

¹²⁵ Response, para. 58.

¹²⁶ *Id.*, para. 59.

similarities and different mitigating and aggravating circumstances might dictate different results.¹²⁷

While providing a list of contempt cases resulting in lower sentences or acquittals, Šešelj has failed to make a convincing case as to why the circumstances of these cases were so similar to his own that his greater sentence was unjustified. Vague and unsubstantiated assertions regarding anti-Serb bias are insufficient to show an abuse of discretion on the part of the Trial Chamber. In addition, the Trial Chamber identified factors that rendered Šešelj's contempt particularly serious, including the deliberate violation of protective measures, and the potential impact of this violation on witnesses' confidence in the Tribunal.¹²⁸ It also recognized the need to discourage future violations of protective measure orders.¹²⁹ Šešelj has thus not demonstrated that the Trial Chamber committed a discernible error in imposing his sentence. There is no cause for altering Šešelj's sentence on the basis of this ground of appeal.

TM

¹²⁷ *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, Judgement, 12 November 2009, para. 326 (internal citations and quotations omitted).

¹²⁸ See Trial Judgement, para. 56 (confidential version); para. 37 (public redacted version).

¹²⁹ *Id.*

V. DISPOSITION

42. 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;

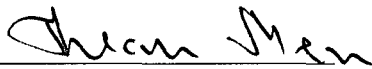
NOTING the respective written submissions of the parties;

DISMISSES all the grounds of appeal advanced by Šešelj in the Combined Filing;

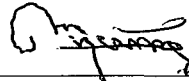
AFFIRMS Vojislav Šešelj's sentence of fifteen months imprisonment; and

ORDERS Vojislav Šešelj to immediately implement the Decision on Removal of Protected Material in which the Appeals Chamber ordered him to remove the Book, his initial notice of appeal and initial Appellant's brief from his internet website.

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



Judge Theodor Meron, Presiding



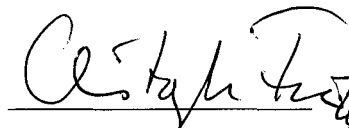
Judge Mehmet Güney



Judge Fausto Pocar



Judge Andréia Vaz



Judge Christoph Flüge

Dated this 19th day of May 2010
At The Hague, The Netherlands

[Seal of the Tribunal]