

**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: IT-03-67-AR73.7

Date: 11 March 2008

Original: English

BEFORE THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andréia Vaz
Judge Theodor Meron

Registrar: Mr. Hans Holthuis

Decision of: 11 March 2008

PROSECUTOR

v.

VOJISLAV ŠEŠELJ

Public

**DECISION ON APPEAL AGAINST THE TRIAL CHAMBER'S ORAL DECISION OF 9
JANUARY 2008**

Office of the Prosecutor

Ms. Christine Dahl

The Appellant

Mr. Vojislav Šešelj

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 “International Tribunal”, respectively), is seized of the “Interlocutory Appeal by Professor Vojislav Šešelj Against the Oral Decision of Trial Chamber III of 9 January 2008”, filed by Vojislav Šešelj (“Appellant”) on 1 February 2008 (“Appeal”) and certified for appeal by the Trial Chamber on 23 January 2008.¹ The Prosecution filed the “Prosecution’s Response to the Accused’s Interlocutory Appeal Against the Oral Decision of 9 January 2008” (“Response”) on 11 February 2008.

I. BACKGROUND

2. On 8 November 2006, the Trial Chamber reduced the number of counts and crime sites in the Prosecution’s indictment against the Appellant² pursuant to Rule 73bis of the Rules of Procedure and Evidence (“Rules”).³ Upon a proposal of the Prosecution, Counts 2, 3, 5, 6 and 7 were removed from the Indictment. These counts were deemed cumulative, charging, for example, the same conduct as crimes against humanity and violations of the laws or customs of war.⁴

3. The Prosecution also proposed dropping charges in relation to crime sites in Western Slavonia and all charges relating to the municipalities of Brčko and Bijeljina, thus reducing the number of crime-base witnesses it would call. However, in making this proposal, the Prosecution sought the permission of the Chamber to adduce non-crime-base evidence in relation to these areas,

namely, pattern evidence and evidence that goes to proof of the purpose and methods of the joint criminal enterprise charged in the Indictment, proof of the degree of co-ordination and co-operation of individuals and institutions that are allegedly part of the joint criminal enterprise, communication, training and transfer of volunteers and the involvement in such of the Accused, knowledge of the Accused of the conduct of the volunteers, and the general elements of the persecution campaign in Croatia as charged in Count 1 of the Indictment.⁵

4. The Trial Chamber accepted the proposals of the Prosecution and held that “evidence shall not be presented in respect of crimes that were allegedly committed in Western Slavonia and the municipalities of Brčko and Bijeljina” while at the same time granting the Prosecution’s request to present non-crime-base evidence with respect to these crime sites.⁶

¹ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, « *Décision relative à la Requête de l’Accusé aux fins de certification d’appel de la Décision orale du 9 janvier 2008* », 23 January 2008.

² *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Modified Amended Indictment, 12 July 2005 (“Indictment”).

³ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, Decision on the Application of Rule 73bis, 8 November 2006 (“Decision on Rule 73bis”).

⁴ Decision on Rule 73bis, paras. 13-14.

⁵ *Ibid.*, para. 17.

⁶ *Ibid.*, para. 19.

5. The Prosecution further proposed dropping the crime site of Boračko Jezero/Mt. Borašnica in the Nevesinje municipality referenced in paragraph 27 of the Indictment thereby eliminating all crime-base witnesses whose evidence related solely to that crime site.⁷ In accepting this proposal, the Trial Chamber noted that the Prosecution intended to call evidence relating to all other allegations contained in this paragraph and other paragraphs of the Indictment with respect to Nevesinje municipality.⁸ Accordingly, the Trial Chamber held that “evidence, with the exception of non-crime-base evidence, should not be presented in respect of this crime site”.⁹

6. In addition to the proposals of the Prosecution, the Trial Chamber held that evidence, other than non-crime-base evidence, should not be presented in respect of the municipality of Bosanski Šamac.¹⁰

7. On 8 January 2008, the Appellant, by oral motion, requested that the Trial Chamber prohibit the presentation of any evidence by the Prosecution during trial as part of a pattern of conduct in locations not contained in the Third Amended Indictment, such as in Western Slavonia, Brčko, Bijeljina and Bosanski Šamac.¹¹ By Oral Decision on 9 January 2008 (“Impugned Decision”),¹² the Trial Chamber rejected the Appellant’s motion and held that the Decision on Rule 73*bis* applies to the Third Amended Indictment.¹³ Upon the request of the Appellant,¹⁴ the Trial Chamber certified the Impugned Decision for appeal on 23 January 2008.¹⁵

II. STANDARD OF REVIEW

8. Trial Chambers exercise broad discretion in relation to trial management and the admissibility of evidence.¹⁶ The Trial Chamber’s decision in this case to refuse the Appellant’s request for the exclusion of non-crime-base evidence in relation to crime sites not contained in the

⁷ *Ibid.*, para. 20.

⁸ *Ibid.*, para. 21.

⁹ *Id.*

¹⁰ *Ibid.*, para. 22.

¹¹ *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, T. 2239-2240, 8 January 2008.

¹² *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-T, T. 2251, Oral Decision Concerning the Motion of the Accused made on the 8th of January, 2008, to Prohibit the Calling of Witnesses Connected with the Places Which Have Been Withdrawn from the Indictment According to Decision Concerning Article 73 *bis*, 9 January 2008.

¹³ *Ibid.*, T. 2255-2256.

¹⁴ *Ibid.*, T. 2268.

¹⁵ *Supra* note 2.

¹⁶ *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR73.3, Decision on Appeals Against Decision on Impeachment of a Party’s Own Witness, 1 February 2008, (“*Popović* Decision”) para. 12; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.4, Decision on Prosecution Appeal Concerning the Trial Chamber’s Ruling Reducing Time for the Prosecution Case, 6 February 2007, (“*Prlić* Decision on Reduction of Time”) para. 8; *Prosecutor v. Milan Martić*, Case No. IT-95-11-AR73.2, Decision on Appeal against the Trial Chamber’s Decision on the Evidence of Milan Babić, 14 September 2006, (“*Martić* Decision”) para. 6; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.2, Decision on Joint Defence Interlocutory Appeal against the Trial Chamber’s Oral Decision of 8 May 2006 Relating to Cross-Examination by Defence and on Association of Defence Counsel’s Request for Leave to File an *Amicus Curiae* Brief, 4 July 2006 (“*Prlić* Decision on Cross-Examination”), p. 3.

Third Amended Indictment is a discretionary decision that is to be accorded deference by the Appeals Chamber.¹⁷

9. Deference implies that the Appeals Chamber will reverse such decisions only when an abuse of such discretion is established. The Appeals Chamber will overturn a Trial Chamber's exercise of its discretion 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. The Appeals Chamber will also consider whether the Trial Chamber has given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations in reaching its decision.¹⁸

10. The question before the Appeals Chamber is thus not whether it agrees with a decision but whether the Trial Chamber has correctly exercised its discretion in reaching this decision.¹⁹ For the Appeals Chamber to intervene in a discretionary decision of a Trial Chamber, it must be demonstrated that the Trial Chamber has committed a "discernible error" resulting in prejudice.

III. DISCUSSION

11. In his Appeal, the Appellant claims that the Impugned Decision is unlawful and results from the Trial Chamber's misinterpretation and misapplication of the Rules.²⁰

12. The Appellant argues that, as the Prosecution has not charged him "with the commission of crimes or criminal responsibility for crimes in Western Slavonia, Brčko, Bijeljina and Bosanski Šamac",²¹ evidence cannot be presented in relation to these locations.²² Nonetheless, according to the Appellant, despite his insistence to this effect since January 2007, the Prosecution is intending to bring witnesses who will testify to events in these locations.²³ The Appellant claims that while the Prosecution amended its Indictment, "it has neither given up its witnesses for locations no longer contained in the charges, nor has it adapted the summaries of testimonies of those witnesses to the conditions under which the Third Amended Indictment came into being."²⁴

13. The Appellant further argues that the last witness list he received from the Prosecution shows that it will call a number of crime-base witnesses to testify to crimes in the locations removed

¹⁷ *Prlić* Decision on Cross-Examination, para. 8; *Martić* Decision, para. 6; *Prlić* Decision on Cross-Examination, p. 3.

¹⁸ *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR73.6, Decision on Appeals against Decision Admitting Transcript of Jadranko Prlić's Questioning into Evidence, 23 November 2007 ("*Prlić* Decision on Admission of Transcript"), para. 8; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-AR108bis.2, Decision on the Request of the United States of America for Review, 12 May 2006 ("*Milutinović* Decision on Review"), para. 6.

¹⁹ *Popović* Decision, para.14; *Milutinović* Decision on Review, para. 6.

²⁰ Appeal, p. 3.

²¹ *Ibid.*, p.5.

²² *Ibid.*, p. 6.

²³ *Id.*

from the counts of the Indictment in violation of paragraph 16 of the Decision on Rule 73bis, which ordered the Prosecution to remove “from the witness list all crime-base witnesses whose evidence wholly relates to events in those municipalities”.²⁵ Accordingly, the Appellant argues that as of the Decision on Rule 73bis, “there could be no witnesses for Brčko and Bijeljina, because all the witnesses from the Prosecution’s list for these sites were crime-base witnesses.”²⁶

14. The Appellant claims to find further support in the Trial Chamber’s statement that despite the testimony and presentation of evidence relating to crimes committed in Western Slavonia, Brčko, Bijeljina and Bosanski Šamac, he cannot be held criminally responsible for crimes with which he is not charged.²⁷ The Appellant argues that this establishes that charges in respect of these locations have not been accepted and that there can be no presentation of evidence in respect of these locations.²⁸

15. The Appellant further complains that contrary to the Decision on Rule 73bis, the Prosecution insists on presenting crime-base evidence “in order to prove the existence and scope of a joint criminal enterprise” and his participation in it.²⁹ The Appellant argues that this constitutes a violation of the Decision on Rule 73bis, because no reduction of the Indictment and the charges has in fact taken place”.³⁰

16. The Appellant contests what he views as the Prosecution’s use of evidence of the commission of crimes in the removed locations to prove his alleged pattern of conduct as well as that of others for which he may be held responsible.³¹ In this respect, the Appellant states that “[s]omebody else’s potential crime at one location cannot possibly represent [his] consistent pattern of conduct, let alone be relevant to his criminal responsibility for a crime in a totally different location.”³² Moreover, the Appellant avers that the acts relating to the removed sites which would form part of his alleged pattern of conduct have not been disclosed to him.³³

17. Accordingly, the Appellant submits that the Impugned Decision misinterprets and therefore misapplies Rules 73bis and 93 of the Rules, impugning his right to a fair trial.³⁴ He argues that the Trial Chamber erred in approving the questioning of Prosecution witnesses for sites that had been

²⁴ *Ibid.*, pp. 6-7.

²⁵ *Ibid.*, pp. 7-8.

²⁶ *Ibid.*, p. 8.

²⁷ *Id.*, referring to the Impugned Decision.

²⁸ *Ibid.*, p. 8.

²⁹ *Ibid.*, p. 9.

³⁰ *Id.*

³¹ *Ibid.*, p. 11.

³² *Ibid.*, p. 12.

³³ *Ibid.*, p. 11.

³⁴ *Ibid.*, p. 12.

removed from the charges contained in the Third Amended Indictment.³⁵ The remedy he proposes is to either restore all the locations removed from the charges and present all the evidence relating to these locations or reject the questioning of witnesses from locations not contained in the charges.³⁶

18. In Response, the Prosecution argues that the Impugned Decision is consistent with the Rules, which confer considerable discretion on the Trial Chamber to deal with evidentiary matters.³⁷ Specifically it refers to Rule 89(C) of the Rules, which confers a broad discretion to admit any relevant evidence, which a Chamber deems to have probative value, and Rule 93(A) of the Rules, which allows for the admission of evidence of a consistent pattern of conduct.³⁸ The Prosecution submits that an overview of the removed sites against the theory of its overall case shows that the Trial Chamber properly exercised its discretion in allowing the admission of non-crime-base evidence in relation to these sites as pattern evidence and evidence that goes to proof of the existence of the joint criminal enterprise and the participation of the Appellant in that enterprise.³⁹

19. The Prosecution claims that like other leadership cases, its case against the Appellant involves allegations of diverse criminal conduct and an extensive and complex joint criminal enterprise.⁴⁰ It alleges the Appellant's participation in a joint criminal enterprise to forcibly remove Croat, Muslim and other non-Serb populations from parts of the territory of Croatia, Bosnia and Herzegovina, and Vojvodina in Serbia, in order to incorporate these areas into new Serb-dominated State.⁴¹ The Prosecution notes that a diverse group of individuals are alleged to have participated in this joint criminal enterprise along with the Appellant⁴² who is alleged to have participated in the joint criminal enterprise through the use of his "power, rhetorical skills and popularity as a politician to constantly promote, in the media and directly to the public, the goal to create by force a Serb-dominated 'Greater Serbia' and to create a climate of ethnic fear and hatred that prepared the ground for the crimes alleged."⁴³ As President of the Serbian Radical Party and leader of the Serbian Četnik Movement, the Appellant is alleged to have overseen the recruitment and assignment of units of volunteers who participated in crimes aimed at the forcible removal of non-Serbs from the targeted territories.⁴⁴

20. The Prosecution submits that in order to prove the nature and breadth of the Appellant's participation in the joint criminal enterprise, it must lead evidence pertaining to a broad and diverse

³⁵ *Ibid.*, pp. 12-13.

³⁶ *Ibid.*, p. 12.

³⁷ Response, para. 9.

³⁸ *Id.*

³⁹ *Ibid.*, para. 10.

⁴⁰ *Ibid.*, para. 11.

⁴¹ *Id.*

⁴² *Ibid.*, para. 12.

⁴³ *Ibid.*, para. 14.

⁴⁴ *Id.*

crime-base, including the leading of certain evidence concerning the removed crime sites.⁴⁵ As all the crimes charged in the Third Amended Indictment are alleged to come within the object of the joint criminal enterprise, the Prosecution argues that the Trial Chamber was within its discretion to allow it, in principle, to lead evidence relating to the removed crime sites.⁴⁶ To demonstrate the relevance to its case of the evidence relating to the removed crime sites, the Prosecution provides details of the evidence it seeks to adduce thereto, which need not be repeated here. It suffices to say that the Prosecution has established the *prima facie* relevance of that evidence to its case.⁴⁷

21. Having considered the arguments of the parties, the Appeals Chamber is not satisfied that the Appellant has demonstrated that the Trial Chamber erred in the exercise of its discretion in upholding the Decision on Rule 73bis, which permits the Prosecution, in principle, to adduce non-crime-base evidence in relation to those crime sites dropped from the charges in the Third Amended Indictment. It is clear that the Prosecution case, which alleges a broadly based and complex joint criminal enterprise to forcibly remove non-Serb populations from identified parts of Croatia, Bosnia and Herzegovina and Serbia would be prejudiced if the Prosecution was prohibited from adducing any evidence at all in relation to sites that had been dropped from its Indictment.

22. The Appeals Chamber notes that part of the Appellant's complaint relates to the fact that the pattern evidence being adduced by the Prosecution in relation to the removed charges is aimed at establishing his participation in the joint criminal enterprise. He alleges that the Prosecution seeks to establish his criminal responsibility by reference to crimes committed in the removed municipalities by others. As those crimes are alleged to have been committed pursuant to the joint criminal enterprise of which he is alleged to have participated, and participation in a joint criminal enterprise is a form of commission, the Appellant complains that the Prosecution has not in fact removed those crime sites from the charges against him. He argues that should the Prosecution establish their commission by others, he will be responsible for those crimes as a member of the joint criminal enterprise.

23. While the Appeals Chamber understands this concern, the Trial Chamber in the Impugned Decision made it abundantly clear to the Appellant that he could not be convicted for the commission of crimes at the removed sites. It further noted, in line with the jurisprudence of the International Tribunal, that evidence concerning crimes not mentioned in the Third Amended Indictment remains admissible in order to corroborate facts that are included in the Third Amended Indictment and to help establish the existence of a consistent pattern of conduct pursuant to Rule 93

⁴⁵ *Ibid.*, paras. 14-15.

⁴⁶ *Ibid.*, para. 13.

⁴⁷ *Ibid.*, paras. 17-28.

of the Rules, provided sufficient notice is given to the Appellant.⁴⁸ The Appeals Chamber notes that the Appellant has not argued that the Prosecution failed to give sufficient notice of the evidence to be presented concerning the removed municipalities, nor does it appear that sufficient notice has not been given.⁴⁹

24. Accordingly, while the Prosecution may lead pattern evidence to establish the commission of crimes by others in the removed municipalities, the Appellant cannot be convicted with respect to these crimes. Rather, the evidence of the removed crime sites can only go towards proving

the purpose and methods of the joint criminal enterprise [...] the degree of coordination and cooperation of individuals and institutions that are allegedly part of the joint criminal enterprise, communication, training and transfer of volunteers and the involvement in such of the Accused, knowledge of the Accused of the conduct of the volunteers, and the general elements of the persecution campaign in Croatia.⁵⁰

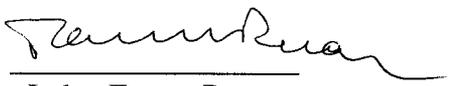
25. As such, the Appellant has not demonstrated that the Trial Chamber abused its discretion in reaching the Impugned Decision.

V. DISPOSITION

On the basis of the foregoing, this Appeal is hereby **DISMISSED**.

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

Done this 11th day of March 2008,
At The Hague,
The Netherlands.



Judge Fausto Pocar
Presiding Judge

[Seal of the International Tribunal]

⁴⁸ Impugned Decision, T. 2254, referring to *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-PT, Decision on the Defence Motion for Indicating that the First and Second Schedule to the Indictment Dated 10th October 2001 Should be Considered as the Amended Indictment, 19 October 2001, paras. 16, 23. *See also*, *Prosecutor v. Zoran Kupreškić et al.*, Appeal Judgement, 23 October 2001 para. 321, *citing* Archbold: *Criminal Pleadings, Evidence and Practice* 2000, paras. 13-37 and John Strong, McCormick On Evidence, para. 190 at 797-812, 4th edition, 1992; *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Decision on the Defence Objection to the Prosecution's Opening Statement Concerning Admissibility of Evidence, 22 January 2004.

⁴⁹ Response, para. 4; *See also* *Prosecutor v. Vojislav Šešelj*, Case No. IT-03-67-PT, Decision on Submission Number 311 Requesting that Trial Chamber III Clarify the Prosecution's Pre-Trial Brief, 20 September 2007, page 5.

⁵⁰ Impugned Decision, T. 2252-2265, citing Decision on Rule 73bis, para. 17.