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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-PT

Date: 8 November 2006

Original: English

IN TRIAL CHAMBER I

Before: Judge Alphons Orie, Presiding
Judge Patrick Robinson
Judge Frank Höpfel

Registrar: Mr Hans Holthuis

Decision of: 8 November 2006

PROSECUTOR

v.

VOJISLAV ŠEŠELJ

DECISION ON THE APPLICATION OF RULE 73 *BIS*

Office of the Prosecutor

Ms Hildegard Uertz-Retzlaff
Mr Dan Saxon
Mr Ulrich Müssemer

The Accused

Mr Vojislav Šešelj

Standby Counsel for the Accused

Mr David Hooper
Mr Andreas O'Shea

1. This Decision of the Trial Chamber is concerned with the application of Rule 73 *bis* of the Tribunal's Rules of Procedure and Evidence ("Rules") to the Modified Amended Indictment, dated 12 July 2005 ("Indictment").
2. The Indictment contains 14 counts, which charge the Accused with persecution as a crime against humanity, extermination as a crime against humanity, murder as a crime against humanity and a war crime, imprisonment as a crime against humanity, torture as a crime against humanity and as a war crime, other inhumane acts as a crime against humanity, cruel treatment as a war crime, deportation as a crime against humanity, forcible transfer as a crime against humanity, wanton destruction as a war crime, destruction or wilful damage done to institutions dedicated to religion or education as a war crime, and plunder of public or private property as a war crime.
3. On 31 August 2006, the Trial Chamber invited the Prosecutor to propose means of reducing the scope of the Indictment by at least one-third by reducing the number of counts charged in the Indictment and/or crime sites or incidents comprised in one or more of the charges in the Indictment.¹ The Chamber made this invitation pursuant to Rule 73 *bis*(D) of the Rules.
4. On 12 September 2006, the Prosecution filed its Response.² The Trial Chamber notes that in the Response, the Prosecution requests permission to exceed the page and word limit given the importance of the Chamber's invitation for the fairness and expeditiousness of the proceedings. The Chamber grants the Prosecution's request to exceed the allowed word and page limits.
5. In the Response, the Prosecution "declined" the Chamber's invitation on the basis that a reduction of the Indictment is unnecessary, would result in a case that is not "reasonably representative of the crimes charged" and would impede the Prosecution's ability to prove its case. However, the Prosecution requested another opportunity to submit a proposal for reducing the Indictment, should the Chamber require the Prosecution to reduce the scope of the Indictment.

¹ Request to the Prosecutor to Make Proposals to Reduce the Scope of the Indictment, 31 August 2006.

² Prosecution's Response to Trial Chamber's "Request to the Prosecutor to Make Proposals to Reduce the Scope of the Indictment", 12 September 2006 ("Response").

6. At the Status Conference held on 14 September 2006,³ the pre-trial Judge asked the Prosecution to file its proposals for reducing the Indictment within a week of the Status Conference.

7. On 21 September 2006, the Prosecution filed the "Prosecution's Submission on Proposals to Reduce the Scope of the Indictment" ("Submission"). The Prosecution proposes the dropping of certain counts and identifies a number of crime sites in Croatia and Bosnia-Herzegovina in respect of which evidence will not be presented.

8. At the Status Conference held on 3 November 2006, the pre-trial Judge told Mr Vojislav Šešelj ("the Accused") that the Prosecution and the then Assigned Counsel had been informed at a Rule 65 *ter* Conference held on 20 October 2006 of the likely changes to the Indictment that would be ordered by the Trial Chamber pursuant to Rule 73 *bis* of the Rules, subject to the final Decision being issued, and the Accused was informed of the same. The Accused was then told that he would have an opportunity to make submissions on the matter. In response, the Accused stated that, "I would just like to insist, when you complete your work, which I will not interfere with, I just insist that I get a fully modified text of the Indictment – I think I am entitled to that – so that I have a clear text of the Indictment. I don't want to interfere in your work. I'm not interested [*sic*] what I will be accused of. I just have to know what I am defending myself from".⁴

A. Law

9. Rule 73 *bis* provides various means by which a Trial Chamber may set constraints on the presentation of the Prosecution's case-in-chief, including allowing for intervention by the Chamber to focus the issues in respect of which evidence will be led at trial. In particular, Rule 73 *bis* of the Rules provides, in relevant part:

(D) After having heard the Prosecutor, the Trial Chamber, in the interest of a fair and expeditious trial, may invite the Prosecutor to reduce the number of counts charged in the indictment and may fix a number of crime sites or incidents comprised in one or more of the charges in respect of which evidence may be presented by the Prosecutor which, having regard to all the relevant circumstances, including the crimes charged in the indictment, their classification and nature, the places where they are alleged to have been committed, their scale and the victims of the crimes, are reasonably representative of the crimes charged.

³ T. 568-626, 585-590.

⁴ T. 668-708, 686-688.

10. Rule 73 *bis*(D) permits the Trial Chamber to invite the Prosecutor to reduce the number of counts charged and fix the number of crime sites or incidents. The Chamber notes that its discretion under Rule 73 *bis*(D) to invite the Prosecutor to reduce the number of counts charged and/or to fix the number of crime sites or incidents must be exercised in the interest of a fair and expeditious trial. Furthermore, the crime sites or incidents in respect of which evidence may be presented by the Prosecution must, after taking into account all the relevant circumstances and the factors listed in the paragraph, be “reasonably representative of the crimes charged”.

11. The Rule has been applied previously in the *Milutinović* case.⁵ In the *Milutinović* Decision, Trial Chamber III held that “it is possible for the Chamber to determine the charges on which evidence should be led at trial by identifying those crime sites or incidents that are clearly different from the fundamental nature or theme of the case, and ordering the Prosecution to lead evidence relating to the other sites or incidents that fall squarely within that nature or theme”.⁶

12. In the present case, the Trial Chamber is of the view that the identification of crime sites or incidents, in respect of which evidence may not be led, is less a question of determining the fundamental nature or theme of the Prosecution case and identifying crime sites or incidents that do not fall within that nature or theme than it is an identification, on the basis of the criteria set out in Rule 73 *bis*(D), of the crime sites or incidents that are “reasonably representative of the crimes charged”.

B. Reduction of Counts

13. The Prosecution proposes to “drop” Counts 2, 3, 5, 6, and 7 from the Indictment. In the Submission, it notes that these are cumulative counts and their removal would not have an impact on the scope of evidence to be led by the Prosecution but that their removal would reduce the scope of both the arguments of the parties and the Judgement.⁷

14. The removal of the counts that are cumulative, that is, counts that charge the same conduct as crimes against humanity or violations of the laws or customs of war, may be beneficial in certain ways, such as those put forward by the Prosecution, as well as for the

⁵ *Prosecutor v. Milutinović*, Case No. IT-05-97-T, Decision on Application of Rule 73 *bis*, 11 July 2006 (“*Milutinović* Decision”).

⁶ *Milutinović* Decision, para. 10.

⁷ Submission, para. 3.

Chamber's deliberations. The Trial Chamber considers that Counts 2, 3, 5, 6, and 7 should be removed.

C. Proposals for Reductions Relating to Croatia and Bosnia-Herzegovina

15. In addition to the removal of counts, the Prosecution proposes "dropping charges" in respect of certain crime sites. With regard to Croatia, the Prosecution's proposals concern crimes that were allegedly committed in Western Slavonia, which are currently included in paragraphs 17(a) to (j), 19, 29(c) and (d), 31, 32 and 34 of the Indictment. The Prosecution argues that this would "substantially" reduce the number of crime-base witnesses that are currently on the Prosecution's Rule 65 *ter* list.⁸

16. With regard to Bosnia-Herzegovina, the Prosecution suggests dropping all the charges relating to the municipalities of Brčko and Bijeljina and thus "remov[ing] from the witness list all crime base witnesses whose evidence wholly relates to the events" in those municipalities.⁹

17. However, according to the Submission, if the Chamber decides to accept these proposals pertaining to the charges that relate to Western Slavonia and the municipalities of Brčko and Bijeljina, the Prosecution seeks permission to be able to present certain types of evidence, 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.¹⁰ The Chamber will refer to this evidence as "non-crime-base evidence". The Prosecution argues that it would "seriously harm the Prosecution's ability to prove its case in relation to the other charges in the Indictment" if evidence relating to these crime sites could not be led for any purpose at all.¹¹

⁸ Submission, para. 4.

⁹ Submission, para. 10.

¹⁰ See Submission, paras 5-6 and 8-9.

¹¹ Submission, para. 7. The Prosecution makes an alternative proposal in the event that the Trial Chamber would not permit the Prosecution to lead evidence for any purpose in respect of Western Slavonia, namely, that it could only drop particular crime-base incidents. See footnote 5 of the Submission: the crime-base incidents specified by the Prosecution are those that allegedly took place in Hum, Bokane and Krasković and "most of the incidents pleaded in relation to Voćin". The Prosecution does not make an alternative proposal with regard to the municipalities of Brčko and Bijeljina.

18. Regarding Western Slavonia, the Prosecution submits that the non-crime-base evidence would be led through insider witnesses, written documentation and a small number of crime-base witnesses specified in the Submission.¹² For the municipalities of Brčko and Bijeljina, the Prosecution states that “such evidence [that is, non-crime-base evidence] will be led through witnesses who would have been required to be called in any event in relation to other aspects of the case (that is, the Prosecution foresees, insider witnesses)” and that any documentary evidence will also be introduced through witnesses who will be called “in any event”.¹³ According to the Prosecution, this would lead to a significant reduction in the number of witnesses called. The exact number, however, will be established following the Prosecution’s review of its witness list in light of these proposals.¹⁴

19. The Chamber accepts these proposals of the Prosecution and, consequently, evidence shall not be presented in respect of the crimes that were allegedly committed in Western Slavonia and the municipalities of Brčko and Bijeljina. The Trial Chamber further grants the Prosecution’s request to present non-crime-base evidence with respect to these crime sites.

20. Further to the proposals concerning Western Slavonia, Brčko and Bijeljina, the Prosecution suggests dropping the crime site set out in paragraph 27 of the Indictment, below, and thus not calling all the crime-base witnesses whose evidence relates solely to this crime site:

Also in June 1992, Serb forces, including “Šešelj’s men”, arrested and detained twenty Muslim civilians from Lakat at the resort of Boračko Jezero and subsequently killed nineteen of them on the mountain of Borašnica in Nevesinje.

21. For the purposes of clarity, the Trial Chamber notes that the Prosecution intends to present evidence pertaining to all other allegations contained in paragraph 27 and in other paragraphs of the Indictment insofar as they relate to events in Nevesinje municipality.¹⁵ The Chamber again accepts this proposal of the Prosecution and finds that evidence, with

¹² The crime-base witnesses that the Prosecution would intend to call are: VS-013, VS-018, VS-031, VS-033, VS-050 (who is also being called in relation to Zvornik), VS-1119, VS-1120 (for authentication of exhibits only; Prosecution requested admittance of written evidence with cross-examination), and VS-1122 (Prosecution requested admittance of written evidence without cross-examination). See Submission, paras 5-6.

¹³ Submission, para. 10.

¹⁴ See Submission, footnotes 6 and 8.

¹⁵ Submission, para. 11.

the exception of non-crime-base evidence, should not be presented in respect of this crime site.

D. Additional Reduction

22. In addition to the Prosecution's proposals, the Trial Chamber is of the view that, on the basis of the criteria set out in Rule 73 *bis*(D), evidence should not be presented in respect of a further crime site. The Trial Chamber finds that evidence, with the exception of non-crime-base evidence, should not be presented in respect of the municipality of Bosanski Šamac.

23. The Prosecution Pre-Trial Brief expresses the significance of Bosanski Šamac in the following terms:

The municipality of Bosanski Šamac, lying along the Sava River which divides BiH and Croatia, falls within the so-called "Posavina Corridor", a territory that linked Serbia with parts of the targeted areas in BiH and Croatia. On 12 May 1992, during an Assembly Session, Radovan Karadžić stressed the crucial importance of taking control of this "Corridor" for the members of the joint criminal enterprise when he declared that the establishment of the corridor between the Bosanska Krajina and ultimately the RSK and Serbia, was the second most important strategic goal of the Bosnian Serbs. The Serb leaderships in (S)FRY and RSK were equally aware of the importance of the "Posavina Corridor" as the lifeline to the Serbian motherland...¹⁶

24. The Trial Chamber is aware that as a result of determining that certain evidence will not be presented in respect of Bosanski Šamac as well as Brčko and Bijeljina municipalities, the Prosecution will not present this evidence in respect of any of the municipalities directly associated with the Posavina Corridor. However, the Trial Chamber notes that, in its Response, the Prosecution states that the municipality of Zvornik, which borders that of Bijeljina, was also important for Serb control of the Posavina Corridor,¹⁷ and evidence may be presented in respect of Zvornik. Moreover, the Prosecution will, as it will in respect of Brčko and Bijeljina, and Western Slavonia, be able to present non-crime-base evidence in respect of Bosanski Šamac.

25. Furthermore, in its Response, the Prosecution states that Bosanski Šamac is the only municipality in Bosnia-Herzegovina included in the Indictment in which ethnic Croats were the majority population and thus the prime targets of the alleged crimes. The victims in the

¹⁶ Prosecution Pre-Trial Brief, 28 October 2004, para. 79.

¹⁷ Para. 22.

other municipalities in Bosnia-Herzegovina were primarily Muslim. The term “victims of the crimes” is referred to in Rule 73 *bis*(D) and allows the Chamber to consider the ethnicity of the victims when determining whether the crime sites or incidents in respect of which evidence will be presented are “reasonably representative of the crimes charged”. At the same time, this factor is not, alone, sufficient to persuade the Trial Chamber that evidence should be presented in respect of crimes that were allegedly committed in Bosanski Šamac. The number of victims is also a consideration. It is not discernible from the Indictment or Pre-Trial Brief how many alleged victims there are from each crime site and in respect of each alleged crime. However, the number of alleged murder victims from Bosanski Šamac is less compared to the other crime sites for which evidence relating to crimes allegedly committed in those crime sites will be presented, as can be seen from Annexes II to X of the Indictment.

26. In addition, despite the fact that the evidence pertaining to the crimes that were allegedly committed in Bosanski Šamac will not be presented, none of the charges under the counts will be removed as a consequence.

E. Conclusion

27. The Trial Chamber considers that the Prosecution’s proposals together with the exclusion of evidence in respect of the municipality of Bosanski Šamac will result in a sufficient and fair reduction of the scope of evidence to be presented by the Prosecution, in accordance with Rule 73 *bis*(D) of the Rules. Fixing the number of crime sites in the Indictment in this manner means that evidence in respect of the crimes allegedly committed in the Western Slavonia, Brčko, Bijeljina and Bosanski Šamac crime sites and the Boračko Jezero/Mt. Borašnica crime site as set out in paragraph 27 of the Indictment may, therefore, not be presented by the Prosecution.

28. The Prosecution, however, may still present non-crime base evidence that contributes to proving the charges beyond the limited scope of proving the occurrence of a crime or crimes within the geographically defined areas, even if it relates to a crime site for which no evidence relating to specific alleged crimes is to be presented.

29. Therefore, evidence pertaining to the full range of crimes charged in Counts 1, 4, and 8 to 14 may be presented in respect of Vukovar, Zvornik, Greater Sarajevo, Mostar, Nevesinje (with the exception of the Boračko Jezero/Mt. Borašnica crime site) and in Serbia (“parts of Serbia” and Hrtkovci).

30. These crime sites are reasonably representative of the crimes charged in the Indictment. The broad geographical scope of the Indictment will be retained given the scope of the crime sites in respect of which evidence will be presented. The Trial Chamber also considers that the broad geographical scope of the Indictment is further guaranteed by the ability of the Prosecution to present non-crime-base evidence in respect of all crime sites currently set out in the Indictment.¹⁸

31. Moreover, the remaining crime sites certainly reflect the scale of the alleged criminal activity. The same can be concluded in respect of the alleged victims; evidence pertaining to the alleged crime of murder, the victims of which are listed in Annexes II to X to the Indictment, will be presented in respect of the crime sites where its effects were felt most severely.

32. Furthermore, the fact that the evidence relating to the specific crimes that were allegedly committed in the Western Slavonia, Brčko, Bijeljina, Bosanski Šamac and Boračko Jezero/Mt. Borašnica crime sites will no longer be presented will not have the effect of removing any of the charges under the counts.

33. Finally, the Trial Chamber considers that the ability of the Prosecution to present non-crime-base evidence in respect of all crime sites means that evidence pertaining to broader aspects of the Prosecution's case is not excluded.

FOR THE FOREGOING REASONS, the Trial Chamber,

GRANTS the request for the Response to exceed the allowed word and page limits, and

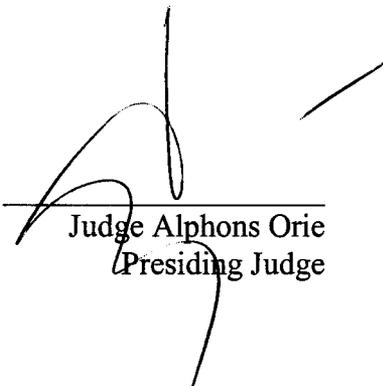
Pursuant to Rule 73 *bis*(D) of the Rules, **ORDERS** that:

- a) Counts 2, 3, 5, 6, and 7 are hereby removed from the Indictment;
- b) The Prosecution shall not present evidence in respect of crimes allegedly committed in the crime sites of Western Slavonia, Brčko, Bijeljina, Bosanski Šamac, and the crime site of Boračko Jezero/Mt. Borašnica as currently described in paragraph 27 of the Indictment and specified in paragraph 20 of this Decision;

¹⁸ The dropping of the charge of persecution by imposition of restrictive and discriminatory measures (paragraph 17(g) of the Indictment) in relation to Voćin in Western Slavonia will mean that this aspect of persecutions is not charged vis-à-vis Croatia.

- c) The Prosecution may present non-crime-base evidence in respect of the crime sites of Western Slavonia, Brčko, Bijeljina, Bosanski Šamac, and the crime site of Boračko Jezero/Mt. Borašnica as currently described in paragraph 27 of the Indictment and specified in paragraph 20 of this Decision;
- d) The Prosecution shall indicate the changes made to the Indictment in accordance with this Decision by the substitution of the relevant parts of the Indictment with “[Omitted pursuant to Rule 73 *bis*(D) of the Rules and the Decision of the Trial Chamber dated 8 November 2006]”.

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



Judge Alphons Orié
Presiding Judge

Dated this eighth day of November 2006
The Hague
The Netherlands

[Seal of the Tribunal]