



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-AR73.6  
Date: 24 January 2008  
Original: English

**IN 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:** 24 January 2008

**PROSECUTOR**

v.

**VOJISLAV ŠEŠELJ**

**PUBLIC**

**DECISION ON VOJISLAV ŠEŠELJ'S APPEAL AGAINST THE  
TRIAL CHAMBER'S ORAL DECISION OF 7 NOVEMBER 2007**

**The Office of the Prosecutor:**

Ms. Christine Dahl

**Accused:**

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 “Tribunal” respectively) is seized of the “Interlocutory Appeal by Professor Vojislav Šešelj Against the Oral Decision of the Trial Chamber of 7 November 2007” (“Appeal”) filed by Vojislav Šešelj on 22 November 2007, which was certified for appeal by the Trial Chamber on 14 November 2007.<sup>1</sup> On 17 December 2007, the Office of the Prosecutor (“Prosecution”) filed its Response to the Appeal.<sup>2</sup>

## I. BACKGROUND

2. The Impugned Decision concerns the Trial Chamber’s denial of a motion by Mr. Šešelj to overturn decisions originally made during the pre-trial phase of the proceedings with respect to the timing of disclosure by the Prosecution to Mr. Šešelj of witnesses expected to be heard during the Prosecution case.<sup>3</sup>

3. On 30 August 2007, the Pre-Trial Judge issued a confidential Decision on Protective Measures granting a number of protective measures requested by the Prosecution, including delayed disclosure of the identity of some of the witnesses the Prosecution intended to call for up to 30 days prior to the date set for the beginning of the trial (“no later than 30 days prior to the firm trial date”) as well as delayed disclosure of the identity of other witnesses 30 days prior to their expected appearance in Court.<sup>4</sup> The Decision on Protective Measures rejected various other requests for additional protective measures on the ground that the Prosecution had failed to establish an objective basis for such measures. The Prosecution sought certification to appeal in part the Decision on Protective Measures on the grounds that it put the security of some of its witnesses at risk and hampered its ability to bring its case.<sup>5</sup> This request was denied by the Pre-Trial Judge.<sup>6</sup> In the Denial of Certification Decision, the Pre-Trial Judge considered that “the Prosecution may at

<sup>1</sup> Decision on the Accused’s Motion for Certification to Appeal the Oral Decision of 7 November 2007, 14 November 2007.

<sup>2</sup> Prosecution’s Response to the Accused’s Interlocutory Appeal Against the Oral Decision of 7 November 2007, 17 December 2007 (“Response”).

<sup>3</sup> T. 1785:21-T 1786:5, 7 November 2007 (“Impugned Decision”).

<sup>4</sup> Decision of Adopting Protective Measures, 30 August 2007 (“Decision on Protective Measures”), page 8, paras iv-v.

<sup>5</sup> Prosecution Request for Certification to Appeal “Decision Portent Adoption de Mesures de Protection” Dated 30 August 2007, 6 September 2007.

<sup>6</sup> Decision on Prosecution Request for Certification to Appeal the Decision Adopting Protective Measures, 26 September 2007 (“Denial of Certification Decision”).

any moment request an augmentation of existing protective measures for the witnesses covered by the Decision of 30 August, with the proviso that new circumstances are shown”.<sup>7</sup>

4. On 8 October 2007, the Prosecution requested reconsideration of the Decision on Protective Measures in light of additional facts which had been discovered following contact with proposed witnesses. The reconsideration request was granted by the Pre-Trial Judge.<sup>8</sup> The Decision on Prosecution Motion for Reconsideration granted delayed disclosure for an additional Prosecution witness for up to 30 days prior to the date set for the beginning of the trial as well as delayed disclosure for two additional witnesses for up to 30 days prior to their appearance in Court. In the Decision on Prosecution Motion for Reconsideration the Pre-Trial Judge also clarified that the expression “no later than 30 days prior to the firm trial date” should be intended to mean “no later than 30 days prior to the date set for the commencement of the Prosecution case”.<sup>9</sup>

5. On 6 November 2007, Mr. Šešelj requested the Trial Chamber to order the Prosecution to disclose to him the identity of all the witnesses it intended to call prior to the Prosecution’s opening statement, including those eight witnesses subject to delayed disclosure on the basis of the Decision on Protective Measures and of the Decision on Prosecution Motion for Reconsideration. By Impugned Decision of 7 November 2007, the Trial Chamber rejected the request by Mr. Šešelj and confirmed its previous decisions on the basis that there had been no change in circumstances or identification of error justifying reconsideration.<sup>10</sup> While finding that there was no basis for departing from its previous orders, the Trial Chamber granted Mr. Šešelj’s request for certification to appeal that rejection.

## II. STANDARD OF REVIEW

6. Decisions with respect to protective measures fall within the discretion of the Trial Chamber. 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.<sup>11</sup> 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

<sup>7</sup> *ibid.*, p. 5.

<sup>8</sup> Decision on the Prosecution’s Motion for Reconsideration of the Decision of 30 August 2007, 16 October 2007 (“Decision on Prosecution Motion for Reconsideration”).

<sup>9</sup> *ibid.*, pp. 5, 6.

<sup>10</sup> T. 1785:13-T 1787:3,7 November 2007.

given weight to extraneous or irrelevant considerations or has failed to give weight or sufficient weight to relevant considerations in reaching its decision.<sup>12</sup> 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 a decision.<sup>13</sup>

### III. ARGUMENTS ON APPEAL

7. In his Appeal, Mr. Šešelj claims that the Impugned Decision “is unlawful”<sup>14</sup>, does not conform with the Rules of the Procedure and Evidence (“Rules”) and that the Trial Chamber has erroneously interpreted Rule 69(C).<sup>15</sup> Rule 69(C) provides:

Subject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the defence.

Mr. Šešelj argues that by reference to this provision, the Trial Chamber erroneously determined that the start of trial should be considered the first day of evidence during the Prosecution case. He claims that this interpretation is wrong, as in all legal systems the day a trial commences is the day the proceedings are opened before the Chamber.<sup>16</sup> Accordingly, the start of his trial is the day on which the Prosecution presented its opening statement (that is, 7 November 2007) and not as the Trial Chamber determined, 11 December 2007 (the first day of evidence led by the Prosecution).<sup>17</sup>

8. Mr. Šešelj supports his contention by averring that the Scheduling Orders filed in each case before the Tribunal identify the first day of trial with the opening statement of the Prosecution.<sup>18</sup> In further support of his argument, he refers to the announcement made on the Tribunal’s website:

The trial recommenced on 7 November 2007 with the opening statement by the Prosecution. The presentation of evidence is scheduled to commence on 11 December 2007.<sup>19</sup>

9. Mr. Šešelj moreover claims that the Impugned Decision is also unlawful because it is inconsistent with Rule 69(C) of the Rules in respect of the allocation of sufficient time prior to the trial for the preparation of the defence”.<sup>20</sup> He argues that the purpose of the provision in allocating “sufficient time prior to the trial [...] is to ensure that the Accused is allowed sufficient time for the

<sup>11</sup> *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. 9.

<sup>12</sup> *Prlić Decision on Admission of Transcript*, para. 8.

<sup>13</sup> *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65-4, Decision on the Prosecution Appeal of the Trial Chamber’s “*Décision relative à la demande de mise en liberté provisoire de l’accusé Pušić*”, 20 July 2007, para. 6.

<sup>14</sup> Appeal, p. 3.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*, pp. 4-6.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*, p. 7.

preparation of defence, rather than the Accused being granted or asking for time to prepare the defence after the trial has commenced”.<sup>21</sup> He also notes that the Impugned Decision involves at least seven protected witnesses for the Prosecution whose identities are to be disclosed 30 days before they give evidence, with the consequence that the date on which their identities will be disclosed is some unspecified date following the commencement of the trial. He claims that, given his situation, he will be in court during the trial, listening to the evidence of Prosecution witnesses and conducting cross-examination. Additionally, he will be preparing his defence with respect to witnesses whose identity has already been disclosed to him. Thus, according to Mr. Šešelj, there will be little time available to him to prepare his defence in respect of those witnesses whose identity has not yet been disclosed. He claims that “[t]his situation constitutes a violation of the right to a fair trial and that is why Rule 69(C) of the Rules seeks to avoid such situations and lays down that the identity of the Prosecution’s protected witnesses shall be disclosed to the Accused prior to trial to allow adequate time for the preparation of defence. Sufficient time for the preparation of defence is therefore some time before the trial commences”.<sup>22</sup> Consequently, Mr. Šešelj argues that, if 30 days is adequate time for preparation, this should at least be 30 days prior to the commencement of the trial, that is prior to 7 November 2007. Therefore, he claims the identity of all the Prosecution witnesses should have been disclosed to him at the latest by 7 October 2007.<sup>23</sup>

10. In the Response, the Prosecution argues that Mr. Šešelj has failed to demonstrate that the Trial Chamber abused its discretion in determining which protective measures were necessary to protect witnesses. It submits that, in the Decision on Protective Measures, the Pre-Trial Judge required the Prosecution to establish (i) a likelihood that there would be interference or intimidation of the witnesses once their identity was disclosed to the Defence; (ii) that the protective measures sought were necessary for the protection of the witnesses in the specific case; and (iii) that the timing of delayed disclosure would not be so short as to impinge on the ability of the Defence to adequately prepare its case.<sup>24</sup> The Prosecution claims that the Impugned Decision confirmed the earlier decisions of the Pre-trial Judge and “[i]n accordance with Rules 69(C) and 75, the Chamber ordered the Prosecution to disclose the identify of the witnesses ... sufficiently in advance of their anticipated testimony to ensure adequate time for the Accused to prepare and present an effective defence”.<sup>25</sup>

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<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*, para. 8.

<sup>23</sup> *Ibid.*

<sup>24</sup> Response, para. 1.

<sup>25</sup> *Ibid.*

11. The Prosecution also refutes the argument of Mr. Šešelj that the Trial Chamber erred in law in its interpretation of Rule 69. It claims that Rules 69 and 75 allow for delayed disclosure of a witnesses identity until after the commencement of trial. It argues that Mr. Šešelj ignores Rule 69(C)'s incorporation of Rule 75 and fails to refer to any authority "that prohibits the protective measure of delaying disclosure until after the trial commences".<sup>26</sup>

12. The Prosecution claims that the combined effect of Rules 75 and 69 is that the disclosure of witnesses to an accused may be delayed. Rule 69(A) permits the Prosecution to apply in exceptional circumstances for an order of non-disclosure with respect to a victim or witness who may be in danger or at risk. However, any grant of delayed disclosure must ensure that the "span of time between the delayed disclosure and calling the witness must not be so short as to prevent the accused and his counsel from adequately preparing the defence".<sup>27</sup> Rule 69(C) specifically incorporates Rule 75 and, in so doing, permits disclosure of the identity of a witness after the commencement of trial, provided that the delay is consistent with the accused's rights.<sup>28</sup>

13. The Prosecution argues that the jurisprudence of the ICTY and that of the ICTR supports the proposition that delayed disclosure of between 21 and 30 days prior to witnesses' giving of evidence is consistent with the right of the defence to have sufficient time for the preparation of its case.<sup>29</sup> It notes that, as of 9 November 2007, the identities of seven Prosecution witnesses remained undisclosed and, as of the date of the filing of the Response, only three were still undisclosed.<sup>30</sup> It claims that Mr. Šešelj has failed to identify a discernible error in the Trial Chamber's decision to grant the Prosecution delayed disclosure until 30 days before the witnesses' giving of evidence. In reaching this determination, according to the Prosecution, "the Pre-Trial Judge assessed the security risk and danger to each witness", thus striking "the appropriate balance between protecting Tribunal

<sup>26</sup> *Ibid.*, para. 11.

<sup>27</sup> Response, para. 12.

<sup>28</sup> *Ibid.*, para. 14.

<sup>29</sup> *Ibid.*, para. 16 referring to *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-PT, Order to Grant Protective Measures to Eleven Sensitive Witnesses, 5 October 2005, Disposition, para. 2, ordering that the identity of eleven sensitive witnesses shall be disclosed to the Accused and the Defence "not less than thirty days before this witness is expected to testify"; *Prosecutor v. Mile Mrškić et al.*, Case No. IT-95-13/1-T, Decision on Prosecution's Additional Motion for Protective Measures for Sensitive Witnesses, 25 October 2005, Disposition, para. 3; *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Decision of 1 August 2006; *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision of 21 November 2003; *Prosecutor v. Milan Martić*, Case No. IT-95-11-PT, Decision of 18 December 2003; *Prosecutor v. Tharcisse Renzaho*, Case No. ICTR-97-31-I, Decision on the Prosecution's Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment, 17 August 2005; *Prosecutor v. Protais Zigiranyirazo*, Case No. ICTR-2001-73-I, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses, 25 February 2004; *Prosecutor v. Ferdinand Nahimana et al.*, Case No. ICTR-99-52-T Decision on the Prosecutor's Application to Add Witness X to its List of Witnesses and for Protective Measures, 14 September 2001.

<sup>30</sup> *Ibid.*, para. 15.

witnesses and safeguarding the Accused's right to a fair trial. The Trial Chamber correctly affirmed this finding".<sup>31</sup>

14. The Prosecution further argues that Mr. Šešelj has failed to show that delayed disclosure has impinged or will impinge his ability to properly prepare his defence. It argues that in fact he will have sufficient time to do so, since only three names have not been disclosed to him already. As the Trial Chamber is only sitting three days per week, for four hours per day, and as he will be given 30 days notice of the identity of these three witnesses, his ability to prepare and present his defence is adequately protected.<sup>32</sup>

#### IV. ANALYSIS

15. The Appeals Chamber is not persuaded that Mr. Šešelj has established a discernible error in the Trial Chamber's exercise of its discretion when it granted to the Prosecution delayed disclosure of witnesses 30 days prior to their appearance in court. The Appeals Chamber does not accept the arguments of Mr. Šešelj that Rule 69(C) must be interpreted as authorising delayed disclosure prior to the commencement of the opening of the trial only. The purpose of Rule 69(C) is to allow a Trial Chamber to grant those protective measures that are necessary to protect the integrity of its victims and witnesses, subject to the caveat that such measures are consistent with the right of the accused to have adequate time for the preparation of his defence. There is no rule that the rights of the defence to have adequate time for preparation mandate that delayed disclosure be granted only with reference to the beginning of the trial. The matter rather falls under the discretion of the Trial Chamber.

16. The Appeals Chamber is also not persuaded that Mr. Šešelj's right to prepare his defence is hindered by the delayed disclosure of the identity of a limited number of Prosecution witnesses during the conduct of the trial. The Prosecution in this case intends to present the evidence of more than one hundred witnesses. Out of these witnesses, only eight were granted delayed disclosure until 30 days prior to them giving evidence.<sup>33</sup> Currently, the identity of three of those witnesses remains undisclosed. While Mr. Šešelj will be expected to prepare for the evidence of these witnesses during the course of the trial, he has not shown that this impinges on his right to a fair defence. Indeed, the Appeals Chamber is satisfied that the trial schedule will allow Mr. Šešelj ample opportunity to prepare an effective defence with respect to those witnesses whose disclosure

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<sup>31</sup> *Ibid.*, para. 17.

<sup>32</sup> *Ibid.*, paras 18-19.

<sup>33</sup> *Ibid.*, para. 9.


has been delayed. Consequently, he has failed to establish that the Trial Chamber erred in the exercise of its discretion in granting the delayed disclosure to certain of the Prosecution witnesses.

**V. DISPOSITION**

17. In light of the foregoing, the Appeal is **DISMISSED**.

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

Done this 24th day of January 2008,  
At The Hague,  
The Netherlands.

  
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Fausto Pocar  
Presiding Judge

**[Seal of the Tribunal]**