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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-AR72.1

Date: 29 July 2004

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Theodor Meron, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney

Registrar: **Mr. Hans Holthuis**

Decision of: **29 July 2004**

THE PROSECUTOR

v.

Vojislav ŠEŠELJ

DECISION ON VALIDITY OF APPEAL OF VOJISLAV ŠEŠELJ CHALLENGING JURISDICTION AND FORM OF INDICTMENT

Counsel for the Prosecutor:
Ms. Hildegaard Uertz-Retzlaff
Mr. Daniel Saxon

The Accused:
Mr. Vojislav Šešelj

Standby Counsel:
Mr. Tjaco Eduard van der Spoel

1. The Bench is seised of "The Prosecution's Appeal from 'Decision on Motion by Vojislav Šešelj Challenging Jurisdiction and Form of Indictment'" filed by the Prosecution on 18 June 2004 ("Appeal"). The Appeal takes issue with Trial Chamber II's decision dated 26 May 2004, which held that the Prosecution failed to plead whether a state of armed conflict existed in Vojvodina, Serbia, when it charged the Accused with crimes against humanity pursuant to Article 5 of the Statute of the International Criminal Tribunal for the Former Yugoslavia ("Statute") in its initial indictment dated 14 February 2003 ("Impugned Decision"). Because of the jurisdictional requirement under Article 5 of the Statute, the Prosecution must establish that the crimes against humanity alleged were committed in an armed conflict, whether international or internal in character. The Impugned Decision thus ordered the Prosecution to, among other things, "clarify the ambiguity in the pleadings (and the allegations and the charges or parts of charges thereon) in relation to Vojvodina and the issue of armed conflict."[1] The Impugned Decision further held that if the Prosecution chooses not to plead the existence of an armed conflict in Vojvodina, then all charges relating to the Vojvodina will have to be expunged from the indictment.[2]

2. The Appeal purports to proceed as an interlocutory appeal as of right under Rule 72(B)(i) of the Rules of Procedure and Evidence of the International Tribunal ("Rules"), which states that preliminary motions are without interlocutory appeal, except "in the case of motions challenging jurisdiction."[3] Rule 72(D) of the Rules expands on this provision by stating that, for purposes of Rule 72(B)(i) of the Rules, a "motion challenging jurisdiction refers exclusively to a motion which challenges an indictment on the ground that it does not relate to" the personal, territorial or temporal jurisdiction of the Tribunal, or to any of the violations enumerated in Articles 2, 3, 4, 5 and 7 of the Statute.

3. Under the relevant Practice Directions, the Prosecution's "Reply to Vojislav Šešelj's Motion in Rebuttal to Prosecution's Appeal from the Decision on Motion by Vojislav Šešelj Challenging Jurisdiction and Form of Indictment" ("Reply") was due on or before 12 July 2004.[4] Although the Reply is dated 12 July 2004, it was not filed until 19 July 2004 and no explanation or showing of good cause has been offered. The Reply is, therefore, out of time and will not be considered.

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[1] Impugned Decision, para. 39.
[2] Ibid., para. 40.
[3] Rule 72(B)(i).
[4] Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal (IT/155/Rev. 1), 7 March 2002, para. II.3.

4. This Bench must determine, pursuant to Rule 72(E) of the Rules, whether the Appeal is "capable of satisfying the requirements" of Rule 72(D) of the Rules; if it is not, the Appeal must be dismissed.

5. The Prosecution maintains that the Appeal may proceed as of right because the Accused's underlying motion challenged the indictment for lack of subject-matter jurisdiction. Specifically, the Accused argued, and the Trial Chamber found, that charges relating to Vojvodina could only be retained if the Prosecution pled the existence of an armed conflict in Vojvodina. This conclusion rested on the Trial Chamber's interpretation of the scope of the subject-matter jurisdiction conferred by Article 5 of the Statute.[5] In its Appeal, the Prosecution argues that the Trial Chamber's interpretation of Article 5 of the Statute was incorrect and unduly narrow.

6. The Accused does not argue that the Prosecution's Appeal does not meet the requirements of Rule 72(D) of the Rules.[6]

7. The decisions of the Appeals Chamber, as well as the decisions of the Appeals Chamber of the International Criminal Tribunal for Rwanda under an identical provision of that Tribunal's Rules of Procedure and Evidence, make clear that an appeal concerning an issue whether a charge in an indictment falls within a statutory grant of jurisdiction meets the requirements of Rule 72(D) of the Rules and may proceed.[7] This Appeal satisfies the requirements of Rule 72(D)(iv) of the Rules and may therefore proceed.

8. For the foregoing reasons, the Bench **DECLARES** that the Appeal is validly filed.

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

Done this 29th of July 2004,
At The Hague,
The Netherlands.

Judge Theodor Meron
Presiding

[Seal of the Tribunal]

[5] Impugned Decision, para. 39.
[6] Motion. No 38, 8 July 2004.
[7] *See e.g. Prosecutor v. Hadžihasanović et al.*, No. IT-01-47-AR72, Decision Pursuant to Rule 72(E) as to Validity of Appeal, 21 February 2003; *Prosecutor v. Milutinović et al.*, No. IT-99-37-AR72, Decision Pursuant to Rule 72(E) as to Validity of Appeal, 25 March 2003; Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, 21 May 2003; *Prosecutor v. Rwamakuba*, No. ICTR-98-44-AR72.4, Decision on Validity of Appeal of André Rwamakuba Against Decision Regarding Application of Joint Criminal Enterprise to the Crime of Genocide Pursuant to Rule 72(E) of the Rules of Procedure and Evidence, 23 July 2004.