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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: 31 August 2004
Original: English

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Fausto Pocar
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Inés Mónica Weinberg de Roca

Registrar: Mr. Hans Holthuis

Decision of: 31 August 2004

THE PROSECUTOR

v.

Vojislav ŠEŠELJ

**DECISION ON THE INTERLOCUTORY APPEAL CONCERNING
JURISDICTION**

Counsel for the Prosecutor:

Ms. Hildegaard Uertz-Retzlaff
Mr. Daniel Saxon

The Accused:

Mr. Vojislav Šešelj

Standby Counsel:

Mr. Aleksandar Lazarević

Case No.: IT-03-67-AR72.1

31 August 2004

1. The Prosecution filed this appeal against a decision of the Trial Chamber upholding part of the accused Vojislav Šešelj's (Šešelj) challenge to jurisdiction and the form of the indictment.¹ On 29 July 2004, a bench of three Judges of the Appeals Chamber issued a decision holding that the appeal met the requirement of Rule 72 (A) and that an appeal therefore lay as of right.

2. On appeal the Prosecution argues that the Trial Chamber erred in law in holding that the jurisdiction of the Tribunal over crimes against humanity alleged to have occurred in Vojvodina, Republic of Serbia, was conditional on the existence of an armed conflict in Vojvodina.² The Prosecution claims that the Trial Chamber's error of law resulted from an incorrect interpretation of the phrase "committed in armed conflict" in Article 5 of the Statute of the Tribunal.³

3. In its indictment against Šešelj the Prosecution pleaded as follows: "At all times relevant to this indictment a state of armed conflict existed in Croatia and Bosnia and Herzegovina. A nexus existed between this state of armed conflict and the alleged crimes in Croatia, Bosnia and Herzegovina, and parts of Vojvodina, Serbia". In the Impugned Decision the Trial Chamber held that criminal liability under Article 5 for acts alleged by the Prosecution is dependent on the existence of an armed conflict in Vojvodina at the time. The Trial Chamber ordered the Prosecution to clarify its pleading to state whether an armed conflict existed in Vojvodina and held: "If the Prosecution decides not to plead the existence of an armed conflict in Vojvodina then, as a consequence, all charges relating to Vojvodina will have to be deleted from the indictment. If the Prosecution insists on keeping these charges, the existence of an armed conflict at the time the crimes were allegedly committed has to be pleaded."⁴ The Trial Chamber gave no further reasons for its holding.

4. On Appeal the Prosecution claims that the Trial Chamber committed the following errors of law:

a) The Trial Chamber applied an incorrect and unduly narrow standard for the jurisdictional elements of charges alleged under Article 5 of the Statute.

¹ Prosecution's Appeal From The "Decision on Motion By Vojislav Šešelj Challenging Jurisdiction and Form of Indictment", 18 June 2004 ("Appeal Brief").

² Appeal Brief, par 1.

³ *Ibid*, par 3.

⁴ Decision on Motion by Vojislav Šešelj Challenging Jurisdiction and Form of Indictment, 3 June 2004 ("Impugned Decision"), pars 39-40.

b) The words “committed in armed conflict” in Article 5 of the Statute have two possible legal interpretations, both of which are broader than the interpretation expressed by the Trial Chamber. In its broadest sense, the phrase “committed in armed conflict” simply means during a period of hostilities on the territory of the former Yugoslavia. Alternatively, the phrase “committed in armed conflict” means nothing more than the crimes were committed somewhere in the territory of a party to a conflict in the former Yugoslavia during the time the conflict was ongoing.

c) Because the Trial Chamber applied an incorrect and unduly narrow standard for the jurisdictional elements of the charge alleged under Article 5 of the Statute, the Trial Chamber erred when it held that Article 5 may apply to crimes alleged to have occurred in Vojvodina only if, at the relevant time, an armed conflict existed in Vojvodina. The Trial Chamber further erred in directing the Prosecution to plead the existence of an armed conflict (meaning the existence of hostilities or fighting) in Vojvodina if the Prosecution intended to maintain Article 5 charges in respect of crimes committed in Vojvodina.⁵

5. The Prosecution claims that it is well established that there is no requirement in customary international law that crimes against humanity be committed in an armed conflict. Rather, the Prosecution contends, the existence of an armed conflict is a jurisdictional requirement imposed by the Tribunal’s Statute. As a jurisdictional requirement imposed by the Tribunal’s Statute, the issue on this appeal is one of statutory interpretation. In the *Tadić* Appeal Judgement, the Appeals Chamber held that this jurisdictional requirement was satisfied by showing that there was an armed conflict at the relevant time and place at which the offences were committed. There is no further requirement of a nexus between the acts of the accused and that armed conflict.⁶ In the *Kunarac* Appeal Judgement, the Appeals Chamber held that the Statute required “proof that there was an armed conflict and that objectively the acts of the accused are linked geographically and temporally with the armed conflict”.⁷ Upon the basis of these authorities, the Prosecution says all that needs to be established is whether an armed conflict existed at the relevant time and place.

6. To determine the meaning of the phrase “relevant time and place” the Prosecution claims that the starting point is the interpretative declarations of members of the United Nations Security Council at the time of the adoption of the Tribunal’s Statute. The Prosecution argues that, as the Appeals Chamber noted in the *Tadić* Jurisdiction Decision⁸, unchallenged interpretative declarations made by Security Council members can be regarded as authoritative interpretations of

⁵ Appeal Brief, par 12.

⁶ *Prosecutor v Tadić*, Case IT-94-1-A, 15 July 1999, pars 249-251.

⁷ *Prosecutor v Kunarac*, Case IT-96-23, IT-96-23/1-A, 12 June 2002, par 55.

⁸ *Prosecutor v Tadić*, Case IT-94-1-72, 2 October 1995, par 88.

the relevant provisions of the Statute.⁹ At the meeting of the Security Council held prior to the adoption of the Tribunal's Statute statements made by several of the members suggest that they understood Article 5 to apply to the acts enumerated in that Article when those acts were committed during a period of armed conflict on the territory of the former Yugoslavia within the context of a widespread or systematic attack against a civilian population.¹⁰ In light of the statements made at that meeting, the Prosecution argues the jurisdictional requirement of Article 5 should be interpreted to require proof that hostilities were ongoing in the territory of the former Yugoslavia at the time the Article 5 offences were committed, but not proof that an armed conflict was ongoing at the specific location where the Article 5 crimes were alleged to have occurred.¹¹

8. In the alternative, the Prosecution relies on the standard established in the *Tadić* Jurisdiction Decision, in which the Appeals Chamber stated that "the temporal and geographic scope of both internal and international armed conflicts extends beyond the exact time and place of the hostilities" and that "(i)nternational humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there".¹² The Prosecution argues that, while the Appeals Chamber did not specifically address the applicability of these same principles to Article 5, there is no basis for according a more restrictive interpretation to the term "armed conflict" in that Article.¹³ Applying this interpretation, the Prosecution claims that the pleading required for crimes against humanity under Article 5 is only that the crimes in question took place in armed conflict. The Prosecution argues that paragraph 12 of its indictment against Šešelj, which alleges the existence of a nexus between a state of armed conflict within the territory of the former Yugoslavia and the crimes against humanity in Croatia, Bosnia and Herzegovina and Vojvodina, more than satisfies the legal requirement.

9. In his reply, Šešelj argues five almost completely separate armed conflicts took place in the period subject to the temporal jurisdiction of the Tribunal. He argues that each of these conflicts took place independently of the others and there was no congruence between them in substance or timing.¹⁴ He claims that there was never an armed conflict in Vojvodina, nor was there any

⁹ Appeal Brief, par 20.

¹⁰ Provisional Verbatim Record of the 3, 217th Meeting UN Doc S/PV.3217 (25 May 1993).

¹¹ Appeal Brief, par 25.

¹² Appeal Brief, par 30.

¹³ Appeal Brief, par 32.

¹⁴ Appeal Brief, par 32.

territorial or temporal nexus between Vojvodina and any one of the armed conflicts that occurred in the territory of the former Yugoslavia.¹⁵ He says that the armed conflict in Croatia “ended in January 1992” following the implementation of the “Vance Plan” and that, because the Prosecution is unable to prove the existence of an armed conflict in Croatia in the period relevant to the alleged events in Vojvodina, it is “attempting to artificially create a nexus with the armed conflict in Bosnia and Herzegovina despite the fact that, at the time Bosnia and Herzegovina was an internationally recognised independent state with no concern at all for disputes between Serbia and Croatia unrelated to either its population or territory”.¹⁶ In conclusion, Šešelj also claims that “it is absolutely impossible to establish any objective geographical or temporal link between the alleged criminal acts committed in Vojvodina and the armed conflict”¹⁷ because at the relevant time, there was no armed conflict at all anywhere in Vojvodina, or in Serbia, or the entire Federal Republic of Yugoslavia.¹⁸

10. The arguments made by Šešelj in his response are factual issues that will be adjudicated by the Trial Chamber as the finder of fact. The only issue with which the Appeals Chamber is concerned is whether the Trial Chamber erred in its interpretation of the jurisdictional requirement of Article 5. This is a legal question that is logically prior to the factual question of whether, the legal scope of that requirement having been properly identified, the Prosecution can factually establish this jurisdictional requirement.

11. The Prosecution filed a reply to the response of Šešelj addressing the factual arguments made. In the Appeals Chamber decision confirming that the appeal could proceed as of right under Rule 72 of the Rules of Evidence of Procedure, the Appeals Chamber stated that it would not consider the reply of the Prosecution as the Registry date on the filing indicated that the document was filed 7 days out of time and the Prosecution had not requested an extension of time, nor given any explanation as to the lateness of the filing so as to show good cause. The Prosecution has now filed before this Appeals Chamber a motion requesting it to consider its reply in the appeal on the basis that there is good cause for the Appeals Chamber to do so.¹⁹ In its Motion the Prosecution explains that while its reply was filed with the Registry within time it is the practice of the Registry not to formally file documents in this case until those documents have been translated into the language of Šešelj. The Registry has verified that this is its practice and that the Prosecution motion was filed on time. It is unfortunate that the Appeals Chamber’s inquiries with the Registry did not

¹⁵ *Ibid.*, par 2.

¹⁶ *Ibid.*, par 3.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

lead to this explanation being given at that time. However, as the Appeals Chamber is now satisfied that the reply of the Prosecution was duly filed, the Prosecution's reply is considered in this appeal.

Analysis

12. The Appeals Chamber agrees that the issue on this appeal is one of statutory interpretation. As was stated by the Appeals Chamber in the *Tadić* Appeals Decision, the Statute of the Tribunal should be interpreted in light of its object and purpose.²⁰ Article 1 of the Tribunal's Statute defines the territorial and temporal jurisdiction of the Tribunal conferring "the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991". The object of the Security Council's establishment of the Tribunal, as stated in Security Council Resolution 808 (1993), is to bring to an end the reported widespread violations of international humanitarian law, bring to justice the persons responsible for those violations, and contribute to the restoration and maintenance of peace in the territory of the former Yugoslavia. In drafting Article 5 of the Tribunal's Statute and imposing the additional jurisdictional requirement that crimes against humanity be committed in armed conflict, the Security Council intended to limit the jurisdiction of the Tribunal to those crimes which had some connection to armed conflict in the former Yugoslavia. At the meeting of the Security Council at which the Tribunal's Statute was adopted, those members that addressed the scope of Article 5 of the Statute made clear their view that it encompassed widespread or systematic criminal acts committed against the civilian population on the territory of the former Yugoslavia during an armed conflict.²¹

13. As expressed in the jurisprudence of the Tribunal, the jurisdictional requirement of Article 5 requires the existence of an armed conflict at the time and place relevant to the indictment, but it does not mandate any material nexus between the acts of the accused and the armed conflict.²² While this interpretation itself offers little guidance on the meaning of "time and place relevant to the indictment", the Tribunal's jurisprudence on the application of Article 5 of the Statute points towards a broad interpretation. For example, there is no requirement that an attack directed against a civilian population be related to the armed conflict. As the Appeals Chamber in the *Tadić* Appeals Decision held: "The two – 'the attack on the civilian population' and the 'armed conflict' – must be separate notions, although of course under Article 5 of the Statute the attack on 'any

¹⁹ Prosecution's Explanation of Good Cause and Request for Consideration, 11 August 2004 ("Motion").

²⁰ *Prosecutor v Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction Case IT-94-1-AR72, 2 October 1995, par 88.

²¹ Provisional Verbatim Record of the Three Thousand Two Hundred and Seventeenth Meeting, 25 May 1993, S/PV. 3217, 25 May 1993.

²² *Kunarac* Appeals Judgment, par 83; *Tadić* Appeals Judgment, pars 249 and 251.


civilian population' may be part of an 'armed conflict'".²³ Likewise, the above mentioned *Tadić* Appeals Chambers interpretation of the application of international humanitarian law, of which Article 5 is a part, supports a broad interpretation of the jurisdictional requirement that a crime against humanity be committed in armed conflict.

14. The Appeals Chamber does not accept that the jurisdictional requirement of Article 5 requires the Prosecution to establish that an armed conflict existed within the State (or region) of the Former Yugoslavia in which the charged Article 5 crime is alleged to have been committed. There can be situations where an armed conflict is ongoing in one state and ethnic civilians of one of the warring sides, resident in another state, become victims of a widespread and systematic attack in response to that armed conflict. All that is required under Article 5 of the Statute is that the prosecution establish that an armed conflict is sufficiently related to the Article 5 crime with which the accused is charged. While, as previous jurisprudence of this Tribunal has held, there is no need for the Prosecution to establish a material nexus between the acts of the accused and the armed conflict, the Prosecution must establish a connection between the Article 5 crime itself and the armed conflict. Consistently with the object of the purpose of the Tribunal's Statute, the jurisdictional requirement that Article 5 crimes be committed in armed conflict requires the Prosecution to establish that a widespread or systematic attack against the civilian population was carried out while an armed conflict in Croatia and/or Bosnia and Herzegovina was in progress. Whether the Prosecution can establish this connection in this case with respect to crimes against humanity in Vojvodina is a question of fact to be determined at trial.

15. For the foregoing reasons the Prosecution's Appeal is allowed and the Trial Chamber's Impugned Decision is reversed.

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

Done this 31st day of August 2004,
At The Hague,
The Netherlands.


Judge Theodor Meron
Presiding

[Seal of the Tribunal]

²³ *Tadić* Appeal Judgement, par 251.