

IT-95-14/2-A  
D3249-D3242  
22 MAY 2002

3249 KB

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-95-14/2-A

Date: 22 May 2002

Original: English

**IN THE APPEALS CHAMBER**

**Before: Judge David Hunt, Pre-Appeal Judge**

**Registrar: Mr Hans Holthuis**

**Decision of: 22 May 2002**

**PROSECUTOR**

v

**Dario KORDIĆ & Mario ČERKEZ**

**DECISION ON DARIO KORDIĆ'S MOTION FOR LEAVE  
TO FILE A SUPPLEMENTARY REPLY**

**Office of the Prosecutor:**

**Mr Norman Farrell**

**Counsel for the Defence:**

**Mr Mitko Naumovski for Dario Kordić**

**Mr Božidar Kovačić and Mr Goran Mikuličić for Mario Čerkez**

1. The interlocutory steps taken by the parties in this appeal against conviction have unfortunately become complicated as a result of the failure by both appellants to identify with any clarity their grounds of appeal in their Appellant's Briefs. They were each ordered to file a document which identified clearly and concisely each and every one of the grounds of appeal upon which he relied.<sup>1</sup> That document was filed by appellant Dario Kordić ("Kordić") on 8 March 2002.<sup>2</sup> The prosecution objected to the filing on the ground that Kordić had included in it grounds of appeal which had not been raised previously, had only been raised in footnotes to the Appellant's Brief, or raised for the first time in the Appellant's Reply Brief.<sup>3</sup> Kordić was ordered to show cause why he should be permitted to add two of the grounds of appeal as new grounds of appeal,<sup>4</sup> and he was subsequently permitted to add one of those grounds (1-A).<sup>5</sup> The other ground (1-D) was further amended by him by deleting that part of the ground of appeal to which the prosecution had objected. The remainder of the ground was permitted on the basis that it no longer constituted a new ground of appeal.<sup>6</sup>

2. The other grounds of appeal in the document objected to by the prosecution were allowed but the prosecution was permitted to file a Supplementary Respondent's Brief to all material stated for the first time in those grounds, and in particular to the grounds identified as 1-F, 3-C, 3-F, 3-G and 5-B.<sup>7</sup> Kordić was directed to seek leave to file a Reply to that Respondent's Brief within seven days of that filing if he wished to do so. In the event that leave was sought, he was directed to identify with precision in that application the issue to which he wished to reply. It was made clear that he would only be permitted to reply to matters which went beyond those already raised in his Appellant's Brief and in the amended grounds of appeal.<sup>8</sup> The prosecution has now filed its Supplementary Respondent's Brief,<sup>9</sup> and Kordić seeks leave to file a Reply.<sup>10</sup> The prosecution has opposed leave being granted on

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<sup>1</sup> Order to File Amended Grounds of Appeal, 18 Feb 2002 ("Order"), p 3.

<sup>2</sup> Appellant Dario Kordić's Response to Order to File Amended Grounds of Appeal, 8 March 2002 ("Amended Grounds of Appeal").

<sup>3</sup> Prosecution's Consolidated Response to "Appellant Dario Kordić's Response to Order to File Amended Grounds of Appeal" and "Appellant Mario Čerkez's Brief Pursuant to 18 February 2002 Order to File Amended Grounds of Appeal", 22 Mar 2002 ("Consolidated Response").

<sup>4</sup> Decision on Prosecution Application re Amended Grounds of Appeal, 5 April 2002 ("Decision"), par 10(1).

<sup>5</sup> Decision Granting Leave to Dario Kordić to Amend his Grounds of Appeal, 9 May 2002, par 8.

<sup>6</sup> *Ibid*, par 2.

<sup>7</sup> Decision, par 10(3).

<sup>8</sup> Decision, par 19(4).

<sup>9</sup> Prosecution's Supplementary Respondent's Brief, 26 April 2002; Book of Authorities to the Prosecution's Supplementary Respondent's Brief, 26 April 2002.

<sup>10</sup> Appellant Dario Kordić's Motion for Leave to File a Reply to the 26 April 2002 Prosecution's "Supplementary Respondent's Brief", 3 May 2002 ("Motion").

the basis that none of the issues identified by Kordić warrants leave being granted.<sup>11</sup> Counsel for Kordić has indicated orally that he does not wish to file a reply in relation to the present Motion.

3. In its Supplementary Respondent's Brief, the prosecution has discussed only the grounds identified as 1-F, 3-C, 3-F, 3-G and 5-B.<sup>12</sup> In relation to the responses made to each ground, Kordić asserts that the prosecution "chiefly repeats prior arguments",<sup>13</sup> however he says that the Supplementary Respondent's Brief also "contains an extensive discussion of many issues not raised in his Appellant's Brief or his Amended Grounds of Appeal".<sup>14</sup> He seeks leave to reply to a number of issues, which he identifies as:

- (a) whether the Supplementary Respondent's Brief has, as to each ground of appeal, properly characterised the ground of appeal and the supporting arguments raised by Kordić in his Appellant's Brief and his Amended Grounds of Appeal;
- (b) whether Kordić is barred procedurally from raising Ground of Appeal 1-F in his final appeal;
- (c) whether Kordić has spelt out his arguments on each ground of appeal in sufficient detail in his Appellant's Brief and in his Amended Grounds of Appeal; and
- (d) whether Kordić has properly identified how the Judgment of the Trial Chamber is in error and must be reversed as a result of his arguments on each ground of appeal;<sup>15</sup>

4. None of these matters, except for issue (b), identifies with precision the issue to which Kordić wishes to reply, and none of them, except for issue (b), relates to issues raised in the Supplementary Respondent's Brief which go beyond issues raised in the Appellant's Brief. Indeed, Kordić concedes with respect to three of the grounds of appeal, 1-F, 3-C and 3-F, that the prosecution "makes no arguments that go beyond the issues" raised in his Appellant's Brief or his Amended Grounds of Appeal.<sup>16</sup> The remaining issues are argumentative matters relating to the detail of the grounds of appeal he has identified in his Amended Grounds of Appeal. Kordić has now had more than sufficient opportunity to correct the errors in his Appellant's Brief which led to the order that he file a document which identified clearly and

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<sup>11</sup> Prosecution Response to Appellant Kordić's Motion for Leave to File a Reply to the 26 April 2002 Prosecution's Supplementary Respondent's Brief, 13 May 2002 ("Response"), par 19.

<sup>12</sup> Prosecution's Supplementary Respondent's Brief, par 2.

<sup>13</sup> Motion, par 4.

<sup>14</sup> Motion, par 6(a).

<sup>15</sup> Motion, par 6(a)-(d).

<sup>16</sup> Motion, pars 7-10.

concisely each and every one of his grounds of appeal, and he should not be given yet another opportunity to state his grounds of appeal properly. It is time that the preparation for the hearing of the appeal proceeded.

5. Kordić says that he will not pursue the other issue – issue (b): whether he is procedurally barred from raising Amended Ground of Appeal 1-F in his final appeal – if his request to reply to the broader matters is not granted, “because of the restrictions imposed by paragraph 10(4)” of the Decision.<sup>17</sup> Those restriction merely impose upon Kordić an obligation to abide by the usual limits placed upon any right of reply to address only those issues that have been raised for the first time by a respondent.<sup>18</sup> However, issue (b) is not, as Kordić appears to assume, an argumentative issue falling within the same category as those other issues identified above, and it is not an issue which had been raised previously by either of the parties. In identifying this issue, however, Kordić has misconstrued the nature of the response made by the prosecution.

6. In his Amended Ground of Appeal 1-F, Kordić asserts an error on the part of the Trial Chamber in refusing his motion for an acquittal. The prosecution’s response to that ground is that “the more appropriate stage to attack the legal consequences” of the decision on the motion for acquittal would have been to seek leave to appeal during the trial, and that on appeal after judgment “the issue becomes whether the decision by the Trial Chamber invalidated the verdict or caused a miscarriage of justice”.<sup>19</sup> The prosecution does *not* assert that Kordić is “barred procedurally from raising” the ground on appeal. To make it absolutely clear, Kordić is entitled to complain in this appeal that the Trial Chamber was in error in rejecting his motion for acquittal, but the specific issue raised by such a complaint is whether such an error, if error it be, has led to a miscarriage of justice. It is not simply whether an error was made. Notwithstanding the concession made by Kordić to the contrary, this *is* a new issue, and Kordić should be granted leave to reply to that issue as it has now been identified.

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<sup>17</sup> Motion, par 8.

<sup>18</sup> *Prosecutor v Brđanin*, IT-99-36-PT, Further Decision on Petition for a Writ of Habeas Corpus on Behalf of Radoslav Brđanin, 9 Dec 1999, p 2; *Prosecutor v Brđanin & Talić*, IT-99-36-PT, Decision on Motions by Momir Talić (1) to Dismiss the Indictment, (2) for Release, and (3) for Leave to Reply to Response of Prosecution to Motion for Release, 1 Feb 2000, par 17; Decision on Filing of Replies, 7 June 2000, par 1.

<sup>19</sup> Supplementary Respondent’s Brief, pars 7-8.

7. Amended Ground of Appeal 3-G is pleaded by Kordić as “[t]he Trial Chamber committed an error of law invalidating the Judgement by convicting Kordić of Article 5 offences without a predicate finding that there was a state policy or plan”.<sup>20</sup> Prior to the filing of his amended grounds of appeal, this argument was made only in a footnote in the Appellant’s Brief. No further reference was made to it in any of the Briefs filed by Kordić. The new issue identified by Kordić in relation to this ground on which he seeks leave to reply is “the new authorities and discussions” submitted by the prosecution concerning the “state policy or plan issue”.<sup>21</sup>

8. In its Supplementary Respondent’s Brief, the prosecution has recited a number of decisions as the established jurisprudence of the Tribunal in order to refute Kordić’s ground of appeal that Article 5 offences require a plan, or that such a plan must be formulated by a State.<sup>22</sup> It also refers to the jurisprudence of the World War II cases,<sup>23</sup> the relevant International Law Commission (“ILC”) Commentary,<sup>24</sup> and the ICC Statute in support of its argument.<sup>25</sup> It has filed with its Supplementary Respondent’s Brief a book of authorities containing documents relevant to its reliance upon the ILC and the ICC Statute.<sup>26</sup> The Respondent’s Brief does not, however, raise any new issues by those decisions or documents. The Brief merely responds to the issue now stated by Kordić in his Amended Ground of Appeal 3-G. The time for Kordić to have dealt with these authorities was in his Appellant’s Brief when he put forward a proposition which appears to be in opposition to the current jurisprudence of the Tribunal, at least at Trial Chamber level.

9. The failure of an appellant to state in his Appellant’s Brief the arguments in support of his ground of appeal adequately cannot be cured by permitting him to make those arguments for the first time by way of reply. Accordingly, Kordić is refused leave to file a reply to this ground of appeal. The Tribunal does not, however, exist to punish parties for the apparent inability or the failure of their counsel to comply with their basic obligation to identify in their Appellant’s Brief the arguments in support of their grounds of appeal. As

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<sup>20</sup> Amended Grounds of Appeal, p 7.

<sup>21</sup> Motion, par 11.

<sup>22</sup> Supplementary Respondent’s Brief, pars 42-62.

<sup>23</sup> *Ibid*, par 50,

<sup>24</sup> *Ibid*, par 51.

<sup>25</sup> *Ibid*, par 53.

<sup>26</sup> Book of Authorities to the Prosecution’s Supplementary Respondent’s Brief, filed on 26 Apr 2002 (“Book of Authorities”), documents 1-3.

Kordić has been required to identify with clarity the grounds of appeal upon which he relies, there can be no relevant prejudice to the prosecution if he is also granted leave to do what he should have done before, and that is to identify the arguments as to why the Tribunal's current jurisprudence upon this issue should not be accepted. He should therefore be granted leave to supplement his Appellant's Brief accordingly. The prosecution will have the right to file a Respondent's Brief to any such Supplementary Appellant's Brief if it believes that it is necessary to do so – but, as his counsel is apparently unaware of what is permitted by way of reply, a Reply to such a Respondent's Brief may be filed by Kordić only by leave.

10. The final Amended Ground of Appeal to which Kordić seeks leave to file a reply is Amended Ground of Appeal 5-B. This ground of appeal alleges that the Trial Chamber erred in law and fact by finding that there was an “international armed conflict” in Central Bosnia and erred in law in concluding that conviction under common Article 3 of the Geneva Conventions did not require such a finding.<sup>27</sup> He seeks leave to reply to the arguments made by the prosecution about the impact of decisions of the Tribunal, the United Nations General Assembly Resolution 2675, and what is described as a “new document” filed with the Supplementary Respondent's Brief.

11. To the extent that Kordić seeks leave to reply to arguments made by reference to the jurisprudence of the Tribunal, leave is denied for the same reasons given in relation to the Amended Ground of Appeal 3-G, but leave is granted to Kordić to supplement his Appellant's Brief to put forward any arguments which he may have as to why the Tribunal's current jurisprudence upon this second issue should not be followed. As that jurisprudence includes decisions of the Appeals Chamber,<sup>28</sup> Kordić must keep in mind the binding nature of those decisions.<sup>29</sup> With respect to the United Nations General Assembly Resolution 2675, the prosecution purports to rely upon that document only in the context of the *Tadić* Jurisdiction Appeal Decision<sup>30</sup>, and not as an independent source. It therefore raises no new issue and leave to reply in relation to it is refused. The matter may, however, be addressed in the oral argument if it is necessary to do so.

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<sup>27</sup> Amended Grounds of Appeal, p 10.

<sup>28</sup> *Prosecutor v Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct 1995, par 137; *Prosecutor v Delalić et al*, IT-96-21-A, Judgment, 20 Feb 2001 (“*Čelebići* Judgment”), par 147.

<sup>29</sup> *Prosecutor v Aleksovski*, IT-95-14/1-A, 24 Mar 2000, par 107; *Čelebići* Judgment, par 8.

<sup>30</sup> *Prosecutor v Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct 1995, par 111.

12. This leaves for consideration what is described as a “new document” filed with the prosecution’s Supplementary Respondent’s Brief.<sup>31</sup> This is the “declaration of succession” deposited by Bosnia and Herzegovina on 31 December 1992 with the Swiss Federal Council in its capacity as depository of the 1949 Geneva Conventions. In its Supplementary Response, the prosecution concedes that this document does not form part of the trial record and in that sense it could be considered “new”. It says that judicial notice of this document was taken by the Appeals Chamber in the *Čelebići* Judgment,<sup>32</sup> and that it does not relate to any issue in dispute. It requests, if necessary, that the Appeals Chamber take judicial notice of this document.<sup>33</sup> However, it admits that the “indisputable existence” of this document could provide a basis for a reply.

13. The judicial notice taken of the declaration of succession by the Appeals Chamber in the *Čelebići* Judgment does not exclude the obligation of this Appeals Chamber to hear the views of the opposing party in the present case. As such, the “new authority” filed by the prosecution with its Supplementary Respondent’s Brief *does* raise a new issue. Kordić is granted leave to file a reply in relation to the prosecution’s request that the Appeals Chamber take judicial notice of this document and to the prosecution’s argument based upon it.

### Disposition

14. For the foregoing reasons, the following orders are made:
1. Kordić is granted leave to file a Reply to the Supplementary Respondent’s Brief filed by the prosecution in relation to the issues:
    - (a) whether the rejection by the Trial Chamber of his motion for acquittal caused a miscarriage of justice (par 6);
    - (b) whether judicial notice should be taken of the declaration of succession deposited by Bosnia and Herzegovina (par 13); and
    - (c) the argument which the prosecution has based upon that declaration of succession (par 13).
  2. Kordić is granted leave to supplement his Appellant’s Brief in relation to the issues:

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<sup>31</sup> Book of Authorities, document 4.

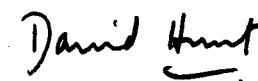
<sup>32</sup> *Čelebići* Judgment, pars 109-110.

<sup>33</sup> Response, par 16.

- (a) whether the Tribunal's jurisprudence concerning the need for the prosecution to establish the existence of a plan, or of a plan formulated by a State, in relation to offences under Article 5 of the Tribunal's Statute should be accepted (par 9); and
  - (b) whether the Tribunal's jurisprudence concerning the need for the prosecution to establish an international armed conflict in relation to offences under common Article 3 of the Geneva Conventions (prosecuted pursuant to Article 3 of the Tribunal's Statute) should be followed (par 11).
3. Any Reply to the Supplementary Respondent's Brief filed by the prosecution and any supplement to the Appellant's Brief permitted by this Decision must be filed by Kordić within twenty-one days of this Decision.
4. Any Respondent's Brief to such Supplementary Appellant's Brief must be filed within fourteen days of the Supplementary Appellant's Brief being filed.
5. No Reply to such Respondent's Brief will be permitted without leave. Leave to file such a Reply must be sought within seven days of the Respondent's Brief being filed, and the application for leave must identify with precision the issues raised in such Respondent's Brief which go beyond what was raised in the Supplementary Appellant's Brief and to which leave to reply is sought.

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

Dated this 22<sup>nd</sup> day of May 2002,  
At The Hague,  
The Netherlands.



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Judge David Hunt  
Pre-Appeal Judge

**[Seal of the Tribunal]**