



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-98-30/1-A

Date: 14 June 2002

Original: English

IN THE APPEALS CHAMBER

Before: Judge David Hunt, Pre-Appeal Judge

Registrar: Mr Hans Holthuis

Decision of: 14 June 2002

PROSECUTOR

v

Miroslav KVOČKA, Mlađo RADIĆ, Zoran ŽIGIĆ & Dragoljub PRCAĆ

**DECISION ON PROSECUTION MOTION REQUESTING
ORDER TO ZORAN ŽIGIĆ TO FILE GROUNDS OF APPEAL**

Counsel for the Prosecutor:

Mr Christopher Staker

Counsel for the Defence:

**Mr Krstan Simić for Miroslav Kvočka
Mr Toma Fila for Mlađo Radić
Mr Slobodan Stojanović for Zoran Žigić
Mr Jovan Simić for Dragoljub Prcać**

1. The prosecution has sought an order that the appellant Zoran Žigić (“Žigić”) file a notice setting out “his precise grounds of appeal”.¹ Before determining whether the prosecution Motion should succeed, it is necessary to refer to the position of Žigić, as a convicted person in a pending appeal, in relation to amendments made to the Rules of Procedure and Evidence (“Rules”) after he filed his Notice of Appeal and in relation to a Practice Direction published subsequently.

2. At the time when Žigić filed his Notice of Appeal on 16 November last, the Rules did not require an appellant to identify his grounds of appeal until he filed his Appellant’s Brief.² Since then, however, Rule 108 has been amended to require an appellant to identify his grounds of appeal in his Notice of Appeal. Where a Notice of Appeal was filed before the amendment to Rule 108, the obligation to specify the grounds of appeal in the Appellant’s Brief remains necessarily implicit in the formal requirement laid down in a Practice Direction that an Appellant’s Brief contain “the arguments in support of each ground of appeal”.³

3. The first response by Žigić to the Motion is an assertion that he is not bound by the Practice Direction which imposed that formal requirement, as it was published after he had filed his Notice of Appeal and, by analogy to Rule 6(D), the Direction prejudices his rights as a convicted person in a pending appeal.⁴ Rule 6(D) provides:

An amendment [to the Rules of Procedure and Evidence] shall enter into force seven days after the date of issue of an official Tribunal document containing the amendment, but shall not operate to prejudice the rights of the accused or of a convicted or acquitted person in any pending case.

It is not immediately clear, and Žigić has failed to demonstrate, how the imposition of an obligation to identify grounds of appeal in the Notice of Appeal rather than in the Appellant’s Brief could possibly be regarded as prejudicing the rights of an appellant. An appellant bears the onus of persuading the Appeals Chamber that his appeal should succeed. He must therefore reveal his grounds of appeal at some stage before the hearing of his appeal. It is not the obligation of the Appeals Chamber to find those grounds of appeal for him. The disadvantage resulting from an appellant’s failure to identify those grounds of appeal with clarity is suffered

¹ Prosecution Motion Requesting Statement of Grounds of Appeal, 24 May 2002 (“Motion”), par 1.

² Rule 108 prescribed no formal requirements for a Notice of Appeal, but Rule 111 required the appellant to set out his grounds of appeal in his Appellant’s Brief.

³ Practice Direction on Formal Requirements for Appeal from Judgment (IT/201), 7 Mar 2002 (“Practice Direction”), par 4(b).

⁴ Response to Prosecution Motion Requesting Statement of Grounds of Appeal – Defence for Zoran Žigić, 30 May 2002 (“Response”), par 3.

not only by the prosecution but by the appellant himself for, unless there is an adequate identification of his grounds of appeal, the Appeals Chamber may well overlook an argument upon which his appeal could succeed. The amendment to Rule 108 to require an appellant to identify his grounds of appeal in his Notice of Appeal was to enable the Appeals Chamber to understand from the outset just what the issues are to be in the appeal. This was considered necessary to ensure that the inevitable stream of interlocutory motions which precede the hearing of an appeal can be dealt with on a properly informed basis.⁵

4. In any case, a Practice Direction is not a rule of procedure and evidence, and the analogy drawn by Žigić from Rule 6(D) is not a sound one. In the absence of any indication to the contrary, the intention of a Practice Direction is ordinarily to control matters of practice taking place after the Direction has been published as an official Tribunal document. It is, however, unnecessary in the present case to pursue this issue because, if the Practice Direction is inapplicable to him (as Žigić asserts), the Rules as they stood at the time when Žigić filed his Notice of Appeal must continue to apply by virtue of the same Rule 6(D) upon which he relies for that assertion. At that time, Rule 111 required an appellant to file an Appellant's Brief "setting out the grounds of appeal [...]". This argument of Žigić that he was not obliged to identify his grounds of appeal is rejected.

5. The second response by Žigić to the Motion is that his Appellant's Brief does in any event identify his grounds of appeal,⁶ insofar as the expression "grounds of appeal" is defined in Article 25 of the Tribunal's Statute.⁷ Article 25.1 ("Appellate proceedings") provides:

1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chamber or from the Prosecutor on the following grounds:
 - (a) an error on a question of law invalidating the decision; or
 - (b) an error of fact which has occasioned a miscarriage of justice.

The reliance by Žigić upon Article 25 is misplaced. That Article defines the *jurisdiction* of the Appeals Chamber. It is to determine whether there has been an error on –

- (a) a question of law where that ruling invalidates the decision, or
- (b) an error of fact where that finding has occasioned a miscarriage of justice,

⁵ *Prosecutor v Kordić & Čerkez*, IT-95-14/2-A, Decision on Second Motions to Extend Time for Filing Appellant's Briefs, 2 July 2001, par 14.

⁶ Response, par 5.

⁷ *Ibid*, par 6.

thus limiting that jurisdiction to appeals *stricto sensu*. A rehearing or a trial *de novo* is excluded. Article 25 does *not* define grounds of appeal for the purposes of the Rules or the Practice Direction.

6. A ground of appeal in an appeal from a judgment is not sufficiently identified by referring to a ruling of law made by the Trial Chamber and by describing it merely as an error which invalidated the judgment, or to a finding of fact made by the Trial Chamber and by describing it merely as an error which has occasioned a miscarriage of justice. A ground of appeal must identify what is alleged to be the error made by the Trial Chamber in its judgment (or in a decision given or an order made during the course of the trial).⁸ The Appeals Chamber cannot be expected to give detailed consideration to submissions of the parties if they are obscure, contradictory or vague, or if they suffer from other formal and obvious insufficiencies.⁹ The appellant should state, in succinct terms, the particular proposition which he seeks to argue by reference to the ruling or finding challenged, and which provides the causal link between the alleged error of law and the invalidity of the decision or between the alleged error of fact and a miscarriage of justice.¹⁰

7. Three different examples, which deal with hypothetical procedural, factual and legal errors, and which are not intended to relate to the present case, may illustrate what would be acceptable as a ground of appeal:

- (i) By rejecting the appellant's application to cross-examine prosecution witness X, the Trial Chamber denied the appellant a fair trial.
- (ii) The Trial Chamber's finding that the appellant personally participated in the killing of Y was solely dependent upon the evidence of prosecution witness Z, whose evidence was demonstrated at the trial to be unreliable. It is therefore a conclusion which no reasonable tribunal of fact could have reached.
- (iii) In relation to the charge of persecution under Article 5(h) of the Tribunal's Statute, the Trial Chamber ruled that, if the prosecution established that the appellant's act was intended by him to discriminate against the victim on one of the listed grounds, it was unnecessary for the prosecution to establish also that his act did in fact discriminate against the victim. This ruling was contrary to the jurisprudence of the Tribunal, as laid down by the Trial Chamber's Judgment in *Prosecutor v Tadić*. As the prosecution had not

⁸ *Prosecutor v Kupreskić*, IT-95-16-A, Appeal Judgment, 23 Oct 2001 ("*Kupreskić* Appeal Judgment"), par 27.

⁹ *Prosecutor v Kayishema & Ruzindana*, ICTR-95-1-A, Reasons for Judgment, 1 June 2002, par 137; *Prosecutor v Kunarac et al*, IT-96-23 & 23/1A, Judgment, 12 June 2002, par 43.

¹⁰ *Prosecutor v Kordić & Čerkez*, Order to File Amended Grounds of Appeal, 18 Feb 2002, p 3.

established that the act of the appellant did in fact discriminate against the victim, the ruling denied the appellant an acquittal on that charge.

It is also necessary in relation to each ground of appeal to identify (a) the ruling or the finding challenged with specific reference to the page and paragraph numbers in the judgment, or the filing date and/or transcript page of any other decision or order, and (b) the precise relief sought in the event that the ground of appeal is upheld. Although these two additional requirements were stated expressly in the Rules and in the Practice Direction for the first time after the present appeal commenced, such requirements have always existed within the practice of the Tribunal and they are applicable to the grounds of appeal to be identified in the present appeal.

8. The prosecution has stated orally to the Appeals Chamber that it does not intend to file a reply to the Response filed by Žigić. It does not therefore controvert the assertion by Žigić that his Appellant's Brief does sufficiently identify his grounds of appeal,¹¹ although its attitude that the Brief does not do so was baldly stated without elaboration in the Motion. In that Response, Žigić identified his grounds of appeal by reference to any mention in his Appellant's Brief of Article 25 of the Statute,¹² and also by reference to other paragraphs of that Brief where, he says, his grounds of appeal are "described on [*sic*] another but yet very discernible way".¹³ These are not intended by Žigić to be comprehensive references, and he adds, moreover, that "the grounds of appeal are almost always interwoven".¹⁴ His counsel concludes with the offer to explain his procedure to the prosecution.¹⁵

9. It is regrettable that the prosecution has not answered this Response by directing the Appeals Chamber's attention to the particular difficulties it has had with the form of the Appellant's Brief. That was done by the prosecution in support of its first successful complaint about the form of such a Brief.¹⁶ Its failure to do so in this case could suggest that its complaint is perhaps based more upon the absence of form rather than of substance. It is, of course, very obvious that counsel for Žigić has misunderstood what is meant by the phrase "ground of appeal", and that he is unfamiliar with the Tribunal's practice in relation to appeals. It is also very obvious that he has not produced a numbered series of grounds of appeal, with all of the

¹¹ Response, par 5.

¹² *Ibid*, par 6.

¹³ *Ibid*, par 7.

¹⁴ *Ibid*, par 11.

¹⁵ *Ibid*, par 12.

¹⁶ That was in *Prosecutor v Kordić & Čerkez (supra)*.

detail required by that practice. But the prosecution should not adopt an over-fastidious approach to the form of the grounds of appeal merely because the form is defective, where the appellant has in fact identified his grounds of appeal in a tolerably clear way. The Appeals Chamber does not exist to punish parties for the apparent inability or failure of their counsel to act in accordance with the Rules where no disadvantage has been caused.¹⁷ The prosecution is expected to point to the difficulties which it has with the Brief, rather than merely rely upon the absence of form. It is also regrettable that the prosecution has not accepted the offer made by counsel for Žigić to explain to it the form of his Brief. Counsel for the parties are expected to talk to each other to resolve problems before rushing in with motions which may become unnecessary.¹⁸

10. An example of how a poorly expressed ground of appeal, which does not comply with the Tribunal's requirements, could have been cured of its manifold defects after a discussion between counsel is to be found in par 18 of the Appellant's Brief.¹⁹ After a long and rambling series of generalities in the previous paragraphs, the appellant says:

However, there is no "correct" decision without well reasoned opinion which is the result of comprehensive and rational deliberation taking into account *all* the evidence presented to the court. Trial *per se* includes this procedure and its absence, again *per se*, constitutes both principal error on fact and gross error on a question of law, which most certainly meets requirements under Article 25 of the Statute.

It is tolerably clear that the appellant is here complaining that the Trial Chamber failed to provide a reasoned opinion for its rulings of law and findings of fact in accordance with Article 23.2 of the Statute, and that its failure to do so has rendered the trial unfair. That is a respectable proposition to assert in a ground of appeal.²⁰ Whether or not it will succeed remains to be seen. What is missing from par 18 is any identification of the rulings and findings which are said to be in error and the nature of the error alleged to have been made. Despite the somewhat extraordinary claim made in the next paragraph of the Brief, that it would be unfair to "force" the appellant to prove that the Trial Chamber erred in its assessment of the facts when it

¹⁷ *Prosecutor v Kordić & Čerkez*, Decision on Dario Kordić's Motion for Leave to File a Supplementary Reply, 22 May 2002, par 9.

¹⁸ Of course, where an agreement has been reached between counsel, it will be necessary for some document to be filed which records that agreement, so that the Appeals Chamber is given the assistance to which it is entitled.

¹⁹ Appellant's Brief of Argument – Defence for the accused Zoran Žigić, 21 May 2002 ("Appellant's Brief").

²⁰ *Prosecutor v Furundžija*, IT-95-17/1-A, Judgment, 21 July 2000, par 69; *Kupreškić Appeal Judgment*, par 32.

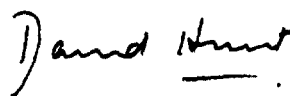
had made no assessment at all, Žigić will no doubt be able to extract from the remainder of his Appellant's Brief the particular errors upon which he relies for such a proposition.

11. But, having said that, it nevertheless remains clear from an unaided perusal of the Appellant's Brief that it gives little warning to the prosecution or to the Appeals Chamber as to just what issues Žigić is asking the Appeals Chamber to consider, and that what warning there is given by the Brief can only be elucidated by the unnecessary expenditure of considerable time and effort, and without any satisfaction that what is found has been accurately understood. Notwithstanding the regrettable failure of the prosecution to point to the particular problems which it has in the preparation of its Respondent's Brief, it is on this occasion entitled to the relief it seeks.

12. Accordingly, Zoran Žigić is ordered to file, within fourteen days of the date of this Decision, a new document which clearly and concisely lists each and every ground of appeal upon which he relies, and to identify in this document the pages and paragraphs where each of those grounds of appeal is dealt with in his Appellant's Brief. Each such ground of appeal must be given a number, and he must identify the ruling or finding challenged (with specific reference to the page and paragraph numbers in the judgment) and the precise relief sought in the event that the ground of appeal is upheld. He may consolidate under the one ground of appeal any clearly related complaints presently made in his Appellant's Brief instead of assigning to each such related complaint a separate ground of appeal. He is to state concisely the manner in which the Trial Chamber is alleged to have committed an error with respect to each such ground of appeal.

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

Dated this 14th day of June 2002,
At The Hague,
The Netherlands.



Judge David Hunt
Pre-Appeal Judge

[Seal of the Tribunal]