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22 NOVEMBER 2002

**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-01-42-AR72
Date: 22 November 2002
Original: English**

IN THE APPEALS CHAMBER

**Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge David Hunt
Judge Asoka de Z. Gunawardana
Judge Theodor Meron**

Registrar: Mr. Hans Holthuis

Decision of: 22 November 2002

**PROSECUTOR
v.
PAVLE STRUGAR
MIODRAG JOKIĆ
& OTHERS**

DECISION ON INTERLOCUTORY APPEAL

Counsel for the Prosecution:

**Ms. Susan L. Somers
Ms. Susan R. Lamb**

Counsel for the Defence of Pavle Strugar:

**Mr. Goran Rodić
Mr. Vladimir Petrović**

A. Background

1. The Appeals Chamber of the International Criminal 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 "International Tribunal" respectively) is seised of an interlocutory appeal challenging the jurisdiction of the International Tribunal, filed by counsel for Pavle Strugar ("Appellant" or "Strugar"), on 21 June 2002, in which the Appellant seeks the setting aside of the written decision rendered by Trial Chamber I ("Trial Chamber"), on 7 June 2002 ("Impugned Decision").
2. On 18 January 2002, the Appellant filed a preliminary motion¹ before the Trial Chamber challenging, *inter alia*, the jurisdiction of the International Tribunal over the offences of attacks on civilians as recognised by Article 51 of Additional Protocol I and Article 13 of Additional Protocol II and unlawful attacks on civilian objects as recognised by Article 52 of Additional Protocol II, as charged in counts 3, 6, 9 and 11 of the Indictment ("Indictment").² On 7 June 2002, the Trial Chamber rendered the Impugned Decision in which it found, *inter alia*, that the International Tribunal did have jurisdiction to try Strugar under the relevant counts.
3. The appeal was filed under Rule 72(B) of the Rules of Procedure and Evidence of the International Tribunal ("Rules"). Pursuant to Rule 72(E) of the Rules, a bench of three judges examined the Appeal to determine whether it concerned a challenge to jurisdiction as defined in paragraph (D) of the Rule, and so could proceed. The bench declared that the appeal might proceed in relation to the following ground:

The Impugned Decision erred in law by finding that the International Tribunal has jurisdiction over the accused Strugar under Article 3 of the Statute for violations of Articles 51 and 52 of Additional Protocol I and Article 13 of Additional Protocol II and that, therefore, the related Counts 3, 6, 9 and 11 of the Indictment may stand[.]³

¹ *Prosecutor v. Pavle Strugar et al.*, Case No.: IT-01-42-PT, "Defence Preliminary Motion", 18 January 2002 ("Defence Preliminary Motion").

² The procedural background before the Trial Chamber is as follows: On 1 February 2002, the Office of the Prosecutor ("Prosecution") filed the "Prosecution's Response to 'Defence Preliminary Motion Challenging Jurisdiction'". On 6 February 2002, the Prosecution added its "Consolidated Corrigenda and Supplemental Sourcing to Prosecution's Responses to Defence Preliminary Motions Alleging Defects in the Form of the Indictment and Challenging Jurisdiction". On 15 February 2002, the Defence filed the "Defence Reply to the Prosecution's Response to the Defence Preliminary Motion". On 21 February 2002, the Prosecution filed its "Prosecution's Response to the 'Defence Reply to the Prosecution's Response to the Defence Preliminary Motion'". On 12 March 2002, the Trial Chamber heard oral arguments on the Motion. On 4 April 2002, the Defence filed its "Additional Defence Submission (Defence Preliminary Motion on Jurisdiction)".

³ "Decision on 'Defence Interlocutory Appeal on Jurisdiction'", 24 July 2002. The procedural background on appeal is as follows: the "Defence Interlocutory Appeal on Jurisdiction" was filed on 21 June 2002; the "Prosecution's Response to Defence Interlocutory Appeal on Jurisdiction" was filed on 1 July 2002, and the

B. The Impugned Decision

4. The Impugned Decision framed the challenge to jurisdiction presented in the Defence Preliminary Motion as follows:

[the Defence] submits that the offences of attacks on civilians and unlawful attacks on civilian objects did not at the relevant times form part of customary international law as the underlying instruments were not of a customary nature. The Defence also argues that the Additional Protocols did not bind either party to the conflict as a matter of treaty law during the Indictment Period because they were ratified by the Republic of Croatia on 11 May 1992 whereas the Indictment Period runs from 1 October to 31 December 1991. In addition, it argues that the Additional Protocols are of a contractual nature, that the conflicting parties did not agree upon their application by any mutual special agreement, 'which would allow their application in a concrete situation'. Consequently, the Defence submits that to charge the Accused with these offences amounts to a violation of the principle *nullum crimen sine lege*.⁴

The Trial Chamber went on to examine whether the offences charged did form part of customary international law at the relevant time, and concluded that they did.⁵ Having thus established that the International Tribunal had jurisdiction over the accused under customary international law, the Trial Chamber found that it was not necessary to consider whether the norms in question applied as a matter of conventional law between the parties.⁶

5. The Appeals Chamber understands the argument of the Appellant at first instance to have been that, as the Indictment stood, he was not charged with the offences under customary international law but under the Additional Protocols, and that these instruments did not provide a legitimate basis for the charges against him. As he clarified in his reply to the Prosecution's response to the Defence Preliminary Motion: "[I]t goes without saying that

"Defence Reply to Prosecution's Response to Defence Interlocutory Appeal on Jurisdiction" was filed on 5 July 2002. On 26 July 2002, the President appointed a five Judges bench to rule on the appeal. Having been granted an extension of time, the Defence filed the "Defence Brief on Interlocutory Appeal on Jurisdiction" on 12 August 2002 ("Appellant's Brief"). On 22 August 2002, the Prosecution filed the "Prosecution's Response to the Defence Brief on Interlocutory Appeal on Jurisdiction". On 30 August 2002, the Appellant filed the "Defence Reply to Prosecution's Response to Defence Brief on Interlocutory Appeal on Jurisdiction". On 9 September 2002, the Prosecution filed the "Prosecution's Application for Leave to File a Reply to the Defence's Reply to the Prosecution's Response to the Defence's Brief on Interlocutory Appeal on Jurisdiction" ("Request"). On 12 September, the Appeals Chamber issued the "Decision on 'Prosecution's Application for Leave to File a Reply to the Defence's Reply to the Prosecution's Response to the Defence's Brief on Interlocutory Appeal on Jurisdiction'" granting the Request. In this decision, the Appeals Chamber allowed the Prosecution to comment on the application to amend the indictment filed by the Prosecution before the Trial Chamber on 26 July 2002 seeking, *inter alia*, to add the wording "and customary law" to Counts 8 and 11 of the Indictment. Accordingly, on 13 September 2002, the Prosecution filed the "Prosecution's Reply Following Appeals Chamber's 'Decision on Prosecution's Application for Leave to File a Reply to the Defence's Brief on Interlocutory Appeal on Jurisdiction' of 12 September 2002".

⁴ Impugned Decision, par.9.

⁵ Impugned Decision, par.21.

⁶ Impugned Decision, par.24.

attacks on civilians are forbidden by international humanitarian law; however the legal basis of this ban is not the Additional Protocol.”⁷

6. The Impugned Decision dealt with this central objection. It explained that the Appellant was indeed charged with offences under customary international law, despite the reference in the Indictment to the Additional Protocols. The Appellant had, the Trial Chamber continued, misunderstood the purpose of this reference, which was intended to clarify the nature of the offences with which he was charged, and not to provide a legal basis for those offences:

The reference to the Additional Protocols by the use in the Indictment of the words ‘as recognised by’ is to be understood as a reference to a clear and relatively recent legal instrument in which the relevant prohibitions under customary international law is [*sic*] reaffirmed.⁸

C. The Appeal

7. As stated above, the Appeal was permitted on the grounds that “[t]he Impugned Decision erred in law by finding that the International Tribunal has jurisdiction over the accused Strugar under Article 3 of the Statute for violations of Articles 51 and 52 of Additional Protocol I and Article 13 of Additional Protocol II and that, therefore, the related Counts 3, 6, 9 and 11 of the Indictment may stand”. The Appellant maintains that he is charged under the Additional Protocols, and that the Trial Chamber failed properly to examine his objections to this as a basis for jurisdiction. In his brief, the Appellant sets out the errors of the Trial Chamber as follows:

- 1) The Trial Chamber erred in finding that Articles 51 and 52 of Additional Protocol I and Article 13 of Additional Protocol II represented customary international law;
- 2) The Trial Chamber failed to identify Articles 51 and 52 of Additional Protocol I and Article 13 of Additional Protocol II as (exclusively) treaty law, and thus
- 3) The Trial Chamber erred in finding that the Tribunal had jurisdiction over the Appellant under these provisions, as cited in counts 3, 6, 9 and 11.⁹

⁷ “Defence Reply to the Prosecution’s Response to the Defence Preliminary Motion”, 15 February 2002, par.4.

⁸ Impugned Decision, par.22.

⁹ Appellant’s Brief, par.9.

8. The Appellant asks the Appeals Chamber, if it agrees with his sub-grounds 1) and 2), to either return the case to the Trial Chamber for a determination of whether the Additional Protocols applied in his case, or to make that determination itself.¹⁰

D. Discussion

9. Articles 51 and 52 of Additional Protocol I and, to a lesser extent, Article 13 of Additional Protocol II consist of a number of provisions focusing on but not limited to the prohibition of attacks on civilians and civilian objects cited in the relevant counts of the Indictment. Contrary to the suggestion in the Appellant's first sub-ground of appeal identified in paragraph 7, *supra*, the Trial Chamber did not pronounce on the legal status of the whole of the relevant Articles, as, having found that they did not form the basis of the charge against the Appellant, it was not obliged to do so. It rather examined "whether the *principles contained in the relevant provisions of the Additional Protocols have attained the status of customary international law*"¹¹ (emphasis added), and in particular the principles explicitly stated in the Indictment: the prohibition of attacks on civilians and of unlawful attacks on civilian objects. It held that they had attained such a status,¹² and in this it was correct.

10. Therefore, to answer the Appellant's first sub-ground of appeal with reference to the question actually asked by the Trial Chamber, the Trial Chamber made no error in its finding that, as the Appeals Chamber understood it, the principles prohibiting attacks on civilians and unlawful attacks on civilian objects stated in Articles 51 and 52 of Additional Protocol I and Article 13 of Additional Protocol II are principles of customary international law. Customary international law establishes that a violation of these principles entails individual criminal responsibility.

11. It follows from the above that the Trial Chamber also made no error in "failing to identify" the relevant Articles as treaty law, as the second sub-ground of appeal asserts. The Trial Chamber clearly set out the function and significance in the Indictment of the cited

¹⁰ Appellant's Brief, par.52.

¹¹ Impugned Decision, par.16.

¹² "The Trial Chamber has no doubts that Articles 51 and 52 of Additional Protocol I and Article 13 of Additional Protocol II constitute a reaffirmation and reformulation, not long before the Indictment Period, of the existing norms of customary international law, which prohibit attacks on civilians and civilian objects." Impugned Decision, par.21.

Articles; it was not obliged to comment further on their status once it had found that they did not provide the legal basis for the charges.

12. The Appellant's insistence that the Trial Chamber should identify the relevant Articles one way or the other appears to stem from a passage in the Appeals Chamber's decision on jurisdiction in the Tadić case,¹³ which held that one of the requirements for a crime to fall within Article 3 of the Statute was that "the rule [violated] must be customary in nature, or, if it belongs to treaty law, the required conditions must be met".¹⁴ The Appellant maintains that the Trial Chamber has shirked its duty in not determining into which of these categories the Additional Protocols fall. He argues that, in finding that he was charged with violations of customary international law,

[t]he Trial Chamber is avoiding giving its clear view concerning the basic dilemma the Defence is raising by submitting its 'Defence Preliminary Motion': do Articles 51 and 52 of the Additional Protocol I and Article 13 of the Additional Protocol II represent customary or treaty law?¹⁵

13. Although the precise status of the relevant Articles did not fall to be determined in this case (for the reasons set out above), the Appeals Chamber notes that there is a justified demand contained within the Appellant's "basic dilemma". An accused is entitled to know the jurisdictional basis for the charge against him. It may be that, prior to the rendering of the Impugned Decision, it was not clear to the Appellant whether he was charged with violations of the Additional Protocols *per se*, or with violations of the underlying principles of customary international law. However, after the clarification in the Impugned Decision that the basis for the relevant counts of the Indictment is customary international law, the Appellant had no basis for further complaint.

14. With regard to the third sub-ground (which encompasses the first two), the Appeals Chamber has already stated that the Trial Chamber did not find that it had jurisdiction over the Appellant under the relevant Articles of the Additional Protocols, but under the customary principles recognised therein. Its determination of this point was correctly made. There is consequently no error in the Trial Chamber's finding that it has jurisdiction over the Appellant under counts 3, 6, 9 and 11 of the Indictment.

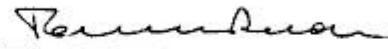
¹³ Prosecutor v. Duško Tadić, case no. IT-95-1-AR72, "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction", 2 October 1995. ("Tadić Jurisdiction Decision").

¹⁴ Tadić Jurisdiction Decision, par.94(ii).

¹⁵ Appellant's Brief, par.38.

15. The appeal is therefore dismissed.

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



Fausto Pocar
Presiding Judge

Dated this twenty-second day of November 2002
At The Hague,
The Netherlands.

[Seal of the Tribunal]