

Aj

**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-02-65-AR11bis.1

Date: 16 November 2005

Original: English

**IN THE APPEALS CHAMBER**

**Before:** Judge Fausto Pocar, Presiding  
Judge Florence Ndepele Mwachande Mumba  
Judge Mehmet Güney  
Judge Andrézia Vaz  
Judge Wolfgang Schomburg

**Registrar:** Mr. Hans Holthuis

**Decision of:** 16 November 2005

**PROSECUTOR**

v.

**Željko MEJAKIĆ  
Momčilo GRUBAN  
Dušan FUŠTAR  
Duško KNEŽEVIĆ**

---

**DECISION ON SECOND JOINT DEFENSE SUPPLEMENT  
TO JOINT APPEAL BRIEF IN SUPPORT OF NOTICE OF APPEAL**

---

**Counsel for the Prosecution:**

Mr. Mark J. McKeon  
Ms. Susan L. Somers  
Ms. Ann Sutherland

**Counsel for the Appellants:**

Mr. Jovan Simić and Mr. Zoran Živanović for Željko Mejakić  
Mr. Branko Lukić for Momčilo Gruban  
Mr. Theodore Scudder and Mr. Dragan Ivetić for Dušan Fuštar  
Mrs. Slobodanka Nedić for Duško Knežević

Al

**THE APPEALS CHAMBER** of the 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 (“International Tribunal”),

**NOTING** the “Joint Defence Notice of Appeal” filed on 4 August 2005 by Željko Mejačić, Momčilo Gruban, Dušan Fuštar, and Duško Knežević (“Appellants”) against the “Decision on Prosecutor’s Motion for Referral of Case Pursuant to Rule 11*bis*” rendered by the Referral Bench on 20 July 2005 (“Referral Decision”);

**NOTING** the “Joint Defense Motion for Enlargement of Time to File Appellants’ Brief” filed on 18 August 2005 (“Motion for Extension of Time”) by the Appellants, in which they requested an extension of time to file their consolidated Appellants’ Brief pursuant to Rule 127 of the Rules of Procedure and Evidence of the International Tribunal (“Rules”) on the basis of several reasons;

**NOTING** the “Joint Defense Appellants’ Brief in Support of Notice of Appeal” filed on 19 August 2005 (“First Defence Brief”);

**NOTING** the “Decision on Joint Defense Motion for Enlargement of Time to File Appellants’ Brief” rendered on 30 August 2005 (“Decision on Motion for Extension of Time”), in which the Appeals Chamber dismissed the Motion for Extension of Time as moot, and advised the Appellants that they might, if necessary, file a substantive supplement to the First Defence Brief pursuant to Rule 127(A)(ii) and (B) of the Rules;<sup>1</sup>

**BEING SEIZED** of the “Second Joint Defense Supplement to Joint Appeal Brief in Support of Notice of Appeal” filed by the Appellants on 12 October 2005 (“Second Defence Supplement”), in which they submit that: (i) the Defence arguments with regard to its ninth ground of appeal in its Notice of Appeal are almost identical to those advanced by the Prosecution in its appeal, therefore the Defence did not specifically argue the “monitoring issue” in detail in its First Defence Brief;<sup>2</sup> and (ii) since the Appeals Chamber will not consider the “monitoring issue” due to the fact that Prosecution has withdrawn its appeal against the Referral Decision, “the Defence files the instant supplement to its [First Defence Brief] which [contains] the Defence arguments relating to the monitoring issue, which were being saved for oral submissions on the Prosecution’s [a]ppel;”<sup>3</sup>

<sup>1</sup> Decision on Motion for Extension of Time, pp 3-4.

<sup>2</sup> Second Defence Supplement, para. 2.2.

<sup>3</sup> *Id.*, para. 2.3.

**NOTING** the “Prosecution’s Response in Opposition to the Appellants’ ‘Second Joint Defense Supplement to Joint Appeal Brief in Support of Notice of Appeal’” filed on 19 October 2005 (“Prosecution’s Response”) in which the Prosecution submits that: (i) the Appellants have failed to seek leave to file the Second Defence Supplement and to show that the withdrawal of the Prosecution’s appeal constitutes good cause;<sup>4</sup> (ii) since the Prosecution’s appeal and the ninth ground of appeal of the First Defence Brief differ in substance even though they touch upon the same topic, the submissions contained in the Second Defence Supplement should have been included in the First Defence Brief;<sup>5</sup> (iii) the Second Defence Supplement is an attempt to avoid the procedures set out in the Rules and Practice Directions which prejudices the Prosecution and the administration of justice;<sup>6</sup> and (iv) the Second Defence Supplement is therefore invalidly filed and should be dismissed;<sup>7</sup>

**NOTING** the “Joint Defence Reply to the Prosecution’s Response in Opposition to the Appellant’s [sic] Second Joint Defence Supplement to Joint Appeal Brief in Support of Notice of Appeal” filed by the Appellants on 25 October 2005 (“Reply”) in which they submit that: (i) pursuant to Rule 73(A) of the Rules, the Appellants need not seek leave to file the Second Defence Supplement;<sup>8</sup> (ii) “there is no strategy to avoid the procedures set out in the Rules and Practice Directions;”<sup>9</sup> and (iii) all the extensions of time sought by the Defence were due to the complexity of the issues at stake in the present case and the short deadlines set out in the Practice Directions;<sup>10</sup>

**NOTING** that the Prosecution’s appeal against the Referral Decision — in which it requested the Appeals Chamber to vacate the order requiring the Prosecution to monitor the proceedings before the State Court of Bosnia and Herzegovina in cooperation with the Organisation for Security and Co-operation in Europe or another international organisation and to report back to the Referral Bench on the progress of the proceedings — was withdrawn on 19 September 2005;<sup>11</sup>

**CONSIDERING** that the Appellants have previously been advised by the Appeals Chamber that if they required a substantive amendment to supplement their First Defence Brief, they might, “pursuant to Rule 127(A)(ii) and (B) of the Rules, file said supplement with a request that the Appeals Chamber recognize the late filing of this part of the Appellants’ Brief as validly filed on

<sup>4</sup> Prosecution’s Response, paras 1, 9.

<sup>5</sup> *Id.*, para. 11.

<sup>6</sup> *Id.*, para. 15.

<sup>7</sup> *Id.*, para. 17.

<sup>8</sup> Reply, p. 3.

<sup>9</sup> *Id.*, p. 4.

<sup>10</sup> *Ibid.*

condition that the Appellants provide[d] sufficient reasons constituting good cause for the Appeals Chamber to do so;”<sup>12</sup>

**CONSIDERING** that pursuant to the Decision on Motion for Extension of Time, the Appellants filed the “Joint Defense Motion for Leave to File Supplemented Appeals Brief” on 14 September 2005 (“Motion for Leave”), in which they sought *leave* to file a supplemented appeals brief, and requested the Appeals Chamber to recognize the “Joint Defense Appellants’ Brief in Support of Notice of Appeal (Supplemented)” — attached as Exhibit “A” to the Motion for Leave — as validly filed pursuant to Rule 127(A)(ii) of the Rules;<sup>13</sup>

**NOTING** the “Decision on Joint Defense Motion for Leave to File Supplemented Appeals Brief” rendered on 16 November 2005, in which the Appeals Chamber dismissed the Motion for Leave on the basis that good cause within the meaning of Rule 127(A) of the Rules had not been established by the Defence;<sup>14</sup>

**FINDING** that the Appellants have erroneously relied upon Rule 73 of the Rules in support of the filing of the Second Defence Supplement and that they have failed to seek leave from the Appeals Chamber in order to supplement their First Defence Brief as instructed by the Appeals Chamber;<sup>15</sup>

**CONSIDERING** however, that in the interest of justice, the Appeals Chamber will undertake to nevertheless ascertain whether sufficient reasons constituting good cause exist for the Appeals Chamber to recognize the filing of the Second Defence Supplement as validly done;

**FINDING** that the Defence’s strategic decision to save the submissions concerning the monitoring of the proceedings before the State Court of Bosnia and Herzegovina for oral argument does not constitute “good cause” within the meaning of Rule 127 of the Rules, since an appeal pursuant to

---

<sup>11</sup> *Prosecutor v. Željko Mejakić et al.*, Case No.: IT-02-65-AR11bis.1, *Prosecutor v. Mitar Rašević and Savo Todović*, Case No.: IT-97-25/1-AR11bis.1 and *Prosecutor v. Gojko Janković*, Case No.: IT-96-23/2-AR11bis.2, Notice of Withdrawal of Appeals, 19 September 2005.

<sup>12</sup> Decision on Motion for Extension of Time, p. 3.

<sup>13</sup> Motion for Leave, para. 6.

<sup>14</sup> Decision on Joint Defense Motion for Leave to File Supplemented Appeals Brief, p. 6.

<sup>15</sup> According to previous practice in the International Tribunal, the Appeals Chamber has required parties to seek leave for the filing of supplementary briefs. See e.g. *Prosecutor v. Zejnil Delalić, Zdravko Mucić (aka “Pavo”), Hazim Delić and Esad Landžo (aka “Zenga”)*, Case No.: IT-96-21-A, Order on the Appellant-Cross Appellee’s Second Motion for an Extension of Time to File Briefs, 15 June 1999; Order on Motion of Appellants Hazim Delić and Zdravko Mucić for Leave to File Supplementary Brief and on Motion of Prosecution for Leave to File Supplementary Brief, 31 March 2000; Decision on Hazim Delić’s Motion for Leave to File Second Supplementary Brief, 1 February 2001; *Prosecutor v. Radislav Krstić*, Case No.: IT-98-33-A, Decision Granting Leave for Supplementary Response, 29 May 2002; *Prosecutor v. Tihomir Blaškić*, Case No.: IT-95-14-A, Scheduling Order, 31 October 2001; Decision on Appellant’s Application for Extension of Page Limits for Supplementary Brief on Appeal, 24 November 2003; Decision on Prosecution’s Request for an Extension of Page Limit for its Supplemental Filing, 4 December 2003.

Rule 11bis(I) of the Rules is more akin to an interlocutory appeal than to an appeal from judgement<sup>16</sup> and thus, once the briefing is completed, it may be decided without a hearing;<sup>17</sup>

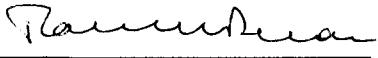
**FINDING** that none of the remaining arguments raised in the Second Defence Supplement constitute good cause within the meaning of Rule 127(A) of the Rules;

**FOR THE FOREGOING REASONS,**

**HEREBY DIMISSES** the Second Defence Supplement.

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

Done this sixteenth day of November 2005,  
At The Hague,  
The Netherlands.

  
\_\_\_\_\_  
Judge Fausto Pocar  
Presiding

[Seal of the International Tribunal ]

<sup>16</sup> *Prosecutor v. Radovan Stanković*, Case No.: IT-96-23/2-AR11bis.1, Decision on Defence Application for Extension of Time to File Notice of Appeal, 9 June 2005, paras. 14-16.

<sup>17</sup> See Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal (IT/155 Rev.3), 16 September 2005, para. 7.