

**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-02-60-A
Date: 26 June 2006
Original: English

BEFORE THE APPEALS CHAMBER

Before: Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andréia Vaz
Judge Theodor Meron

Registrar: Mr. Hans Holthuis

Decision: 26 June 2006

PROSECUTOR

v.

**Vidoje BLAGOJEVIĆ
Dragan JOKIĆ**

**DECISION ON MOTION OF DRAGAN JOKIĆ FOR LEAVE TO FILE
THIRD AMENDED NOTICE OF APPEAL AND AMENDED APPELLATE
BRIEF**

The Office of the Prosecutor:

Mr. Norman Farrell
Mr. Chester Stamp
Ms. Sureta Chana

Counsel for the Accused:

Mr. Vladimir Domazet for Vidoje Blagojević
Mr. Peter Murphy and Ms. Chrissa Loukas for Dragan Jokić

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1. 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 (“Appeals Chamber” and “International Tribunal”, respectively) is seized of appeals by all parties against the Judgement of Trial Chamber I in this case, rendered orally on 17 January 2005 and in writing on 24 January 2005 (“Judgement”). It is also presently seized of the “Motion of Dragan Jokić for Leave to File Third Amended Notice of Appeal and Amended Appellate Brief”, filed on 15 May 2006 (“Motion”).

Procedural Background and Submissions of the Parties

2. The briefing on the appeals in this case filed by the Prosecution and Vidoje Blagojević has been complete since the filing of those parties’ reply briefs on 5 July 2005 and 28 December 2005, respectively. Dragan Jokić filed his initial Notice of Appeal on 23 February 2005, his Amended Notice of Appeal on 25 February 2005, and his Second Amended Notice of Appeal on 2 December 2005. He filed his Appeal Brief on 4 October 2005. The Prosecution filed its Consolidated Response Brief to Mr. Blagojević’s and Mr. Jokić’s appeals on 16 December 2005. Mr. Jokić did not file a reply brief. Instead, on 6 January 2006, his then-counsel filed a “Notice of Intention to Reply to Prosecution Response to Appeal Brief of Dragan Jokić in Oral Argument and Request for Oral Argument” (“Notice of Intention”), stating that she did not intend to file a reply brief but would reply to the Prosecution’s response brief orally at the appeal hearing. The Prosecution filed a response observing, *inter alia*, that if counsel was unable to meet the reply brief deadline, it would be appropriate instead to apply for an extension of time.¹ The Appeals Chamber did not issue any decision related to the matter in light of proceedings in the Registry, initiated by Mr. Jokić, to replace his lead counsel.

3. In April 2006, the Registry replaced lead counsel Ms. Cynthia Sinatra with new lead counsel Mr. Peter Murphy as well as co-counsel Ms. Chrissa Loukas, who had also served as co-counsel earlier in the appeal proceedings. On 28 April 2006, a status conference was held at which new counsel indicated to the Pre-Appeal Judge an intention to file a motion to amend Mr. Jokić’s notice of appeal and appeal brief. The present Motion followed. In the Motion, Mr. Jokić seeks to amend the Second Notice of Appeal in several respects: withdrawing certain grounds of appeal, altering the wording of certain other grounds, and adding one wholly new ground. He also seeks leave to file a new appeal brief corresponding to the proposed new notice of appeal. He argues that these changes are justified “in the interests of justice and of fairness”

¹ Prosecution Response to Jokić’s Notice of Intention and Request for Oral Argument, 11 January 2006, para. 9.

to himself because they are important to the success of his appeal, and that they will help to clarify the issues in the appeal by stating them more precisely.² Mr. Jokić further explains that the original notice of appeal included arguments with no chance of success, failed to include other arguments with a substantial chance of success, and failed to articulate other arguments with sufficient clarity and precision.³ As an alternative to the relief sought, the defence seeks permission to file a reply brief belatedly.⁴

4. The “Prosecution Response to Jokić’s Motion for Leave to File Third Amended Notice of Appeal and Amended Appellate Brief” was filed on 25 May 2006 (“Response to Jokić’s Motion”). The Prosecution opposes the amendments sought as well as the filing of a new appeal brief. It argues that the amendments sought are so substantial as to amount to a “sweeping rewriting” of the notice of appeal, and that there is no ground for them.⁵ It contends that substantial importance to the success of an appeal is not sufficient to justify an amendment in the absence of “inadvertence or negligence of counsel”, which it claims the Motion failed to allege.⁶ The Prosecution also contends the Motion’s objective of dropping certain arguments could be solved by filing a notice of withdrawal of grounds.⁷ It also argues that even if amendments to the notice of appeal are granted, no new appeal brief is necessary as the objective of clarification could be accomplished “by filing a table clearly correlating the proposed notice of appeal to the Amended Appeal Brief, or by cutting and pasting the standing appeal brief in this case to correspond to the proposed notice of appeal.”⁸ It argues that allowing the relief sought by Mr. Jokić would unjustifiably slow the administration of justice and prejudice his co-appellant Mr. Blagojević.⁹ The Prosecution does not oppose Mr. Jokić’s alternative request to file a belated reply brief.¹⁰

5. The “Reply of Dragan Jokić to Prosecution Response to Motion for Leave to File Third Amended Notice of Appeal and Amended Appellate Brief and Request for Leave to File Same” was filed on 29 May 2006 (“Reply Supporting Jokić’s Motion”). It contends that the Motion did indeed demonstrate negligence or inadvertence of counsel in several respects.¹¹ It further

² Motion, paras 1, 11-15.

³ Motion, paras 9-10.

⁴ Motion, para. 17.

⁵ Response to Jokić’s Motion, paras 29-31; *see ibid.* paras 4-7..

⁶ Response to Jokić’s Motion, para. 18.

⁷ Response to Jokić’s Motion, paras 14, 32.

⁸ Response to Jokić’s Motion, para. 32.

⁹ Response to Jokić’s Motion, paras 6, 11.

¹⁰ Response to Jokić’s Motion, para. 28.

¹¹ Reply Supporting Jokić’s Motion, para. 2.

argues that grounds for the amendments have been established consistently with the Appeals Chamber's jurisprudence concerning changes in counsel, relying on a decision in the *Momir Nikolić* case.¹²

6. Mr. Blagojević has filed no submissions pertaining to the present matter.

Applicable Law

7. Under Rule 108 of the Rules of Procedure and Evidence of the International Tribunal ("Rules"), leave to amend a notice of appeal may be granted upon a showing of "good cause", a concept that encompasses both good reason for including the new or amended grounds of appeal sought and good reason showing why those grounds were not included (or were not correctly phrased) in the original notice of appeal.¹³ In its cases, the Appeals Chamber has relied upon a variety of factors in determining that "good cause" has been established. These have included the fact that the variation is so minor that it does not affect the content of the notice of appeal; the fact that the opposing party would not be prejudiced by the variation or has not objected to it; and the fact that the variation would bring the notice of appeal into conformity with the appeal brief.¹⁴ Where the appellant seeks a substantive amendment broadening the scope of the appeal, "good cause" might also, under some circumstances, be established.¹⁵ The Appeals Chamber notes that it has never established a cumulative list of requirements that must be met each time a substantive amendment is to be granted. Rather, each amendment is to be considered in light of the particular circumstances of the case.¹⁶

8. The good cause requirement necessarily must be interpreted particularly strictly at late stages in the appeal proceeding when amendments would necessitate a substantial slowdown in the progress of the appeal—for instance, when they would require briefs already filed to be revised and resubmitted. Otherwise, appellants would be free to change their appeal strategy and essentially restart the appeal process at will (including after they have had the advantage of reviewing the

¹² Reply Supporting Jokić's Motion paras 4-6, citing *Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-A, Decision on Appellant's Request to Withdraw Previous Motions, to Revise Appellant's Brief and to Amend Notice of Appeal, 19 July 2005 ("Nikolić Decision").

¹³ As to the latter aspect, a good reason might include, for instance, that recognizing the error required the appellant's personal participation and that the appellant had previously been unable to read the trial judgement because of a lack of translation. See, e.g., Decision on Motions Related to the Pleadings in Dragan Jokić's Appeal, 24 November 2005, para. 10 ("24 November 2005 Decision"); Decision on Defence Motion for Extension of Time in Which to File the Defence Notice of Appeal, 15 February 2005.

¹⁴ See 24 November 2005 Decision, para. 7; Decision on Prosecution's Request for Leave to Amend Notice of Appeal in Relation to Vidoje Blagojević, 20 July 2005, pp. 3-4 ("20 July 2005 Decision").

¹⁵ See, e.g., 24 November 2005 Decision, para. 7; 20 July 2005 Decision, p. 3.

¹⁶ 24 November 2005 Decision, para. 7.

arguments in a response brief), interfering with the expeditious administration of justice and prejudicing the other parties to the case.

9. Nonetheless, in the interest of protecting the right of convicted defendants to a meaningful appeal, the Appeals Chamber has under limited circumstances permitted amendments even where there was no good cause for failure to include the new or amended grounds in the original notice—that is, where the failure resulted from counsel negligence or inadvertence. In such instances, the Appeals Chamber has permitted amendments which are of substantial importance to the success of the appeal such as to lead to a miscarriage of justice if the grounds were excluded.¹⁷ In these exceptional cases, the Appeals Chamber has reasoned, the interests of justice require that an appellant not be held responsible for the failures of his or her counsel.

10. The Appeals Chamber has adopted a relatively liberal approach to amendments in the rare instances in which an appellant's lead counsel has been changed late in the appeal process. The *Nikolić* Decision followed a change of defence counsel and involved a request for amendments “made at a very late stage of the appeal proceedings, over 12 months after the filing of his initial appeal brief and after the Prosecution filed its Respondent's brief”.¹⁸ The Appeals Chamber observed, however, that “the right of the Appellant to an effective defence pursuant to Article 21 of the Statute of the International Tribunal is best served by allowing his newly appointed defence team to choose the litigation strategy it considers best”.¹⁹ It further found that Mr. Nikolić's “new defence should be allowed, after familiarizing itself with the case, to give the Appellant its expertise and to seek leave to vary the Appellant's submissions in order to correct any ambiguity or error made by the previous counsel, without unduly delaying the appeal proceedings”.²⁰ For these reasons, it permitted Mr. Nikolić to file a revised appeal brief intended to “simplify and clarify” certain “confusing” aspects of his previous brief, and also to adopt certain “minor” and non-substantive modifications to his notice of appeal.²¹ It allowed the Prosecution to file a revised Respondent's Brief accordingly, and set a briefing schedule more accelerated than that provided by the Rules for the ordinary briefing process on appeal.²²

11. Together, these precedents provide certain guiding principles that are applicable under the particular circumstances of this case—namely, involving late-stage amendments to both the notice

¹⁷ See, e.g., *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Decision Granting Leave to Dario Kordić to Amend His Grounds of Appeal, 9 May 2002, para. 5. This principle has been applied in the present case. See 24 November 2005 Decision, para. 8; Decision on Dragan Jokić's Motion to Amend Notice of Appeal, 14 October 2005, para. 8.

¹⁸ *Nikolić* Decision, p. 3.

¹⁹ *Nikolić* Decision, p. 2.

²⁰ *Nikolić* Decision, p. 3; see also *ibid.*, p. 4.

²¹ *Nikolić* Decision, p. 2, 4.

²² *Nikolić* Decision, p. 5.

of appeal and appeal brief, sought by newly appointed counsel, in a case also involving a co-appellant whose appeal is otherwise ready to be heard. First, amendments to the notice of appeal will be granted only (1) for good cause within the meaning of Rule 108, as defined by the above-discussed principles; (2) if they remedy the previous counsel's negligence or inadvertence and are of substantial importance to the success of the appeal; or (3) if they otherwise correct ambiguity or error made by the previous counsel and do not unduly delay the appeal proceedings, as, for example, in the case of minor and non-substantive modifications. Second, revisions to the appeal brief (or, in the alternative, supplemental briefing) will be permitted only (1) as necessary to reflect the amendments to the notice of appeal; or (2) as necessary to correct ambiguity or error in the previous counsel's filings, without unduly delaying the appeal proceedings. These requirements will be strictly construed so as to permit expeditious resolution of the appeal and to protect the rights of Mr. Blagojević.²³

12. Finally, the Appeals Chamber has previously noted the lack of correspondence in structure between Mr. Jokić's Second Amended Notice of Appeal and Appeal Brief.²⁴ As in *Nikolić*, these problems might be resolved by new counsel's efforts to simplify and clarify the filings, with benefits to all parties, to the Appeals Chamber, and to the interests of justice. However, mere simplification and clarification is not sufficient ground for amendment if it unduly delays the appeal process; the Appeals Chamber has already declined to permit re-briefing in this case for that purpose.²⁵

13. These requirements do not apply to Mr. Jokić's decision to drop certain grounds of appeal, which neither prejudices the other parties nor slows the appeal process. Although, as the Prosecution points out, dropping grounds of appeal can ordinarily be accomplished without formal amendments to the notice of appeal or appeal brief (either through a motion to withdraw or by orally withdrawing those grounds at the appeal hearing), if amendments to those documents are in any event being made, there is no harm in permitting the formal amendments sought. However, it bears noting that an appellant's decision to withdraw some grounds of appeal does not automatically entitle it (or the respondent) to then submit additional briefing on the grounds that remain so as to fill a page limit. Such an approach would slow the proceedings and prejudice the parties without an adequate justification. Therefore, no additional briefing will be permitted except for the reasons set forth in paragraph 11 above.

²³ Mr. Jokić asserts that potential prejudice to Mr. Blagojević can be ignored because he did not file a response to Mr. Jokić's Motion. Reply Supporting Jokić's Motion, para. 12. The Appeals Chamber disagrees; even if Mr. Blagojević chose not to express a view on whether the amendments should be permitted—for instance, because he was insufficiently familiar with the issues raised by Mr. Jokić's appeal to do so—he has obvious interests in avoiding undue delay in the resolution of his appeal, and it cannot be assumed that he has waived those interests.

14. The Appeals Chamber finally notes that, contrary to Mr. Jokić's suggestion,²⁶ it is not the Prosecution's obligation to prove that it is prejudiced by any proposed change to his notice of appeal or appeal brief. Rather, it is Mr. Jokić's obligation to demonstrate that each amendment should be permitted under the standards outlined above. As noted above, lack of prejudice to the opposing side is only one factor, taken in combination with others, which the Appeals Chamber has considered in its determinations of what constitutes "good cause" under Rule 108.

Proposed Amendments to the Second Amended Notice of Appeal

15. The Second Amended Notice of Appeal alleges certain unnumbered errors of law and forty numbered "errors of fact",²⁷ and also includes a number of paragraphs of argument concerning, for instance, the appellate standard of review. In his Motion, rather than proposing specific changes to certain of these errors, Mr. Jokić proposes simply to replace them in their entirety with a Third Amended Notice of Appeal consisting of seven grounds of appeal. The result, he explains, would be to drop most of the allegations of factual error, all but two of the errors of law, and the remaining arguments set forth at paragraphs 54 through 61 of the Second Amended Notice of Appeal; to reformulate the remaining alleged errors (as new grounds of appeal 2, 3, 4, 6, and 7); and to add two new grounds of appeal (grounds 1 and 5).

16. As noted above, it is within Mr. Jokić's rights to abandon allegations of error at any stage in the proceedings. Because the abandoned portions constitute the greater part of the notice of appeal, the Appeals Chamber finds that formal amendment to the notice of appeal removing these paragraphs would make it easier to identify the retained issues.

17. None of the seven grounds of appeal in the proposed Third Amended Notice of Appeal is carried over directly, without variation, from the Second Amended Notice of Appeal. The Appeals Chamber must therefore review each of the seven grounds to determine whether the above-described requirements for amendment are satisfied. In doing so, the Appeals Chamber will also address the extent to which the issues have already been briefed by the parties and the extent to which permitting the amendment would require new briefing.

First and Second Grounds of Appeal: Mens Rea for Aiding and Abetting

18. The proposed First Ground of Appeal states:

²⁴ See 24 November 2005 Decision, para. 16.

²⁵ See 24 November 2005 Decision, para. 17.

²⁶ Reply Supporting Jokić's Motion, para. 10-11.

²⁷ These include certain allegations, notably Errors # 1 and 2, which actually consist of errors of law.

The Trial Chamber erred on a question of law by convicting the Appellant as an aider and abettor in the absence of any evidence, or any evidence capable of amounting to proof beyond reasonable doubt, that the Appellant possessed the requisite *mens rea* for commission of the offences charged. . . .²⁸

19. In framing the issue as one of law, Mr. Jokić appears to imply that the Trial Chamber applied a legally wrong *mens rea* standard for aiding and abetting; he would argue, apparently, that conviction for aiding and abetting requires proof of “the requisite *mens rea* for commission of the offences charged” (emphasis added) and that the Trial Chamber failed to apply this standard. As the parties agree, he did not so allege in the Second Amended Notice of Appeal, which included only allegations of factual error related to this Trial Chamber finding.²⁹ These factual errors (or some of them) are combined in the proposed Second Ground of Appeal as follows:

The Trial Chamber erred on a question of fact in finding that the Appellant possessed the requisite *mens rea* for commission of the offences charged, in the absence of any evidence, or any evidence capable of amounting to proof beyond reasonable doubt, a finding which no reasonable Trial Chamber could have made based on the evidence presented. . .

20. As to the proposed First Ground of Appeal, it bears noting that although the Appeal Brief addresses various aspects of the Trial Chamber’s definition of “aiding and abetting”, it does not allege any legal errors with respect to the *mens rea* element. Thus, permitting the First Ground of Appeal would require new briefing of the issue, and would necessarily slow the appeals process. Mr. Jokić does not claim that there was “good cause” not to include this ground of appeal in the initial notice of appeal. Instead, rather obliquely, he suggests that the failure to address this issue constituted “inadvertence or negligence” on the part of former counsel.³⁰ He also argues generally that the *Nikolić* Decision provides a distinct basis for amendment in order to reflect “the reasoned view of newly assigned counsel as to the best way of ensuring fairness for the Appellant.”³¹ And he asserts that the Prosecution will not be prejudiced and that it was itself previously permitted, in an amendment to its own notice of appeal in relation to Mr. Blagojević’s case, to substitute a legal for a factual error.³²

21. The Appeals Chamber notes that it cannot, without resolving the merits of the purported legal error, determine in any definitive sense whether “inadvertence or negligence” (as opposed to

²⁸ With respect to each proposed ground, the proposed Third Amended Notice of Appeal contains an allegation of prejudice, a listing of relevant paragraphs of the Trial Judgement, and a request for relief consisting of reversal of conviction plus entry of acquittal or a new trial. The Appeals Chamber will not replicate these provisions here.

²⁹ Motion, para. 11 (citing factual errors 11, 14, 15, 17, 19, 20, 21); Response to Jokić’s Motion, para. 22. Footnotes 5 and 7 of the Reply Supporting Jokić’s Motion, in contrast, refer to eleven errors (14-17, 19, 20, 31, 34, 36, 38 and 39) and claim that “both factual and legal grounds” are encompassed. The Appeals Chamber considers this an improper new (and directly contradictory) argument in a reply, and moreover, having perused the eleven errors in question, sees nothing resembling an allegation of legal error.

³⁰ Paragraph 2 of the Reply Supporting Jokić’s Motion states generally that “it is obviously inferable that such deficiencies as there are in the present state of the appeal are attributable to the inadvertence of previously assigned counsel”, a broad statement that appears to encompass the omission of the legal error in question.

³¹ Reply Supporting Jokić’s Motion, para. 6.

³² Reply Supporting Jokić’s Motion, para. 8.

sound judgement) was behind the error's omission from the original pleadings. Such a resolution would be inappropriate at this stage, without benefit of the parties' arguments. As with the determination of whether an amendment is of "substantial importance" to the appeal, then, the Appeals Chamber must assume for the purposes of deciding on the amendment (so long as a non-frivolous argument has been asserted) that Mr. Jokić will prevail on the merits of his argument. Assuming therefore that he does, indeed, have a valid argument that the Trial Chamber convicted him on the basis of a legally erroneous interpretation of the *mens rea* element, omitting that argument entirely from the Second Notice of Appeal and Appeal Brief indeed constituted "inadvertence or negligence", and allowing it now is of substantial importance to the outcome of the appeal. Allowing the Prosecution to respond in a modified Response Brief will minimize any prejudice to it;³³ and keeping the time allotted for this briefing process as short as is reasonably possible will minimize prejudice to Mr. Blagojević.

22. The Appeals Chamber will therefore permit the proposed First Ground of Appeal to be included in a Third Amended Notice of Appeal (which it will permit Mr. Jokić to submit, as detailed further below). Balancing the interest of Mr. Jokić in advancing this argument with the interests of all the parties in an expeditious resolution of the appeal, it concludes that limited new briefing from each party will be necessary to address the issue, in the form of up to ten pages included in a Revised Appeal Brief and ten pages in a Revised Response Brief.

23. As to the proposed Second Ground of Appeal, Mr. Jokić does not articulate any argument he wishes to make beyond the seven³⁴ specific alleged factual errors that he would condense into one general allegation of error, and/or beyond the discussion already contained at pages 66 through 72, 76 through 78, and 80 through 84 of the Appeal Brief, all of which pertain to *mens rea* for aiding and abetting. Mr. Jokić claims that his Second Ground of Appeal is of "substantial importance to the success of the appeal", but in order to so demonstrate it is not sufficient to point out, as he does, that *mens rea* is an essential element;³⁵ it must also be shown that the previous pleadings failed to address this issue adequately and that the amendments sought would correct that failure. Mr. Jokić has not done so. He does not attempt to show that some potentially important allegation of error was left out of the original seven or that the original wording was somehow inadequate. Rather, in his Reply he claims only that the amendment would simplify and clarify the present version.³⁶ In light of this fact, the Appeals Chamber cannot conclude that there was any negligence or

³³ See *Nikolić Decision*, p. 3.

³⁴ Or eleven; see footnote 29 *supra*.

³⁵ See *Motion*, para. 11.

³⁶ Reply Supporting Jokić's Motion, para. 8.

inadvertence, or otherwise any ambiguity or error, in the articulation of these seven errors in the Second Amended Notice of Appeal, nor that the amendment is of “substantial importance”.

24. The proposed Second Ground of Appeal does, certainly, “simplify” the seven specific allegations of error, although it can hardly be said to “clarify” them, as the proposed new ground is far vaguer and does not even specifically mention aiding and abetting (Mr. Jokić apparently interprets it, however, to refer to this mode of liability).³⁷ But simplifying a notice of appeal by removing its specificity is not necessarily an improvement and does not, in any event, itself constitute a basis for amendment so late in the appeal proceedings.

25. The request to include the proposed Second Ground of Appeal is denied. Mr. Jokić may instead retain, in his Third Notice of Appeal, whichever relevant factual errors he chooses from his Second Amended Notice of Appeal. He may, if he so chooses, list all of these alleged errors under a single “ground of appeal”. As Mr. Jokić has not demonstrated any need for further briefing on these issues, none will be permitted; the Revised Appeal Brief and Revised Response Brief should include the parties’ present submissions, unchanged except for deletions and changes in reference numbers as appropriate.

Third and Fourth Grounds of Appeal

26. In its Decision of 24 November 2005, the Appeals Chamber permitted two new grounds of appeal to be added to Mr. Jokić’s notice of appeal; these are numbered “Error # 1” and “Error # 2” under “Errors of Fact” in the Second Amended Indictment, although they are actually errors of law. Mr. Jokić seeks to include a modified formulation of these errors as Grounds 3 and 4 of his Third Amended Notice of Appeal, changing some of the language as well as the paragraph references. He asserts that the changes are non-substantive, and the Prosecution does not contest this fact, pointing out only that if the changes are non-substantive they do not necessitate new briefing.³⁸ Mr. Jokić has provided no reason that new briefing would be necessary.

27. The Appeals Chamber considers that the changes sought are closely comparable to the changes permitted to the notice of appeal in the *Nikolić* Decision under similar circumstances.³⁹ Here, new counsel is seeking to correct “ambiguity or error” in the previous counsel’s drafting, and there is no risk of unduly delaying the appeal proceedings because no new briefing is necessary.

³⁷ Motion, para. 11.

³⁸ Motion, para. 12 (stating that the “proposed further amendment simply states the grounds with greater precision”); Reply Supporting Jokić’s Motion, para. 7 (stating that they involve “no change in the substance of the grounds whatsoever”); Response to Jokić’s Motion, para. 26.

³⁹ *Nikolić* Decision, para. 4.

28. The Appeals Chamber therefore will permit Grounds 3 and 4 to be included in the Third Amended Notice of Appeal. The Revised Appeal Brief should not include revisions to the briefing on the issue except, if necessary, corrections to paragraph references to correspond with the Third Amended Notice of Appeal. The Prosecution may amend its Response Brief only as necessitated by the amended paragraph references.

Fifth Ground of Appeal

29. Mr. Jokić's proposed fifth ground of appeal is, in his own characterization, a completely new addition to the notice of appeal. It would read:

The Trial Chamber erred on a question of law by convicting the Appellant of the offences charged when the evidence against the Appellant, taken at its highest and making all assumptions in favour of the Prosecution, clearly showed that there was an equally probable explanation for the acts and omissions completely consistent with innocence, namely that it was essential in the interests of public health that the bodies of the victims be buried without delay, regardless of how they died....

30. Mr. Jokić argues that prior counsel, through negligence or inadvertence, failed "to state an apparently meritorious legal ground of appeal" and that this ground is of "substantial importance to the success of the appeal" because, if the Appeals Chamber were to accept it, "it would have to set aside the Appellant's convictions" on the basis of failure to overcome the presumption of innocence.⁴⁰ The Prosecution makes no specific arguments about this ground of appeal other than the general arguments set forth above.

31. Without passing on the merits of this alleged error, which must be assumed for this purpose, the Appeals Chamber agrees that the ground of appeal is of substantial importance to the success of the appeal, in that if successful it would require reversal of the Appellant's convictions, and that its complete omission must therefore be considered as inadvertence or negligence on the part of previous counsel.

32. The Appeals Chamber therefore permits the fifth ground of appeal to be included in the Third Amended Notice of Appeal. It considers that under the circumstances ten pages of additional briefing from Mr. Jokić and from the Prosecution will be sufficient to address the issue, and that this can be completed in a relatively short period of time so as to minimize prejudice to Mr. Blagojević.

Sixth and Seventh Grounds of Appeal

33. The Sixth Ground of Appeal included in the proposed Third Amended Notice of Appeal reads:

The Trial Chamber made an error of fact in finding that the Appellant must have been present at the duty officer station in the early hours of 15 July 1993, a finding which no reasonable Trial Chamber could have made based on the evidence presented. . . .

The Seventh Ground of Appeal included in the proposed Third Amended Notice of Appeal reads:

The Trial Chamber made an error of fact in finding that Zvornik Brigade engineering resources and personnel were sent to the Pilica School burial site “as a result of Dragan Jokić’s actions”, a finding that no reasonable Trial Chamber could have made based on the evidence presented. . . .

34. Mr. Jokić notes that the paragraphs of the Judgement to which these grounds of appeal make reference—paragraphs 763, 766, and 767—are also mentioned in factual errors #36 and #37 in the Second Amended Notice of Appeal. However, he states, “the factual errors did not raise the correct grounds of appeal”.⁴¹ The Appeals Chamber notes that, as the Prosecution points out,⁴² factual errors #36 and #37 bear no apparent relationship to the proposed new Sixth and Seventh Grounds of Appeal other than making reference to the same paragraphs of the Judgement. They are new proposed grounds of appeal.

35. Mr. Jokić does not attempt to argue that there was good cause for the failure to include these grounds of appeal in his initial Notice of Appeal or its subsequent amended versions. Instead he claims that the failure resulted from counsel inadvertence,⁴³ and asserts that the allegations of error are of substantial importance to the success of his appeal because, “if the factual findings involved were to be set aside, it would seriously affect the whole Prosecution case against the Appellant”.⁴⁴ The Appeals Chamber notes that the factual findings challenged by Mr. Jokić constituted a partial basis for the Trial Chamber’s reasoning for his convictions stemming from the digging of mass graves.⁴⁵ The Appeals Chamber is therefore persuaded in the circumstances of this case that, assuming the merits of the allegations of error for the purposes of this decision, they are of substantial importance to the success of Mr. Jokić’s appeal and that the failure to assert them earlier constituted inadvertence or negligence. It also believes that these errors can be addressed in 10 pages total of briefing from each side, and that allowing such limited briefing will not substantially slow the proceedings or interfere with the administration of justice.

36. Mr. Jokić’s request to include the proposed Sixth and Seventh Grounds of Appeal is granted.

⁴⁰ Motion, paras 9, 13; Reply Supporting Jokić’s Motion, para. 2.

⁴¹ Motion, para. 14.

⁴² Response to Jokić’s Motion, paras 23-24.

⁴³ Reply Supporting Jokić’s Motion, para. 2 (stating that the “factual errors” section of the notice of appeal “fails to identify correctly factual errors that may have occasioned a miscarriage of justice” and that “it is obviously inferable that such deficiencies. . . are attributable to the inadvertence of previously assigned counsel”).

⁴⁴ Motion, para. 14.

⁴⁵ Trial Judgement, paras 763-767.

Further Briefing

37. Mr. Jokić moves for leave to file “a further amended appellate brief”, although he does not specify what that would entail or the amount of time he requests to do so.⁴⁶ He does not provide any arguments specifically setting forth a legal justification for filing such a brief or explaining why briefing would be valuable on any particular issues. Instead, he states generally that the “interests of justice and of fairness” to himself would benefit from the full development of the “truly meritorious grounds of appeal”, the removal of grounds with no reasonable prospect of success, and the reorganization of the appeal brief to correspond to the notice of appeal.⁴⁷ He proposes that the Prosecution should then be permitted to amend its consolidated response brief, and that he should then be permitted to file a reply brief.⁴⁸

38. The Prosecution argues that there is no basis for “a sweeping rewriting of the Amended Appeal Brief and the arguments therein”.⁴⁹ It further contends that “many of the objectives set out in the Motion would otherwise be achieved by (a) filing a notice of withdrawal of grounds and (b) by filing a table clearly correlating the proposed notice of appeal to the Amended Appeal Brief, or by cutting and pasting the standing appeal brief in this case to correspond to the proposed notice of appeal.”⁵⁰

39. The Appeals Chamber has already determined above that limited additional briefing is necessitated by the addition of the first, fifth, sixth, and seventh grounds of appeal and that no substantive additions to the Appeal Brief are necessary with respect to the third and fourth grounds of appeal. With respect to the second proposed ground of appeal, the Appeals Chamber has held that Mr. Jokić is free to retain whichever of the corresponding grounds he chooses from his Second Amended Notice of Appeal. He may likewise retain the corresponding portions of his Appeal Brief if he so chooses, and has not demonstrated any justification for substantive revisions to those portions (beyond renumbering references as appropriate and deleting any portions he prefers not to retain). Mr. Jokić has not demonstrated that any further non-technical revisions to his Appeal Brief are justified by, for instance, his prior counsel’s failure to articulate his arguments properly.

40. In order to minimize prejudice to the Prosecution, it will be permitted to make appropriate revisions to its Consolidated Response Brief as outlined in the Disposition below. Mr. Jokić will then be permitted to file a reply brief of normal length replying to the revised Consolidated Response Brief. The Appeals Chamber considers that this approach, to which the Prosecution does

⁴⁶ Motion, para. 1.

⁴⁷ Motion, para. 15.

⁴⁸ Motion, para. 15.

⁴⁹ Response to Jokić’s Motion, para. 31.

not object, is necessary in the interests of justice and as a remedy for the clear negligence of Mr. Jokić's prior counsel in failing to file a reply brief. Although the changes made to the Consolidated Response Brief will strictly be in response to Mr. Jokić's appeal, because portions of that brief address both Appellants' cases, there is some possibility that Mr. Blagojević's case will be implicated indirectly by changes to those portions. Thus, in order to avoid any possible prejudice to Mr. Blagojević, the Appeals Chamber will permit him to make any amendments to his reply brief that he considers to be necessitated by the changes made by the Prosecution to its Consolidated Response Brief.

41. The Appeals Chamber considers that in light of the relatively limited briefing that is necessary, and in light of the fact that Mr. Jokić's new lead counsel has already had time to familiarize himself with the case and to determine the arguments he finds suitable to make, the remaining filings can be completed on an accelerated schedule (with the exception of the reply brief, for which the normal time will be allocated).

Disposition

42. The Motion is granted in part and denied in part. Mr. Jokić is granted leave to file the following within ten days of this decision:

- a Third Amended Notice of Appeal consisting of (a) Grounds 1, 3, 4, 5, 6, and 7 of his Draft Third Amended Notice of Appeal, and (b) whichever grounds of appeal he chooses to retain from his Second Amended Notice of Appeal, which may if Mr. Jokić so chooses be grouped as sub-grounds within one or more grounds of appeal; and
- a Revised Appeal Brief, corresponding in order to the Third Amended Notice of Appeal consisting of (a) up to thirty pages total of new briefing addressing Grounds 1, 5, 6, and 7 of the Third Amended Notice of Appeal, and (b) whichever portions of the original Appeal Brief Mr. Jokić chooses to retain, without substantive editing except for deletions. Permissible non-substantive edits are changes in order, corresponding changes in transitional language between sections, changes in internal page and paragraph references, and changes in references to the Notice of Appeal and Judgement as necessitated by the amendments to the Notice of Appeal. The Revised Appeal Brief is to be accompanied by a complete list of the changes that have been made.

43. The Prosecution is granted leave to file, within fourteen days of the filing of the Third Amended Notice of Appeal and Revised Appeal Brief, an Revised Consolidated Response Brief

⁵⁰ Response to Jokić's Motion, para. 32.

consisting of (a) up to thirty pages total of new briefing responding to Mr. Jokić's arguments in support of Grounds 1, 5, 6, and 7 of his Third Amended Notice of Appeal; and (b) whichever portions of the original Consolidated Response Brief the Prosecution chooses to retain, with non-substantive edits permitted as defined in Paragraph 42. Substantive changes to the pre-existing portions may consist only of deletions and changes strictly necessitated by the changes to the Second Amended Notice of Appeal and Appeal Brief—such as, for instance, analysis of any paragraphs in the Trial Judgement referred to in the Third Amended Notice of Appeal but not in the corresponding portions of the Second Amended Notice of Appeal. The Revised Consolidated Response Brief is to be accompanied by a complete list of the changes that have been made.

44. Mr. Jokić may file a Brief in Reply within fifteen days of the filing of the Revised Consolidated Response Brief, following the ordinary requirements of the Practice Direction on the Length of Briefs and Motions.⁵¹

45. If Mr. Blagojević should determine that any of the changes reflected in the Revised Consolidated Response Brief necessitate amendments to his Brief in Reply, he may file an Amended Brief in Reply within fifteen days of the filing of the Revised Consolidated Response Brief.

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

Dated 26 June 2006
At The Hague
The Netherlands.



Judge Fausto Pocar
Presiding

[Seal of the International Tribunal]

⁵¹ No. IT/184/Rev. 2, 16 September 2005.