



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: 27 September 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: 27 September 2006

PROSECUTOR

v.

**Vidoje BLAGOJEVIĆ
Dragan JOKIĆ**

**DECISION ON MOTION OF DRAGAN JOKIĆ TO STRIKE OR REQUIRE
RE-DRAFTING OF PARTS OF PROSECUTION AMENDED
CONSOLIDATED RESPONSE BRIEF**

The Office of the Prosecutor:

Mr. Norman Farrell

Counsel for Dragan Jokić:

Mr. Peter Murphy
Ms. Chrissa Loukas

Counsel for Vidoje Blagojević:

Mr. Vladimir Domazet

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 to Strike or Require Re-drafting of Parts of Prosecution Amended Consolidated Response Brief (20 July 2006),” filed on 2 August 2006 (“Motion”).

2. On 15 May 2006, following a change in his defence counsel, Dragan Jokić (“Appellant”) filed a “Motion of Dragan Jokić for Leave to File Third Amended Notice of Appeal and Amended Appellate Brief”. On 26 June 2006, the Appeals Chamber issued its “Decision on Motion of Dragan Jokić for Leave to File Third Amended Notice of Appeal and Amended Appeal Brief”, granting the motion in part, and granting permission to include several new grounds of appeal in the revised appeal brief.¹ The Prosecution was granted leave to file a revised consolidated response brief.² The Appellant filed his Third Amended Notice of Appeal and his Third Amended Appellate Brief on 6 July 2006. On 20 July 2006, the Prosecution filed its confidential and partly *ex parte* Prosecution Amended Consolidated Response Brief (“Amended Response Brief”).³ The Appellant replied confidentially on 2 August 2006 (“Reply Brief”).⁴

Submissions of the Parties

3. In the Motion, filed on the same day as the Appellant’s Reply Brief, the Appellant argues that “a significant number of important passages [of the Amended Response Brief] misrepresent the findings of the Trial Chamber to such a degree that it is difficult to prepare a Reply to the Brief in a constructive manner.”⁵ He also raises several “relatively minor, but nonetheless important issues”,⁶ which include requests for clarification as to which parts of the Amended Response Brief are confidential and for review by the Appeals Chamber of the necessity of continued nondisclosure of any materials presented to the Appeals Chamber on an *ex parte* basis.⁷ The Appellant further moves to strike paragraphs of the Amended Response Brief that he claims improperly place before the

¹ Decision of 26 June 2006, paras 22, 42.

² *Ibid.*, para. 43.

³ A public, redacted version of the Amended Response Brief was filed on 4 August 2006 (“Public Redacted Amended Response Brief”).

⁴ A public, redacted version of the Reply Brief was also filed on 2 August 2006 (“Public Redacted Reply Brief”).

⁵ Motion, para. 1.

⁶ *Id.*

⁷ *Ibid.*, para. 16.

Appeals Chamber factual findings made in another case; challenges the Prosecution's use of bullet-points; and seeks the provision of the Italian domestic legal authority cited at paragraph 12.24 and footnote 575 of the Amended Response Brief, together with a translation of the material into one of the working languages of the Tribunal.⁸

4. In response, the Prosecution argues that the Appellant's submission that the Prosecution's interpretation of the Judgement is unfounded is essentially a request that the Appeals Chamber adjudicate the merits of the appeal on the basis of a procedural motion.⁹ It asserts that this submission does not provide a legitimate basis for striking the Prosecution arguments on the merits and that therefore the Motion should be dismissed outright.¹⁰ Noting that the Appellant has filed a Reply to the Amended Response Brief, it further argues that he has not demonstrated how he was unfairly prejudiced by the Prosecution's alleged misrepresentation of the Trial Chamber's findings, and that in any event, this submission is unfounded.¹¹ Finally, the Prosecution urges the Appeals Chamber to dismiss the additional relief requested in the Motion, with the exception of the request for the full text and translation of the domestic legal authority from Italy, which the Prosecution undertakes to provide.¹²

5. In his reply, the Appellant asserts that the Motion does not seek adjudication of the appeal on its merits but, instead, an accurate presentation of the factual findings of the Trial Chamber.¹³ He reiterates his position that the Prosecution's presentation of those findings was inaccurate.¹⁴ He explains that he has suffered prejudice because he was obliged to devote a disproportionate amount of space in the Reply to correcting the alleged misrepresentations.¹⁵ However, he withdraws his challenge to the *ex parte* and confidential nature of the Amended Response Brief, noting that his concerns were addressed by the Response and the filing of the Public Redacted Amended Response Brief, and that "there is no longer any need for the Appeals Chamber to deal with this question."¹⁶

Discussion

6. The essence of the Appellant's claim is that a number of arguments advanced in the Prosecution's Amended Response Brief are based on misrepresentations of the Trial Chamber's

⁸ *Ibid.*, paras 17-19.

⁹ Prosecution Response to Jokić's Motion to Strike, 14 August 2006 ("Response"), para. 2.

¹⁰ *Ibid.*, para. 3.

¹¹ *Ibid.*, paras 3-5.

¹² *Ibid.*, paras 6, 25-30.

¹³ Reply of Dragan Jokić to Prosecution Response to Motion to Strike ("Reply"), para. 2.

¹⁴ *Id.*

¹⁵ *Ibid.*, para. 3.

findings.¹⁷ He moves the Appeals Chamber to strike or require redrafting of certain sections of the Amended Response Brief, arguing that “[i]t is essential in the interests of justice and fairness to Jokić that the Appeals Chamber be enabled to approach this appeal with the precise and limited findings of the Trial Chamber clearly presented, and that Jokić be enabled to argue his case on that same basis.”¹⁸

7. In carrying out its mandate under Article 25 of the Statute of the Tribunal, the Appeals Chamber depends upon the focused contributions of the parties. It thus “falls to the parties appearing before the Appeals Chamber to present their case clearly, logically and exhaustively so that the Appeals Chamber may fulfil its mandate in an efficient and expeditious manner.”¹⁹ In presenting their arguments on appeal, parties must provide precise references to relevant transcript pages or paragraphs in the judgement being challenged.²⁰ The Appeals Chamber “will not give detailed consideration to submissions which are obscure, contradictory, or vague” or which “suffer from other formal and obvious insufficiencies”.²¹ If these requirements are not met, the Appeals Chamber may, in its discretion, issue an order for clarification or refiling, reject the filing, or dismiss the offending submissions.²²

8. The Appeals Chamber finds that such an order is not warranted in this case. The Appellant lists a number of statements made by the Prosecution in the Amended Response Brief, which allegedly contain a misrepresentation of the Trial Chamber’s findings.²³ However, he does not establish that the passages he cites misstate specific findings of the Trial Chamber. Rather, he argues that these passages are unfounded because they are “based on a single word used by the Trial

¹⁶ *Ibid.*, para. 13.

¹⁷ See Motion, paras 1, 14, & 16; Reply, para. 15.

¹⁸ Reply, para. 15.

¹⁹ *Prosecutor v. Kunarac et al.*, IT-96-23 & IT-96-23/1-A, Judgement, 12 June 2002, (“*Kunarac Appeal Judgement*”), para. 43.

²⁰ Practice Direction on Formal Requirements for Appeals from Judgement, IT/201, 7 March 2002 (“Practice Direction on Formal Requirements for Appeals”), para. 5(c); see *Prosecutor v. Naletilić & Martinović*, IT-98-34-A, Judgement, 3 May 2006, para. 14.

²¹ *Prosecutor v. Blaškić*, IT-95-14-A, Judgement, 29 July 2004, para. 13; see *Kunarac Appeal Judgement*, para. 43.

²² Practice Direction on Formal Requirements for Appeals, para. 17; see *Kunarac Appeal Judgement*, para. 43 and fn. 21.

²³ Motion, para. 4. The appendix to the Motion lists 25 paragraphs in the Amended Response Brief that allegedly contain a misrepresentation. Some but not all of these alleged misrepresentations are addressed in the Appellant’s Motion. The Appeals Chamber considers that this appendix contains arguments, contrary to paragraph (C)(6) of the Practice Direction on the Length of Briefs and Motions, IT/184 Rev. 2, 16 September 2005 (“Practice Direction on Length”). Cf. *Prosecutor v. Halilović*, IT-01-48-A, Decision on Prosecution’s Motion to Strike Annexes to the Respondent’s Brief, 6 September 2006, para. 10. Moreover, if the appendix were considered to be part of the Motion, the final length of the Motion would exceed the limit of 3,000 words for Motions under paragraph (C)(5) of the Practice Direction on Length. Consequently, the Appeals Chamber will not consider any further arguments implicitly or expressly advanced in the appendix to the Motion.

Chamber in paragraph 770 of the Judgement, to which [...] the Prosecution turns for support again and again.”²⁴ At paragraph 770, the Trial Chamber found that

Dragan Jokić rendered practical assistance which had a substantial effect on the commission of the mass executions in Orahovac, Pilica/Branjevo Military Farm, and Kozluk. His acts of assistance included co-ordinating, sending and monitoring the deployment of Zvornik Brigade resources and equipment to the mass execution sites between 14-17 July. Furthermore, he rendered this assistance with the knowledge that his acts assisted the commission of murder. The Trial Chamber finds that there is sufficient evidence to establish beyond reasonable doubt that Dragan Jokić aided and abetted the murders committed at Orahovac, Pilica/Branjevo Military Farm, and Kozluk.²⁵

9. The Appellant claims that the Trial Chamber’s use of the word “included” in the second sentence of paragraph 770 was a “semantic error”, which was not what the Trial Chamber intended.²⁶ Moreover, he urges the Appeals Chamber to look elsewhere in the Judgement to ascertain the Trial Chamber’s intentions. The Motion states: “If a determination has to be made as to whether paragraph 770 (as written) or paragraph 836 better captures the Trial Chamber’s intentions, Jokić submits that the Trial Chamber’s statement of the basis on which sentence was to be imposed, a statement of its findings as to Jokić’s overall criminality, is to be preferred.”²⁷ He adds that paragraph 836 should be construed to be the sole basis for the Appellant’s sentence, arguing that if the Trial Chamber had intended to rely on any of its other factual findings in sentencing the Appellant, it would have referred to them in that paragraph.²⁸ Hence, he argues that the Prosecution’s statements are unfounded because they are based on paragraph 770, “as written,” and other factual findings in the Judgement.²⁹

10. This argument is without merit. Rather than supporting the Appellant’s assertion that the Amended Response Brief misstated the Trial Chamber’s *actual* findings, it suggests that the Prosecution erred in its interpretation of the Judgement, in particular, in its interpretation of the intention behind the Trial Chamber’s words. This is an argument which may be properly advanced in the pleadings and decided on appeal. The Appeals Chamber will not strike portions of the Prosecution’s arguments on the ground that they diverge from the Appellant’s interpretation of the Judgement. This is particularly so where, as here, that interpretation itself differs from what the Trial Chamber actually said.

²⁴ Motion, para. 7.

²⁵ Judgement, para. 770.

²⁶ Motion, para. 8.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Ibid.*

11. Likewise, the Prosecution's characterization of certain findings of the Trial Chamber as falling within the basket of Mr. Jokić's "acts of assistance" does not misrepresent those findings, as the Appellant suggests. Instead, it relates those findings to the unspecified "acts of assistance" alluded to at paragraph 770. Whether or not this connection is correctly drawn is a matter of interpretation, which should be resolved on the pleadings rather than through a procedural motion.

12. Moreover, the Appeals Chamber agrees with the Prosecution that the Motion relies upon the Appellant's own interpretations of the Prosecution's statements and their implications for the issues on appeal. For example, the Appellant asserts that the "clear implication of the [Prosecution's] language [...] is that the Trial Chamber found Jokić to be at the very heart of the joint criminal enterprise," in contrast to "what the Trial Chamber found to be proved."³⁰ He further states that the Prosecution's characterization of the Trial Chamber's findings could mean that the Trial Chamber "must inevitably have convicted Jokić for planning, instigating, or ordering the underlying crimes of murder; and might well have convicted him on a theory of command responsibility."³¹ At this stage, the Appeals Chamber takes no position on the merits of these arguments. However, it notes that the Appellant's submissions on this point do not demonstrate that the Prosecution misrepresented the findings of the Trial Chamber.

13. In sum, the Appellant has not demonstrated that the Prosecution's arguments are based on misrepresentations of the Trial Chamber's findings.³² Accordingly, there is no need for the Appeals Chamber to consider whether alleged misrepresentation of findings of a Trial Chamber by one of the parties in its submissions on appeal could be considered as a ground to strike such submissions. In this case, the interpretation of the Judgement and the relevance of the Trial Chamber's factual findings relating to the *actus reus* of aiding and abetting are live issues in this appeal.³³ In arguing that the Prosecution's interpretation of the Trial Chamber's findings is unfounded and urging the Appeals Chamber to accept his own submissions in this regard, the Appellant, in effect, asks the Appeals Chamber to adjudicate through a pre-appeal motion the merits of his appeal. This, the Appeals Chamber may not do.

14. Turning to the additional grounds of appeal, the Appeals Chamber notes that the Appellant withdrew, in the Reply, his challenge to the *ex parte* and confidential nature of the Amended

³⁰ Motion, para. 5.

³¹ *Ibid.*, para. 4.

³² In light of this conclusion, the Appeals Chamber will not address the Appellant's argument that he was unfairly prejudiced by the impugned paragraphs of the Amended Response Brief.

Response Brief. This issue, therefore, is not before the Appeals Chamber. On 16 August 2006, the Prosecution filed a Book of Authorities to the Amended Response Brief, which included the full text of the Italian domestic legal authority cited in the Amended Response Brief and requested by the Appellant.³⁴ The Prosecution has undertaken to provide a translation of this authority in a subsequent filing.³⁵ It is therefore unnecessary to address further the Appellant's request that this material be provided.

15. The Appellant also moved to strike paragraphs 12.6 and 12.7 of the Amended Response Brief on the ground that they improperly placed before the Appeals Chamber factual findings in another case and would have the effect of supplementing the factual findings of the Trial Chamber in the present case. This argument has no merit. The Amended Response Brief does not present the findings of the Trial Chamber in another case as those of the Trial Chamber in this case. Instead, it describes the underlying reasoning and logic of the quoted passage and argues that a similar logic was applied by the Trial Chamber in this case to the facts as found in the Judgement.³⁶

16. Finally, the use of bullet points within several paragraphs in the Amended Response Brief does not violate the requirement that pages and paragraphs shall be numbered consecutively from beginning to end.³⁷ The Appellant's argument to the contrary therefore falls to be rejected.

Disposition

17. For these reasons, the Appellant's Motion is **DENIED**.

³³ Grounds 3, 4, & 5 of the Third Amended Appellate Brief of Dragan Jokić. The Appeals Chamber notes that the primary argument advanced in this Motion is also contained in the Appellant's Reply Brief. *See* Public Redacted Reply Brief, paras 24-35.

³⁴ Book of Authorities for Prosecution Amended Consolidated Response Brief, 16 August 2006.

³⁵ *Ibid.*, p. 1.

³⁶ *See* Public Redacted Amended Response Brief, paras 12.6 and 12.7.

³⁷ *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. 18.

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

Dated 27 September 2006

At The Hague

The Netherlands.



Judge Fausto Pocar

Presiding

[Seal of the International Tribunal]