



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-95-17-A
Date: 9 January 2007
Original: English

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IN THE APPEALS CHAMBER

Before: Judge Andréia Vaz, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: Mr. Hans Holthuis

Decision of: 9 January 2007

PROSECUTOR

v.

MIROSLAV BRALO

**DECISION ON MIROSLAV BRALO'S MOTION FOR LEAVE TO SUPPLEMENT
APPEAL BRIEF IN LIGHT OF NEW INFORMATION CONCERNING EX PARTE
PORTION OF THE TRIAL RECORD**

The Office of the Prosecutor:

Mr. Peter Kremer Q.C.
Mr. Xavier Tracol

Counsel for the Appellant:

Mr. Jonathan Cooper
Ms. V. C. Lindsay

INTRODUCTION

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 "Tribunal", respectively) is seized of "Miroslav Bralo's Motion for Leave to Supplement Appeal Brief in Light of New Information Concerning *Ex Parte* Portion of the Trial Record" filed confidentially by Miroslav Bralo on 15 August 2006 ("Motion" and "Appellant", respectively), requesting leave to supplement the Appeal Brief with the confidential "*Proposed* Miroslav Bralo's Supplemental Brief in Support of Ground 1.2(2) and 1.3" annexed to the Motion¹.
2. The Prosecution filed its confidential Response on 18 August 2006, arguing that the Motion should be rejected.² The Appellant filed his confidential Reply on 21 August 2006.³

PROCEDURAL BACKGROUND

3. The Appeals Chamber recalls that the Appellant pleaded guilty to all eight counts of the Indictment and Trial Chamber I ("Trial Chamber") accepted the guilty pleas and entered a conviction for each of the eight counts charged.⁴ The Sentencing Judgement in the present case was delivered on 7 December 2005.⁵
4. The Appellant filed the Notice of Appeal on 5 January 2006⁶ and the Appellant's Brief on 30 March 2006.⁷ The Prosecution filed its Respondent's Brief on 2 May 2006.⁸ The Appellant replied on 19 May 2006.⁹ The Appeals Chamber notes that the extent of the Appellant's cooperation with the Tribunal was one of the issues addressed by the parties during the sentencing proceedings,¹⁰ and

¹ Annex A ("Proposed Supplemental Brief").

² Prosecution's Confidential Response to "Miroslav Bralo's Motion for Leave to Supplement Appeal Brief in Light of New Information Concerning *Ex Parte* Portion of the Trial Record", 18 August 2006 ("Response"), para. 8.

³ Confidential Miroslav Bralo's Reply Regarding Motion for Leave to Supplement Appeal Brief, 21 August 2006 ("Reply").

⁴ *Prosecutor v. Miroslav Bralo*, Case No. IT-95-17, T. 19 July 2005, p. 44.

⁵ *The Prosecutor v. Miroslav Bralo*, Case No. IT-95-17-S, Sentencing Judgement, 7 December 2005 ("Sentencing Judgement").

⁶ Notice of Appeal Against Sentence on Behalf of Miroslav Bralo, 5 January 2006 ("Notice of Appeal").

⁷ Appeal Brief on Behalf of Miroslav Bralo filed confidentially on 30 March 2006 and publicly 26 May 2006 ("Appellant's Brief").

⁸ Respondent's Brief to the "Appeal Brief on Behalf of Miroslav Bralo", 2 May 2006 ("Respondent's Brief").

⁹ Reply Brief on Behalf of Miroslav Bralo filed confidentially on 19 May 2006 and publicly on 26 May 2006.

¹⁰ See, Sentencing Judgement, paras 43-45 and 73-81.

that the Trial Chamber's finding on the absence of any "substantial" cooperation is currently on appeal.¹¹

5. On 12 July 2006, the Prosecution filed the partly confidential "Prosecution's Notice to Lift the *Ex Parte* Status of the Prosecution's Further Submissions Concerning Rule 68 Filed on 18 October 2005 (RP D836 to 833)" ("Notice to Lift"). It contains a redacted *inter partes* confidential version¹² of the "Prosecution's Further Submissions Concerning Rule 68" filed *ex parte* on 18 October 2005, relative to references made to information provided by the Appellant in the Prosecution's "Request for Review or reconsideration" filed confidentially on 29 July 2005 in the *Blaškić* review proceedings¹³ ("*Blaškić* Request"). The *Blaškić* Request was annexed to the Prosecution's original Submissions filed *ex parte* but not to the Notice to Lift. On 10 July 2006, a public redacted version of the *Blaškić* Request was filed by the Prosecution.¹⁴ On 3 November 2006, the Appeals Chamber, seized of an "Application on Behalf of Miroslav Bralo for Access to Confidential Material" filed on 13 September 2006 in the *Blaškić* review proceedings, considered that "with respect to references made in the *Blaškić* review proceedings to information provided by Bralo, only paragraphs 63, 65 and 76 of the *Blaškić* Request are relevant, however, there is no legitimate forensic purpose for Bralo obtaining access to the unredacted versions of these paragraphs".¹⁵ The Appeals Chamber, subject to the protected witness' consent being obtained, allowed Bralo access to a closed session transcript in the *Blaškić* appeals proceedings¹⁶ referring to information provided by the Appellant.¹⁷

SUBMISSIONS OF THE PARTIES

6. The Motion is based on Article 21 of the Statute and Rules 73, 107 and 127(A)(ii) of the Rules of Procedure and Evidence of the Tribunal ("Statute" and "Rules", respectively).¹⁸ The Appellant

¹¹ Notice of Appeal, para. 1.2(2); Appellant's Brief, paras 50-81.

¹² Notice to Lift, Confidential Annex ("Prosecution's Submissions"). This document fully corresponds to the Prosecution's *ex parte* filing of 18 October 2005. The only redaction in this document concerns footnote 2 and, according to the Prosecution, remains necessary in terms of protection of certain witnesses who are not relevant to the present case (Notice to Lift, para. 3). In this regard, the Appeals Chamber has considered the existing redaction justified (Decision on Motions for Access to *Ex Parte* Portions of the Record on Appeal and for Disclosure of Mitigating Material, 30 August 2006 ("Access and Disclosure Decision"), fn. 59.)

¹³ Case No. IT-95-14-R.

¹⁴ The Prosecution has sent a copy of this public redacted version to Bralo (Notice to Lift, para. 2) and Bralo has annexed this public redacted version to "Miroslav Bralo's Response to Prosecution's Notice" filed confidentially on 24 July 2006 (see Annex A).

¹⁵ *Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-R, Confidential Decision on Application on Behalf of Miroslav Bralo for Access to Confidential Material*, 3 November 2006 ("*Blaškić* Decision of 3 November 2006"), p. 8.

¹⁶ Case No. IT-95-14-A.

¹⁷ *Blaškić* Decision of 3 November 2006, pp 7, 9.

¹⁸ Motion, para. 1.

argues that the new information is contained in the Notice to Lift, which reveals the earlier Prosecution's Submissions, to which the *Blaškić* Request was annexed.¹⁹ He maintains that it "reveals that information which is relevant to the Appellant's grounds of Appeal is already in the Trial Record, and upon which [he] must be entitled to comment"²⁰. He contends that in his Appeal Brief, he "made reference to the *possibility* that Miroslav Bralo's words or actions had been cited by the Prosecutor in support of [*Blaškić*] Review Proceedings",²¹ while the public version of the *Blaškić* Request "now reveals for the first time that Mr Bralo is indeed relied upon by the Prosecution as the source of certain fresh information about the *Blaškić* case".²² Thus, he seeks leave to supplement Ground 1.2 (2) and Ground 1.3 of his Notice of Appeal relative, respectively, to alleged errors of the Trial Chamber in failing to give proper weight to specific factors in mitigation of sentence, including his cooperation with the Prosecution, and in failing to order an appropriate reduction of sentence to reflect the mitigation in the case.²³

7. The Prosecution responds that the Motion should be rejected because the Appellant has failed to demonstrate good cause for supplementing his Appeal Brief.²⁴ It submits that the only new information is that the public version of the *Blaškić* Request "confirms that Bralo's Factual Basis and Plea Agreement have been relied upon by the Prosecution in the *Blaškić* Review proceeding"²⁵ but underlines that the transcripts of the Sentencing Hearing demonstrate that all parties were aware that these documents were potentially being used by the Prosecution in the *Blaškić* case.²⁶

8. The Appellant replies that until the redacted version of the *Blaškić* Request was filed publicly, he "did not know and could not have known, whether anything he had done or said had in fact been relied upon in the *Blaškić* Review Proceedings [...], and if so, in what way".²⁷

DISCUSSION

9. While it is true that, save for Rule 115(A) allowing parties to file supplemental briefs on the impact of the additional evidence admitted by the Appeals Chamber, no specific provision of the

¹⁹ *Ibid.*, para. 2.

²⁰ *Ibid.*, para. 4.

²¹ *Ibid.*, para. 6.

²² *Ibid.*, para. 7.

²³ *Ibid.*, paras 4-5, 8, Annex A.

²⁴ Response, para. 3.

²⁵ *Ibid.*, para. 4.

²⁶ *Ibid.*, para. 5.

²⁷ Reply, para. 3.

Rules explicitly regulates the possibility for the parties to supplement their briefs on appeal, it has been recognised in the jurisprudence that an appellant may supplement his or her brief, pursuant to Rule 127(A)(ii) and (B) of the Rules, by filing the said supplement with sufficient reasons constituting good cause for the Appeals Chamber to recognize it as validly filed.²⁸ In particular, the appellant must show that the proposed supplemental submissions are relevant to his grounds of appeal²⁹ and add substantial new information to the submissions which have already been made.³⁰ The new information at stake must be of sufficiently compelling importance to justify the admission of a supplemental brief at the stage where the briefing on appeal is completed.³¹

10. The Appeals Chamber recalls that the concept of “good cause” applicable to amendments to a notice of appeal encompasses both good reason for including the new 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.³² Where an appellant seeks a substantive amendment broadening the scope of the appeal, “good cause” might also, under some circumstances, be established.³³ In such instances, each amendment is to be considered in light of the particular circumstances of the case.³⁴ The Appeals Chamber is of the view that the same logic may be applied while examining applications to supplement an appellant’s brief.

11. At the same time, the jurisprudence of the Tribunal establishes that the “good cause” requirement must be interpreted restrictively at late stages in appeal proceedings when amendments

²⁸ *Prosecutor v. Željko Mejakić et al.*, Case No. IT-02-65-AR11bis.1, Decision on Second Joint Defense Supplement to Joint Appeal Brief in Support of Notice of Appeal, 16 November 2005 (“*Mejakić* Decision of 16 November 2005”), p. 4; *Prosecutor v. Željko Mejakić et al.*, Case No. IT-02-65-AR11bis.1, Decision on Joint Defense Motion for Enlargement of Time to File Appellant’s Brief, 30 August 2005, p. 3; *See also Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Confidential Decision on Prosecution’s Motion for Extension of Time, 26 February 2004, p. 2; *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, Decision on Hazim Delić’s Motion for Leave to File Second Supplementary Brief, 1 February 2001 (“*Delalić* Decision of 1 February 2001”), para. 6.

²⁹ *Delalić* Decision of 1 February 2001, para. 3.

³⁰ *Ibid.*, para. 5.

³¹ *Ibid.*, para. 6.

³² *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Decision on Motion of Dragan Jokić for Leave to File Third Amended Notice of Appeal and Amended Appellate Brief, 26 June 2006 (“*Blagojević* Decision of 26 June 2006”), para. 7; *See also, e.g., Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Decision on Motions Related to the Pleadings in Dragan Jokić’s Appeal, 24 November 2005, para. 10 (“*Blagojević* Decision of 24 November 2005”); *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Decision on Defence Motion for Extension of Time in Which to File the Defence Notice of Appeal, 15 February 2005, pp. 2-3; *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Appellant Jean-Bosco Barayagwiza’s Motions for Leave to Submit Additional Grounds of Appeal, to Amend the Notice of Appeal and to Correct his Appellant’s Brief, 17 August 2006 (“*Barayagwiza* Decision of 17 August 2006”), para. 10.

³³ *Blagojević* Decision of 26 June 2006, para. 7; *Blagojević* Decision of 24 November 2005, para. 7; *Blagojević* Decision of 20 July 2005, p. 3; *Barayagwiza* Decision of 17 August 2006, para. 10.

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.³⁵ To hold otherwise would leave appellants free to change their appeal strategy and essentially restart the appeal process at will (including after they have had the advantage of reviewing the arguments in a response brief), thus interfering with the expeditious administration of justice and prejudicing the other parties to the case.³⁶

12. The Appeals Chamber first notes that the Appellant does not seek to supplement his Appeal Brief on the basis of the information disclosed by the Prosecution in its Notice to Lift, but rather on the basis of the public redacted version of the *Blaškić* Request, filed on 10 July 2006. The Appeals Chamber recalls that the Appellant was denied access to unredacted paragraphs 63, 65 and 76 of the *Blaškić* Request³⁷ and that the only matter currently pending in this respect is his access to the closed session transcript in *Blaškić* appellate proceedings.³⁸ Therefore, any supplemental brief would be restricted to four references to the Appellant contained in the public version of the *Blaškić* Request. More specifically, the Appellant refers to the citation by the Prosecution in the *Blaškić* Request of the Factual Basis of the Plea Agreement and Amended Indictment in the *Bralo* case with respect to crimes committed in Ahmići.³⁹

13. The Appeals Chamber is satisfied that this information is relevant to the existing grounds of appeal 1.2 and 1.3. It is further satisfied that, while the Appellant knew that he himself provided this information to the Prosecution, he could not have known, prior to the filing of the public redacted version of the *Blaškić* Request, whether and how the Prosecution had used this information in the *Blaškić* Review Proceedings. Therefore, the Appeals Chamber finds that the Appellant has demonstrated good cause for not having included the proposed submissions in his Appeal Brief, as well as good reason for seeking leave to include it at the present stage.

³⁴ *Blagojević* Decision of 26 June 2006, para. 7; *Blagojević* Decision of 24 November 2005, para. 7; *Barayagwiza* Decision of 17 August 2006, para. 10.

³⁵ *Blagojević* Decision of 26 June 2006, para. 8; *Barayagwiza* Decision of 17 August 2006, para. 11.

³⁶ *Id.*

³⁷ *See supra*, para. 5.

³⁸ The Appeals Chamber notes that should the Appellant be granted access to this document and then wish to submit any supplementary submissions on its basis, he should first seek for admission of the said material as additional evidence on appeal under Rule 115. Should this material be so admitted by the Appeals Chamber, the Appellant will be permitted to file a supplemental submission on the impact of the admitted material as provided under Rule 115(A).

³⁹ *Blaškić* Request, paras 61-62.

14. At the same time, the Appeals Chamber reserves its holding on whether this information is of substantial importance, since the issue of whether the Trial Chamber was correct in holding that the use of such information by the Prosecution in other cases “does not imbue it with value as evidence of co-operation from Bralo”⁴⁰ is currently before the Appeals Chamber as part of the merits of the present appeal.⁴¹ This decision should therefore not be interpreted as prejudging on the merits of the case on appeal.


15. Having reviewed the Appellant’s Proposed Supplemental Brief, the Appeals Chamber accepts paragraphs 1-7 and 10-11 as validly filed to supplement Grounds 1.2(2) and 1.3 of the Appeal Brief. However, it is not satisfied that the argument contained in paragraphs 8-9 of the Proposed Supplemental Brief indeed relies on the new information contained in the public redacted version of the *Blaškić* Request. These latter submissions only contain general arguments as to the fact that the Appellant pleaded guilty and to the alleged significance of voluntarily providing a declaration on factual matters. Therefore, these submissions are not admissible as part of a supplemental brief.

DISPOSITION

16. In light of the findings above, the Appeals Chamber **GRANTS** the Motion **IN PART** and **ACCEPTS** paragraphs 1-7 and 10-11 as validly filed to supplement Grounds 1.2(2) and 1.3 of the Appeal Brief. The Appeals Chamber **ORDERS** the Prosecution, should it wish to do so, to file a brief response to the Appellant’s Supplemental Brief, inasmuch as it has been considered admissible, no later than ten (10) days from the date of the present decision. The Appellant may then file a reply within four (4) days of the filing of the Prosecution’s response. The Motion is **DISMISSED** in all other respects.

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

Done this 9th day of January 2007,
At The Hague, The Netherlands.


Judge Andréia Vaz
Presiding Judge

[Seal of the International Tribunal]

⁴⁰ Sentencing Judgement, para. 80.