

**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-95-17-A
Date: 5 March 2007
Original: English

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: 5 March 2007

PROSECUTOR

v.

MIROSLAV BRALO

**DECISION ON PROSECUTION'S MOTION TO STRIKE AND ON
APPELLANT'S MOTION FOR LEAVE TO FILE RESPONSE TO
PROSECUTION ORAL ARGUMENTS**

Office of the Prosecutor:

Mr. Peter Kremer, Q.C.
Mr. Xavier Tracol
Ms. Kristina Carey

Counsel for the Appellant:

Mr. Jonathan Cooper
Ms. Virginia C. Lindsay

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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 the “Prosecution’s Motion to Strike” filed on 15 February 2007 (“Prosecution’s Motion”). The Prosecution generally submits that the “Reply Brief in Relation to Miroslav Bralo’s Second Supplemental Brief in Support of Sub-Headings 1.2(2) and 1.3 with Citations to the Certified Trial record in Reply to Prosecution Arguments Relating to Sub-Heading 1.2(1) Raised During Oral Argument” filed by Counsel for Miroslav Bralo (“Appellant”) on 14 February 2007 (“Second Supplemental Reply Brief”) contains “inappropriate material” and requests the Appeals Chamber to strike a number of arguments contained therein.¹

2. The Appellant filed his response on 23 February 2007.² On the same date, he filed the “Appellant’s Motion for Leave to File Response to Prosecution Oral Arguments” (“Appellant’s Motion”),³ to which he attached the “Appellant’s *Proposed* Response to Prosecution Oral Arguments” as Annex A (“Proposed Response to Oral Arguments”). The Prosecution filed the “Prosecution’s Reply to ‘Appellant’s Response to the Prosecution’s Motion to Strike’ and Response to ‘Appellant’s Motion for Leave to File Response to Prosecution Oral Argument’” on 27 February 2007 (“Prosecution’s Reply and Response”). The “Appellant’s Reply in Relation to His Motion for Leave to File Response to Prosecution Oral Arguments” was filed by the Appellant on 2 March 2007 (“Appellant’s Reply”).

I. PROCEDURAL BACKGROUND

3. On 19 July 2005, the Appellant pleaded guilty to each of the eight counts charged in the Amended Indictment,⁴ and the Trial Chamber entered a conviction for each of these

¹ Prosecution’s Motion, paras 1 and 3.

² Appellant’s Response to the Prosecution’s Motion to Strike, 23 February 2007; this was subsequently amended by the Corrigenda to Appellant’s Response to Prosecution Motion to Strike, 26 February 2007 (collectively, “Response to the Prosecution’s Motion”).

³ See also Corrigendum to Appellant’s Motion for Leave to File Response to Prosecution Oral Arguments, 26 February 2007 containing the missing page 20 of Annex A.

⁴ The initial indictment charging the Appellant with 21 counts was issued under seal on 10 November 1995 and disclosed in October 2004. The plea agreement (“Plea Agreement”) and the amended indictment reducing the charges against the Appellant to 8 counts (“Amended Indictment”) were filed as part of the following document: *Prosecutor v. Miroslav Bralo*, Case No. IT-95-17-PT, Filing of Documents Relating to Rule 62ter, 19 July 2005, containing the Plea Agreement, the Amended Indictment and the Factual Basis. The Amended Indictment was confirmed on the same date, 19 July 2005.

eight counts.⁵ On 7 December 2005, the Trial Chamber sentenced the Appellant to 20 years' imprisonment.⁶ The Appellant filed his Notice of Appeal on 5 January 2006⁷ and his Appellant's Brief on 30 March 2006,⁸ to which the Prosecution responded on 2 May 2006.⁹ The Brief in Reply was filed on 19 May 2006.¹⁰

4. By its Decision of 9 January 2007, the Appeals Chamber accepted paragraphs 1-7 and 10-11 of the confidential "*Proposed Miroslav Bralo's Supplemental Brief in Support of Ground 1.2(2) and 1.3*" ("*First Supplemental Brief*")¹¹ as validly filed to supplement Grounds 1.2(2) and 1.3 of the Appellant's Brief.¹² The Prosecution responded on 19 January 2007,¹³ and the Appellant replied on 23 January 2007.¹⁴

5. By its confidential Decision of 12 January 2007, the Appeals Chamber admitted three items of additional evidence under Rule 115 of the Tribunal's Rules of Procedure and Evidence ("Rules") and allowed the Appellant to file a supplemental brief on the impact of the said additional evidence.¹⁵ "*Miroslav Bralo's Second Supplemental Brief in Support of Sub-Headings 1.2(2) and 1.3*" was filed confidentially on 30 January 2007 ("*Second Supplemental Brief*").¹⁶ The "*Prosecution's Response to Miroslav Bralo's Second Supplemental Brief in Support of Sub-Headings 1.2(2) and 1.3*" was filed confidentially on 7 February 2007 ("*Response to the Second Supplemental Brief*"). As

⁵ *Prosecutor v. Miroslav Bralo*, Case No. IT-95-17-PT, Plea Hearing, 19 July 2005, T. 44.

⁶ *Prosecutor v. Miroslav Bralo*, Case No. IT-95-17-S, Sentencing Judgement, 7 December 2005 ("*Sentencing Judgement*"), para. 95.

⁷ Notice of Appeal against Sentence on Behalf of Miroslav Bralo, 5 January 2006 ("*Notice of Appeal*").

⁸ Confidential Appeal Brief on Behalf of Miroslav Bralo, 30 March 2006. A public redacted version of this brief was filed on 26 May 2006 ("*Appellant's Brief*").

⁹ Prosecution Respondent's Brief to the "*Appeal Brief on Behalf of Miroslav Bralo*", 2 May 2006 ("*Respondent's Brief*").

¹⁰ Confidential Reply Brief on Behalf of Miroslav Bralo, 19 May 2006, re-filed for public access without redactions on 26 May 2006 ("*Reply Brief*").

¹¹ Annexed to "*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.

¹² 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, 9 January 2007 ("*Decision of 9 January 2007*").

¹³ Confidential Prosecution's Response to "*Miroslav Bralo's Supplemental Brief in Support of Grounds 1.2(2) and 1.3*" of 15 August 2006 pursuant to the Appeals Chamber's 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 Dated 9 January 2007, 19 January 2007 ("*Response to the First Supplemental Brief*").

¹⁴ Confidential Reply Brief on Behalf of Miroslav Bralo in Relation to his Supplemental Brief in Support of Grounds 1.2(2) and 1.3, 23 January 2007 ("*First Supplemental Reply Brief*").

¹⁵ Confidential Decision on Miroslav Bralo's Motion for Admission of Additional Evidence, 12 January 2007 ("*Decision of 12 January 2007*"), para. 27.

¹⁶ The public version of the Second Supplemental Brief was filed by the Appellant on 5 February 2007.

recalled above and in conformity with the Decision of 13 February 2007,¹⁷ the Appellant filed the Second Supplemental Reply Brief on 14 February 2007.

6. The oral arguments of the parties were heard by the Appeals Chamber on 9 February 2007 (“Appeal Hearing”).

II. DISCUSSION

A. Submissions of the Parties

7. The Prosecution submits that certain arguments contained in the Second Supplemental Reply Brief in fact constitute a “reply to the Prosecution’s oral submissions” made at the Appeal Hearing, and thus fall outside the scope of the Response to the Second Supplemental Brief.¹⁸ The Prosecution submits that “[t]he proper forum for replying to the Prosecution’s oral submissions was the Reply by Bralo at the hearing”¹⁹ and requests the Appeals Chamber to strike all of the Appellant’s arguments in that respect pursuant to Rules 73(A) and 107 of the Rules and paragraph 12 of the Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the International Tribunal²⁰ (“Practice Direction”).²¹

8. The Appellant responds that the Second Supplemental Reply Brief properly addresses the arguments set out in the Response to the Second Supplemental Brief, as well as “certain matters raised for the first time in oral argument and which had not appeared in previous filings”.²² With respect to the latter issue, the Appellant generally concedes that it would have been more appropriate for him to seek leave to file a response to the Prosecution’s oral arguments,²³ but submits that in cases where “for whatever reason, oral arguments precede the filing of a written Reply Brief, any concessions or admissions or new arguments raised for the first time during the oral

¹⁷ Decision on Miroslav Bralo’s Motion for Extension of Time to File Reply in Relation to his Second Supplemental Brief, 13 February 2007 (“Decision of 13 February 2007”).

¹⁸ Prosecution’s Motion, paras 1 and 3 specifically referring to paras 4, 7, 7.1-7.3, 10, 11, 16, 18, 22 (except for the last two sentences), 23, 24 (with respect to the reference to “oral argument” in the first sentence), 26, 26.1 and 26.5, as well as the second part of footnote 49 of the Second Supplemental Reply Brief.

¹⁹ Prosecution’s Motion, para. 2.

²⁰ IT/155Rev.3, 16 September 2005.

²¹ Prosecution’s Motion, para. 3.

²² Response to the Prosecution’s Motion, para. 3.

²³ *Ibid.*, para. 5.

arguments should be recognized as an integral step in the development of arguments in the case”.²⁴

9. The Appellant does not oppose the Prosecution’s Motion with respect to paragraphs 4, 7-7.3, and 26 to 26.2,²⁵ but refers to his submissions in the Appellant’s Motion and the Proposed Response to Oral Arguments seeking leave to file the same arguments in a separate document.²⁶ However, the Appellant claims that paragraphs 10, 11, 18, 22, 23 and 26.3 lie within the scope of a reply as they are made in direct response to the arguments contained in the Response to the Second Supplemental Brief.²⁷

10. In the event that the Appeals Chamber were to grant the Prosecution’s Motion, the Appellant seeks leave to file a response “containing each of the passages from his original [Second Supplemental Reply Brief]” in order to: (i) respond to five arguments allegedly raised by the Prosecution for the first time during the Appeal Hearing; (ii) “set out and then apply the [P]rosecution’s proposed definition of ‘cooperation’ to the facts as known followings oral arguments; (iii) address the Prosecution’s “concessions” made during the Appeal Hearing; and (iv) comment on and make written objections to disclosure issues and the Prosecution’s alleged “improper reliance on material not in the trial record”.²⁸

11. In support of the Appellant’s Motion, he submits that there is good cause for allowing the Proposed Response to Oral Arguments because *inter alia*: (i) at the Appeal Hearing, the Prosecution raised important new factual challenges that had not been the subject of briefing; (ii) the Appeals Chamber was denied the benefit of written arguments on these issues; (iii) the Prosecution improperly sought to rely on material that was not in the trial record; and (iv) granting the Appellant’s Motion would not result in any unfair prejudice to the Prosecution.²⁹

12. The Prosecution opposes the Appellant’s Motion and further submits that the Appellant’s “inadequate preparation and lack of facility with the evidence does not justify creating a novel post-hearing briefing procedure”.³⁰ In reply, the Appellant reiterates that

²⁴ *Ibid.*, para. 12.

²⁵ *Ibid.*, para. 7.

²⁶ *Ibid.*, para. 6; Appellant’s Motion, paras 5-6 ; *see* para. 10 *infra*.

²⁷ Response to the Prosecution’s Motion, para. 8.

²⁸ Appellant’s Motion, para. 6.

²⁹ *Ibid.*, para. 7.

³⁰ Prosecution’s Reply and Response, paras 2 and 7.

leave should be granted to him to refute the Prosecution's new arguments, which, in his submission, are "simply wrong" and "might lead the Appeals Chamber to error".³¹

B. Analysis

(i) Prosecution's Motion

13. The Appeals Chamber recalls that a brief in reply must be "limited to arguments in reply to the Respondent's Brief" and therefore that it should not contain new allegations of error³² Consequently, the Second Supplemental Reply Brief should have been limited to the Prosecution's arguments in response to the Appellant's supplemental arguments, which in turn should have been limited to the potential impact of the three elements of additional evidence admitted on appeal.³³ Without having sought leave from the Appeals Chamber, the Appellant chose to include in his Second Supplemental Reply Brief a "reply to assertions raised by the [P]rosecution for the first time during oral arguments that certain of Appellant's factual arguments under the sub-heading 1.2(1) lack evidentiary support in the certified trial record".³⁴ This procedure was improper.

14. In light of the foregoing, the Appeals Chamber considers the arguments contained in paragraphs 4, 7, 7.1-7.3, 11, 16, 18 (the first sentence), 22 (except the last two sentences), 23, 24 (reference to "oral argument" and footnote 49), 26 and 26.1-26.5 to be outside the scope of the Second Supplemental Reply Brief as they refer solely to the oral submission made by the parties at the Appeal Hearing. Contrary to the Prosecution's

³¹ Appellant's Reply, paras 4, 5 and 9.

³² Practice Direction, para. 6; see *Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61-A, Judgement on Sentencing Appeal, 20 July 2005, paras 145-146; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Decision on Prosecution's Motion to Strike New Argument Alleging Errors by Trial Chamber Raised for First Time in Appellant's Reply Brief, 28 January 2005; *Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-A, Decision on Prosecution's Motion to Strike, 20 January 2005, para. 18; *Prosecutor v. Blagoje Simić*, Case No. IT-95-9-A, Decision on Prosecution's Motion to Strike Parts of the Brief in Reply, 27 September 2004.

³³ Decision of 12 January 2007, paras 5, 20, 21 and 27. This evidence consists of: (i) "Prosecutor's Motion for an *ex parte in camera* Hearing in Respect of the Admission of Newly-Discovered Evidence", filed *ex parte* and under seal on 11 December 1997 in *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, and made public on 13 January 2006 ("Item 1"); (ii) public redacted version of "Prosecutor's Revised Reply to Defense's 'Response to Prosecutor's Request for Review or Reconsideration'", filed on 4 September 2006 in *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-R ("Item 2"); and (iii) Letter dated 6 October 2006, from Peter M. Kremer, Q.C., Senior Appeals Counsel ("Item 3").

The Appeals Chamber found that those Items "reveal[ed] the use of documents provided by the Appellant in 1997 and 2005 in other proceedings by the Prosecution" and were therefore "relevant to [...] sub-ground of appeal 1.2, relating to the assessment of his cooperation with the Prosecution". Finally, the Appeals Chamber found that, "had Items 1 to 3 been adduced at trial, those elements could have been a decisive factor in weighing his co-operation as a mitigating factor and could have changed the sentence".

³⁴ Second Supplemental Reply Brief, para. 4.

submissions, the Appeals Chamber finds that paragraph 10 and the remainder of paragraph 18 are validly filed as part of the Second Supplemental Reply Brief.

(ii) Appellant's Motion

15. The Appeals Chamber recalls that parties at an appeal hearing are, as a general rule, invited to “*confine* their oral arguments to elaborating on points *relevant* to [their] appeal[s] that they wish to bring to the Appeals Chamber’s attention”.³⁵ Therefore, unless specifically authorized by the Appeals Chamber, the parties should not raise new arguments that are not contained in their written briefs. The Prosecution, a respondent in the present appeal, was, in addition, supposed to limit its oral arguments to those in response to the Appellant’s submission.

16. The Appellant claims that, at the Appeal Hearing, the Prosecution raised new important factual challenges. The Appeals Chamber is of the view that the Appellant had the opportunity to object to the Prosecution’s allegedly new arguments during the Appeal Hearing but did not do so. This appears to be because, in his submissions, “the time for Appellant’s oral reply did not arrive until after 6 p.m. on a Friday afternoon” and because expecting him to perform “the extemporaneous examination of the record [...] in order to reply to the [P]rosecution’s tactics on the evening of 9 February” would be “more than should be required for oral argument”.³⁶ The Appeals Chamber does not find this reasoning persuasive. Even if the Appellant was not in a position to exhaustively reply to those arguments at the Appeal Hearing, it was open to him to make a reasoned objection at the Appeal Hearing and, in case any allegedly new arguments had nevertheless been allowed by the Appeals Chamber, he should have sought leave, at the Appeal Hearing, to respond to them in writing at a later stage.³⁷

17. The Appeals Chamber is not satisfied that the Appellant has shown that filing a written reply to the Prosecution’s allegedly new arguments raised at the Appeal Hearing would be necessary or justified in the present case. This type of submission is not

³⁵ *Prosecutor v. Blagoje Simić*, Case No. IT-95-9-A, Order Re-scheduling Appeal Hearing, 5 May 2006, p. 4 (emphasis added).

³⁶ Appellant’s Motion, paras 7.d and 7.e.

³⁷ *Cf.*, e.g. *Ferdinand Nahimana et al. v. The Prosecutor*, Case No. ICTR-99-52-A, Appeals Hearing, AT. 18 January 2007, pp. 15-16, The Prosecutor’s Motion to Pursue the Oral Request for the Appeals Chamber to Disregard Certain Arguments Made by Counsel for Appellant Barayagwiza at the Appeals Hearing on 17 January 2007, 6 February 2007, and Decision on the Prosecutor’s Motion to Pursue the Oral Request for the Appeals Chamber to Disregard Certain Arguments Made by Counsel for Appellant Barayagwiza at the Appeals Hearing on 17 January 2007, 5 March 2007.

provided for by the Rules or Practice Directions of the Tribunal and could only be allowed in rather exceptional circumstances.

18. In fairness to the Appellant, the Appeals Chamber has reviewed the Prosecution arguments submitted at the Appeal Hearing that the Appellant claims to be new and “quite important”,³⁸ and notes that it is true that some of these arguments have not been raised by the Prosecution in its Respondent’s Brief or other previous filings. However, the Appeals Chamber finds that, even if these new arguments were to be taken into account by the Appeals Chamber (a question that the Appeals Chamber need not address here), the Appellant would not suffer any prejudice by not having been authorized to reply to them in writing. The Appeals Chamber emphasizes that the present decision should not be interpreted as prejudging in any way the admissibility or success of the arguments contained in other briefs and submissions made by the parties in the present case.

III. DISPOSITION

19. For the foregoing reasons, the Appeals Chamber **GRANTS** the Prosecution’s Motion **IN PART**, and **ORDERS** that the arguments contained in paragraphs 4, 7, 7.1-7.3, 11, 16, 18 (the first sentence), 22 (except the last two sentences), 23, 24 (reference to “oral argument” and footnote 49), 26 and 26.1-26.5 of the Second Supplemental Reply Brief be **STRICKEN**. The Prosecution’s Motion is **DISMISSED** in all other respects.

20. The Appeals Chamber **DISMISSES** the Appellant’s Motion in its entirety.

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

Done this 5th day of March 2007,
At The Hague,
The Netherlands.



Judge Andréia Vaz
Presiding Judge

[Seal of the Tribunal]

³⁸ Appellant’s Motion, para. 7.a.