



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-95-13/1-A
Date: 5 May 2008
Original: English

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Liu Daqun
Judge Andréia Vaz

Registrar: Mr. Hans Holthuis

Decision of: 5 May 2008

PROSECUTOR

v.

**MILE MRKŠIĆ
VESELIN ŠLJIVANČANIN**

PUBLIC

**DECISION ON PROSECUTION REQUEST FOR LEAVE TO
AMEND NOTICE OF APPEAL**

The Office of the Prosecutor:

Ms. Helen Brady

Counsel for Veselin Šljivančanin:

Mr. Novak Lukić and Mr. Stéphane Bourgon

Counsel for Mile Mrkšić:

Mr. Miroslav Vasić and Mr. Vladimir Domazet

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),

NOTING the Judgement rendered in this case on 27 September 2007, by Trial Chamber II (“Trial Judgement”);¹

NOTING the “Prosecution’s Notice of Appeal”, filed on 29 October 2007;

NOTING the “Prosecution’s Appeal Brief” filed confidentially on 14 January 2008 and the “Notice of Filing of Public Redacted and Corrected Version of Prosecution’s Appeal Brief” filed on 8 February 2008 (“Prosecution’s Appeal Brief”);

BEING SEIZED OF the “Prosecution Request for Leave to Amend Notice of Appeal” filed on 15 April 2008 (“Request”) which purports to clarify the two components of the legal error alleged under the Prosecution’s first ground of appeal;²

NOTING that the Prosecution’s current first ground of appeal reads as follows:

The Trial Chamber erred in law in paragraphs 448 to 464, in particular paragraph 461 and paragraph 711, in finding that the term “civilian” in Article 5 of the Statute has to be interpreted in accordance with Article 50 of Additional Protocol I and therefore does not include persons *hors de combat*. Persons who are not lawful targets under international humanitarian law, including persons *hors de combat*, should be considered as “civilians” under Article 5.³

NOTING the proposed amendment to the Prosecution’s first ground of appeal:

The Trial Chamber erred in law in paragraphs 448 to 464, in particular paragraphs 448, 462 and 463, by requiring that the victims of the underlying crimes against humanity under Article 5 must be civilians, and in particular paragraph 461 and paragraph 711, in finding that the term “civilian” in Article 5 of the Statute has to be interpreted in accordance with Article 50 of Additional Protocol I and therefore does not include persons *hors de combat*. Persons who are not lawful targets under international humanitarian law, including persons *hors de combat*, should be considered as “civilians” under Article 5.⁴

NOTING the “Motion on Behalf of Veselin Šljivančanin Requesting Simultaneous Adjudication of the Prosecution Martić Appeal and Prosecution Mrkšić/Šljivančanin Appeal” filed on 26 March 2008 before the *Martić* Appeals Chamber (“Šljivančanin’s Motion”), which states that: “[i]n the Prosecution’s view, (a) Article 5 [of the Statute] does not require individual victims to be civilians; and (b) all non participants in the hostilities should be regarded as civilians”;⁵

¹ Case No.:IT-95-13/1-T.

² Request, paras 1 and 5.

³ Prosecution’s Notice of Appeal, para. 3.

⁴ Request, para. 6.

NOTING that Šljivančanin's Motion submits, however, that "only the second of these issues was raised by the Prosecution in its Notice of Appeal and that arguments in relation to the first issue – whether Article 5 [of the Statute] requires that individual victims of [c]rimes against humanity be civilians – appear for the first time in the Prosecution's Appeal Brief";⁶

CONSIDERING that the Request is made on the grounds that in light of Šljivančanin's Motion, the Prosecution wants to avoid any misunderstanding or any interpretation to the effect that the Prosecution's Notice of Appeal "[does] not address the issue of whether the individual victims of crimes against humanity must be civilians";⁷

NOTING that the Prosecution submits that granting the Request will cause no prejudice to the Defence and that the briefing of the appeal is still at an early stage given that the official Bosnian/Croatian/Serbian translation of the Trial Judgement is not expected until 30 April 2008;⁸

NOTING the "Joint Response to Prosecution Request for Leave to Amend Notice of Appeal" filed by Veselin Šljivančanin and Mile Mrkšić ("Defence") on 25 April 2008 ("Joint Defence Response"), in which the Defence contends that the proposed amendment is a substantive modification which constitutes in fact a new ground of appeal,⁹ but submits that "considering that it is in the interests of justice to have the matter adjudicated by the Appeals Chamber and that the [Defence] will have the opportunity of addressing the Prosecution's arguments in support of this new ground of appeal, the [Defence] take[s] no position in relation to the [Request]";¹⁰

NOTING the "Prosecution Reply to 'Joint Response to Prosecution Request for Leave to Amend Notice of Appeal'" filed on 29 April 2008 ("Reply"), in which the Prosecution reiterates that, (a) there is good cause for the amendment requested, (b) there is no prejudice, (c) the issue is of general importance for the law of the International Tribunal, and (d) it is in the interests of justice to have the legal issues raised in its first ground of appeal resolved by the Appeals Chamber;¹¹

⁵ Šljivančanin's Motion, para. 15.

⁶ Šljivančanin's Motion, footnote 3.

⁷ Request, para. 5.

⁸ Request, para. 7.

⁹ Joint Defence Response, para. 2.

¹⁰ Joint Defence Response, para. 4. *See also* Joint Defence Response, para. 25(b).

¹¹ Reply, para. 2.

NOTING that, pursuant to Rule 108 of the Rules, the “Appeals Chamber may, on good cause being shown by motion, authorise a variation of the grounds of appeal”;

CONSIDERING that the concept of "good cause" 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;¹²

CONSIDERING that the Prosecution’s Notice of Appeal can be read as encompassing the two components of the error of law raised in its first ground of appeal;¹³

CONSIDERING that the amendment concerns an issue which has been fully addressed in the Prosecution’s Appeal Brief;¹⁴

CONSIDERING that the modifications suggested by the Prosecution do not affect the content of the Prosecution’s Notice of Appeal;

CONSIDERING that implementing the proposed amendment would bring the Prosecution’s Notice of Appeal into conformity with the Prosecution’s Appeal Brief;

CONSIDERING FURTHER that the Defence will have the opportunity to respond to the arguments developed on this matter in their Respondents’ Briefs and that no material prejudice would be caused to the opposing party if leave to amend the Prosecution’s Notice of Appeal is granted;

FINDING therefore that there is good cause within the meaning of Rule 108 of the Rules to vary the Prosecution’s Notice of Appeal in the manner requested;

FOR THE FOREGOING REASONS,

GRANTS the Request and

¹² *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, 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. 7; *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, para. 10.

¹³ *See* Prosecution’s Notice of Appeal, paras 3-5; Request, para. 5.

¹⁴ *See* Prosecution’s Appeal Brief, paras 13-24.

ORDERS the Prosecution to file its amended Notice of Appeal no later than two days after the present decision is issued, *i.e.* on 7 May 2008.

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

Dated this fifth day of May 2008,
At The Hague,
The Netherlands.



Judge Theodor Meron
Presiding Judge

[Seal of the International Tribunal]