

**UNITED
NATIONS**

IT-04-83-AR72
A 54 - A 49
08 December 2005

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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-04-83-AR72
Date: 8 December 2005
Original: English

THE APPEALS CHAMBER

Before:
Judge Fausto Pocar, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Andréia Vaz
Judge Wolfgang Schomburg

Registrar: **Mr. Hans Holthuis**

Decision of: **8 December 2005**

THE PROSECUTOR

v.

Rasim DELIĆ

**DECISION ON INTERLOCUTORY APPEAL CHALLENGING THE JURISDICTION OF
THE TRIBUNAL**

Office of the Prosecutor

Mr. Daryl A. Mundis
Ms. Tecla Henry-Benjamin
Ms. Marie Tuma

Counsel for the Appellant:

Mrs. Vasvija Vidović

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1. Rasim Delić ("Appellant") has filed an interlocutory appeal against the Trial Chamber's "Decision on Defence Motion Challenging Jurisdiction of the International Tribunal" issued on 7 September 2005 ("Impugned Decision") as of right pursuant to Rule 72 (B) (i) of the Rules of Procedure and Evidence ("Rules").¹ The Prosecution filed its response to the Appeal on 29 September 2005², and the Appellant filed his reply to that Response on 5 October 2005.³

Variation of Time Limit

2. In filing his Reply, the Appellant claims that there is good cause to receive it as validly filed pursuant to Rule 127 of the Rules. The Appellant's Reply was due to be filed four days after the filing of the Response of the Prosecution in accordance with the Practice Direction on Procedure for Filing of Written Submissions in Appeal Proceedings before the International Tribunal ("Practice Direction")⁴ but was not filed until six days after that Response. The Appellant claims that there is good cause under Rule 127 as Counsel for the Appellant was fully engaged with commitments to other trials at this Tribunal. The Appellant says that "the Response was filed at a time when previously scheduled proofing interviews with Defence witnesses were taking place in the *Orić* case, which could not be changed" and the Reply "was given priority immediately after these interviews".⁵

3. The Appeals Chamber does not accept that Counsel's commitment to other cases at this Tribunal constitutes "good cause" pursuant to Rule 127. Counsel assigned to represent accused at this Tribunal are expected to organise their work schedules in order to meet their obligations to respect the time limits for filings on appeals laid down in the Practice Direction.⁶ Counsel would have been able to calculate, upon the filing of the Appellant's Appeal, the due date for the Prosecution Response and subsequently the Appellant's Reply and is expected to have organised her work schedule to meet those due dates. Accordingly, "good cause" has not been shown, and the Reply of the Appellant will not be considered in this Appeal.

¹ Interlocutory Appeal of Decision on Defence Motion Challenging Jurisdiction of the International Tribunal, 22 September 2005 ("Appeal").

² Prosecution Response to the Defence Motion Challenging Jurisdiction of the International Tribunal, 29 September 2005 ("Response").

³ Reply to the Prosecution's Response to the Interlocutory Appeal of Decision on Defence Motion Challenging Jurisdiction of the International Tribunal and Motion Seeking a Variation of the Time-Limits, 5 October 2005 ("Reply").

⁴ IT/155 Rev., 16 September 2005.

⁵ Reply, paras 5-8.

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Grounds of Appeal

4. The Appellant claims that his interlocutory appeal is filed as of right pursuant to Rule 72(B)(i) as a challenge to the jurisdiction of the Tribunal.⁷ The Appellant notes that the Appeals Chamber has previously held in *Hadžihasanović*⁸ that “an accused cannot be charged under Article 7(3) of the Statute for crimes committed by a subordinate before the said accused assumed command over that subordinate” and submits that if he “had not assumed command over the alleged perpetrators of the violations which would have been committed on 8 June 1993, he cannot be charged under Article 7(3) of the Statute”.⁹ The Appellant argues that the Trial Chamber erred in law in the Impugned Decision in holding that “the questions of whether, at the time of commission of the crimes on 8 June 1993, a superior-subordinate relationship existed between the Accused and the alleged perpetrators, and the Accused has effective control over them, are matters for trial”.¹⁰

6. Before addressing the specific arguments of the Appellant, the Appeals Chamber will revisit the holding of the Appeals Chamber in the *Hadžihasanović* case as the Appellant claims that this decision “is the foundation of this Interlocutory Appeal”.¹¹

7. In the *Hadžihasanović* case, the Prosecution had alleged that the accused Amir Kubura took up his position as acting commander of the Bosnian Army, 3rd Corps, 7th Muslim Mountain Brigade on 1 April 1993, and had charged him with being “criminally responsible in relation to those crimes that were committed by troops of the ABiH 3rd Corps 7th Muslim Mountain Brigade prior to his assignment on 1 April 1993” on the basis that he knew or had reason to know about these crimes and that he had a duty to punish the perpetrators after he assumed command.¹² That is, he was charged with command responsibility in relation to offences committed more than two months before the date he became the commander of the troops on 1 April 1993. The issue before the Appeals Chamber was whether command responsibility extended to acts committed by subordinates prior to the assumption of command by the commander.¹³ It answered this question in the negative, holding (by majority) that “an accused cannot be charged under Article 7(3) of the Statute for

⁶ *Prosecutor v Mejakić et al.*, Case No: IT-02-65-AR11bis.1, Decision on Joint Defense Motion for Leave to File Supplemented Appeals Brief, 16 November 2005, page 5.

⁷ Appeal, para. 10.

⁸ *Prosecutor v Hadžihasanović et al.*, Case No: IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003 (“*Hadžihasanović* Appeal”).

⁹ Appeal, paras 12-13 (internal citations omitted).

¹⁰ *Ibid.*, para.16 (internal citations omitted).

¹¹ *Ibid.*, para. 17.

¹² *Hadžihasanović* Appeal, para. 38 (internal citations omitted).

¹³ *Ibid.*, para. 40.

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crimes committed by a subordinate before the said accused assumed command over that subordinate".¹⁴

8. In this Appeal, the Appellant says that Counts 1 and 2 of the indictment charge him with Article 7(3) responsibility for events which took place "specifically on 8 June 1993,"¹⁵ and he is charged "exclusively for his alleged failure to punish the perpetrators of the said violations".¹⁶ Relying on the Appeals Chamber decision in *Hadžihasanović*, he argues that he can only be charged pursuant to Article 7(3) of the Statute for events that allegedly took place on 8 June 1993 if, on that day, he was a superior who exercised effective control over his subordinates.¹⁷ He identifies the issue on his appeal as being "whether Rasim Delić was a commander who exercised effective control over any individual or unit on 8 June 1993".¹⁸ He argues that the evidence adduced by the Prosecution in support of the indictment against him is insufficient to establish this fact.¹⁹ He notes that pursuant to Article 19, paragraph 1 of the Statute and Rule 47(E), an indictment will be confirmed by the confirming Judge if that Judge is "*satisfied that a prima facie case has been established by the Prosecutor*" and claims that the absence of evidence in the indictment supporting material as to when or how he would have assumed command of the ABiH means that the indictment should not have been confirmed and the Trial Chamber erred by finding that "*the Indictment charges the Accused for crimes committed on the day that the Accused assumed his post as Commander of the Main Staff of the ARBiH [sic]*".²⁰

9. The Appellant also argues that the indictment does not allege that he did exercise effective control over his subordinates on 8 June 1993. He claims that the only relevant allegations in the indictment are:

a. At all times relevant to this Indictment, the 306th Mountain Brigade and the 7th Muslim Mountain Brigade were under the subordination of the ABiH [sic] 3rd Corps, which was a subordinate formation under the command and effective control of the accused Rasim Delić (Paragraph 15);

b. Rasim Delić, as Commander of the Main Staff, exercised de jure and de facto command and control over the ABiH [sic] forces that participated in the crimes alleged in the Indictment (Paragraph 19); and

¹⁴ *Ibid.*, para. 51.

¹⁵ Appeal, para. 18.

¹⁶ *Ibid.*

¹⁷ *Ibid.*, para. 20.

¹⁸ *Ibid.*, para. 23.

¹⁹ *Ibid.*, paras 24-28.

c. On 13 August 1993, Rasim Delić ordered the establishment within the ABiH [sic] 3rd Corp a rea of responsibility of the "El Mujahed" unit comprised of foreign volunteers, with immediate effect, but not later than 31 August 1993 (Paragraph 14).²¹

The Appellant claims that while the allegation at paragraph (c) could indicate that from 31 August 1993 he was exercising some kind of authority over the ABiH, there is no allegation with respect to the situation on 8 June 1993.²²

Analysis

10. Like the accused in *Hadžihasanović*, the Appellant argues that the indictment has failed to allege a necessary element of superior responsibility under Article 7(3), namely the existence of a superior-subordinate relationship at the time of the crimes. This constitutes a challenge to the Tribunal's jurisdiction within the meaning of Rule 72(D)(iv) of the Rules, entitling the Appellant to an interlocutory appeal under Rule 72(B)(i). However, the appeal has no merit. The allegation in paragraph 15 of the indictment, quoted by the Appellant above, states that "at all relevant times to the Indictment" the Appellant exercised "effective control" over the "subordinate formation" of the ABiH 3rd Corps and its subordinate brigades. These were the military units that, according to the indictment, perpetrated crimes on 8 June 1993.²³ Moreover, contrary to the Appellant's suggestion, the indictment does allege that he "assumed the post of Commander of the Main Staff" on 8 June 1993, and not merely that his appointment was announced on that date.²⁴ Taken together, these statements plainly allege that the Appellant had effective control over the units in question at the time of the relevant events on 8 June 1993. While the indictment does not allege at precisely what time on that date and in what manner he assumed this control, these facts are not required to be alleged, so long as there is a clear allegation that he possessed effective control at the time of the crimes.

11. To the extent that the Appellant's argument concerns not the sufficiency of the indictment but the sufficiency of the supporting evidence, the Appeals Chamber agrees with the Trial Chamber that this is an issue to be resolved at trial. The question whether an indictment is supported by sufficient supporting material to make out a *prima facie* case is not a jurisdictional one within the meaning of Rule 72(B)(i), and the Appellant has no right to an interlocutory appeal of the

²⁰ *Ibid.*, paras 26-27.

²¹ *Ibid.*, para. 41.

²² *Ibid.*, para 42.

²³ Indictment, paras. 24-26.


²⁴ *Ibid.*, para. 24.

confirming judge's decision on this question.²⁵ In this respect, the Appellant's argument differs from that advanced in the *Hadžihasanović* case. In that case, there was no factual dispute as to whether the accused had exercised effective control at the time of the crime; the indictment had not so alleged, but had expressly sought to hold him responsible for crimes committed prior to his assumption of command. The Appeals Chamber was thus faced with the purely legal question of whether the indictment alleged a crime within the Tribunal's jurisdiction, and held (by majority) that it did not. Here, in contrast, the indictment's allegations are legally sufficient, and the further question whether those allegations are supported by the evidence is a factual one that is inappropriate for interlocutory appeal.

12. On the basis of the foregoing, this Appeal is **DISMISSED**.

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

Done this 8th Day of December 2005,
At The Hague,
The Netherlands.



Judge Fausto Pocar
Presiding

[Seal of the Tribunal]

²⁵ *Prosecutor v Brđanin*, Case No. IT-99-36-AR 72, Decision on Interlocutory Appeal From Decision on Motion to Dismiss Indictment Filed Under Rule 72, 16 November 1999.