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02 SEPTEMBER 2009

**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-05-87-A
Date: 2 September 2009
Original: English

IN THE APPEALS CHAMBER

Before: Judge Liu Daqun, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Andrézia Vaz
Judge Theodor Meron

Registrar: Mr. John Hocking

Decision: 2 September 2009

PROSECUTOR

v.

**NIKOLA ŠAINOVIĆ
DRAGOLJUB OJDANIĆ
NEBOJŠA PAVKOVIĆ
VLADIMIR LAZAREVIĆ
SRETEN LUKIĆ**

PUBLIC

**DECISION ON DRAGOLJUB OJDANIĆ'S MOTION TO
AMEND GROUND 7 OF HIS NOTICE OF APPEAL**

The Office of the Prosecutor:

Mr. Paul Rogers

Counsel for the Appellants:

Mr. Toma Fila and Mr. Vladimir Petrović for Mr. Nikola Šainović
Mr. Tomislav Višnjić and Mr. Peter Robinson for Mr. Dragoljub Ojdanić
Mr. John Ackerman and Mr. Aleksandar Aleksić for Mr. Nebojša Pavković
Mr. Mihajlo Bakrač and Mr. Đuro Čepić for Mr. Vladimir Lazarević
Mr. Branko Lukić and Mr. Dragan Ivetić for Mr. Sreten Lukić

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 “Tribunal”, respectively) is seized of “General Ojdanic’s [sic] Motion to Amend Ground 7 of His Notice of Appeal” (“Motion”), filed by Counsel for Dragoljub Ojdanić (“Ojdanić”) on 29 July 2009. The Office of the Prosecutor (“Prosecution”) did not file a response.

I. BACKGROUND

2. On 26 February 2009 Trial Chamber III convicted Ojdanić pursuant to Article 7(1) of the Statute for aiding and abetting the crimes of deportation and other inhumane acts (forcible transfer) as crimes against humanity under Article 5 of the Statute,¹ and sentenced him to 15 years of imprisonment.² Ojdanić filed his Notice of Appeal on 27 May 2009, challenging the Trial Judgement on eight grounds.³ Under his seventh ground of appeal to which the present Motion is related, Ojdanić alleges that the Trial Chamber erroneously extended the definition of crimes against humanity.⁴

3. The Trial Judgement has also been appealed by Nikola Šainović, Nebojša Pavković, Vladimir Lazarević, Sreten Lukić and the Prosecution.⁵ The Prosecution filed its Appeal Brief on 10 August 2009.⁶ Briefs by other appellants are due to be filed no later than 23 September 2009.⁷

II. APPLICABLE LAW

4. Pursuant to Rule 108 of the Tribunal’s Rules of Procedure and Evidence (“Rules”), the Appeals Chamber “may, on good cause being shown by motion, authorize a variation of the grounds of appeal” contained in the notice of appeal. Such a motion should be submitted “as soon as possible after identifying the new alleged error” or after discovering any other basis for seeking a

¹ *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Judgement, 26 February 2009 (“Trial Judgement”), vol. III, paras 630, 635; see also Trial Judgement, vol. I, para. 6.

² Trial Judgement, vol. III, para. 1209.

³ General Ojdanic’s [sic] Notice of Appeal, 27 May 2009 (“Notice of Appeal”).

⁴ Notice of Appeal, paras 66-71.

⁵ Defence Submission Notice of Appeal, 27 May 2009 (filed by Counsel for Nikola Šainović); Notice of Appeal from the Judgement of 26 February 2009, 27 May 2009 (filed by Counsel for Nebojša Pavković); Vladimir Lazarević’s Defence Notice of Appeal, 27 May 2009 (confidential) and Defence Submission: Lifting Confidential Status of the Notice of Appeal, 29 May 2009; Sreten Lukic’s [sic] Notice of Appeal from Judgement and Request for Leave to Exceed the Page Limit, 27 May 2009; Prosecution Notice of Appeal, 27 May 2009.

⁶ Prosecution Appeal Brief, 10 August 2009 (confidential). The public redacted version was filed on 24 August 2009. The Corrigendum to Prosecution Appeal Brief was filed on 24 August 2009.

⁷ Decision on Joint Defence Motion Seeking Extension of Time to File Appeal Briefs, 29 June 2009, p. 5.

variation of the notice of appeal.⁸ It is the appellant's burden to explain precisely what amendments are sought and to demonstrate that each proposed amendment meets the "good cause" requirement of Rule 108.⁹

5. The jurisprudence of the Tribunal establishes 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 articulated) in the original notice of appeal.¹⁰ The Appeals Chamber has considered, *inter alia*, the following factors in determining whether "good cause" exists: (i) the variation is minor and it does not affect the content of the notice of appeal; (ii) the opposing party would not be prejudiced by the variation or has not objected to it; and (iii) the variation would bring the notice of appeal into conformity with the appeal brief.¹¹ Where an appellant seeks a substantive amendment broadening the scope of the appeal, "good cause" may also, under certain circumstances, be established.¹² The Appeals Chamber recalls that it has never established a cumulative list of requirements that must be met each time a substantive amendment is to be granted.¹³ Rather, each proposed amendment is to be considered in light of the particular circumstances of the case.¹⁴

6. In certain exceptional cases, notably where the failure to include the new or amended grounds of appeal resulted from counsel's negligence or inadvertence, the Appeals Chamber has allowed variations even though "good cause" has not been shown by the appellant, provided that

⁸ *Prosecutor v. Astrit Haraqija and Bajrush Morina*, Case No. IT-04-84-R77.4-A, Decision on Bajrush Morina's Application for a Variation of the Grounds of Appeal, 19 March 2009 ("*Haraqija and Morina* Decision of 19 March 2009"), para. 5, referring to *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 ("*Nahimana et al.* Decision of 17 August 2006"), para. 9; *Prosecutor v. Mladen Naletilić, a.k.a. "Tuta", and Vinko Martinović, a.k.a. "Štela"*, Case No. IT-98-34-A, Decision on Mladen Naletilić's Motion for Leave to File Pre-Submission Brief, 13 October 2005, pp. 2-3.

⁹ *Haraqija and Morina* Decision of 19 March 2009, para. 5, referring to *Nahimana et al.* Decision of 17 August 2006, para. 9; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Decision on Dragan Jokić's Motion to Amend Notice of Appeal, 14 October 2005, para. 7; see also Practice Direction on Formal Requirements for Appeals from Judgement (IT/201), 7 March 2002, paras 2-3.

¹⁰ *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Case No. IT-04-82-A, Decision on Johan Tarčulovski's Motion for Leave to Present Appellate Arguments in Order Different from that Presented in Notice of Appeal, to Amend the Notice of Appeal, and to File Sur-Reply, and on Prosecution Motion to Strike, 26 March 2009 ("*Bošković and Tarčulovski* Decision of 26 March 2009"), para. 17, referring to *The 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 and Jokić* Decision of 26 June 2006"), para. 7.

¹¹ *Nahimana et al.* Decision of 17 August 2006, para. 10, referring to *Blagojević and Jokić* Decision of 26 June 2006, para. 7; *The Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Decision on Prosecution's Request for Leave to Amend Notice of Appeal in Relation to Vidoje Blagojević, 20 July 2005 ("*Blagojević and Jokić* Decision of 20 July 2005"), pp. 3-4.

¹² *Nahimana et al.* Decision of 17 August 2006, para. 10, referring to *Blagojević and Jokić* Decision of 26 June 2006, para.7; *The 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 ("*Blagojević and Jokić* Decision of 24 November 2005"), para. 7; *Blagojević and Jokić* Decision of 20 July 2005, p. 4.

¹³ *Bošković and Tarčulovski* Decision of 26 March 2009, para. 17, citing *Blagojević and Jokić* Decision of 26 June 2006, para. 7.

¹⁴ *Blagojević and Jokić* Decision of 26 June 2006, para. 7.

the variation sought is of substantial importance to the success of the appeal such as to lead to a miscarriage of justice if it is excluded.¹⁵ In such limited circumstances, the Appeals Chamber has reasoned, the interests of justice require that an appellant not be held responsible for the failures of his counsel.¹⁶ However, it must be shown that the previous pleadings failed to address the issue adequately and that the amendments sought would correct that failure.¹⁷

III. DISCUSSION

A. Submissions

7. Ojdanić submits that good cause exists to allow variation of his Notice of Appeal.¹⁸ His counsel points to Ojdanić's inability to understand English, the language of the Trial Judgement,¹⁹ and emphasises that in the absence of the Serbian translation of the Trial Judgement, "with the assistance of his legal team [Ojdanić] continues to attempt to understand the Trial Judgement and work on his appeal."²⁰ Ojdanić explains that this "continuing process of review and discussion has revealed the necessity of the amendments sought."²¹ He submits that in light of the Appeals Chamber's jurisprudence requiring that motions to vary grounds of appeal be presented as soon as possible after identifying the newly alleged error, he files his Motion prior to receiving the translation of the Trial Judgement without prejudice to any further application he may need to make.²² Ojdanić submits that the variation would neither unduly delay the proceedings nor result in unfairness to any other party to the proceedings.²³

8. Ojdanić seeks leave to amend his Notice of Appeal to include a new alleged error in the Trial Chamber's findings pertaining to the *mens rea* requirement of crimes against humanity.²⁴ He contends that the Trial Chamber erred by holding that the *mens rea* requirement of crimes against humanity is satisfied by the perpetrator "taking the risk" that the conduct of the physical perpetrator

¹⁵ *Tharcisse Muvunyi v. The Prosecutor*, Case No. ICTR-2000-55A-A, Decision on 'Accused Tharcisse Muvunyi's Motion for Leave to Amend His Grounds for Appeal and Motion to Extend Time to File His Brief on Appeal' and 'Prosecutor's Motion Objecting to 'Accused Tharcisse Muvunyi's Amended Grounds for Appeal'', 19 March 2007 ("Muvunyi Decision of 19 March 2007"), para. 15, referring to *Blagojević and Jokić* Decision of 26 June 2006, para. 9; see also *The Prosecutor v. Athanase Seromba*, Case No. ICTR-2001-66-A, Decision of Defence Extremely Urgent Motion to Vary the Grounds of Appeal Contained in its Notice of Appeal, 26 July 2007 ("Seromba Decision of 26 July 2007"), para. 8; *Nahimana et al.* Decision of 17 August 2006, para.12.

¹⁶ *Nahimana et al.* Decision of 17 August 2006, para. 12.

¹⁷ *Blagojević and Jokić*, Decision of 26 June 2006, para. 23.

¹⁸ Motion, para. 12.

¹⁹ Motion, para. 4, referring to the Notice of Appeal, para. 3.

²⁰ Motion, para. 5.

²¹ *Ibid.*

²² Motion, para. 6, referring to *Nahimana et al.* Decision of 17 August 2006, para. 9.

²³ Motion, para. 7.

²⁴ Motion, para. 10.

comprises part of an attack against the civilian population.²⁵ In this respect, Ojdanić argues that the Trial Chamber erred by applying the standard of recklessness and that this error invalidates the Trial Judgement.²⁶ In his view, his newly advanced argument is not encompassed by his seventh ground of appeal which alleges that the Trial Chamber erroneously expanded the definition of crimes against humanity.²⁷

9. As to the reasons for not alleging this error in his Notice of Appeal, Ojdanić submits that “the focus of Counsel’s discussions with General Ojdanić was the Trial Chamber’s novel approach to the question of *which individual* may satisfy the requisite knowledge requirement for crimes against humanity, rather than the *level of knowledge* held by that individual.”²⁸ He further submits that the “alleged error and its potential significance only became apparent to Counsel when considering with General Ojdanić the Trial Chamber’s application of the ‘intermediary perpetrator’ standard.”²⁹

10. Alternatively, Ojdanić submits that the sought variation is of substantial importance to the success of his appeal such as to lead to a miscarriage of justice if excluded. He adds that in such exceptional cases, the interests of justice require that an appellant not be held responsible for the failures of counsel.³⁰

11. In relation to his newly advanced argument that the Trial Chamber erred in defining the *mens rea* requirement of crimes against humanity, Ojdanić seeks the amendment of current paragraph 66 of the Notice of Appeal, introduction of a new paragraph 69, and consequential amendments to current paragraphs 69, 70 and 71 thereof.³¹

B. Analysis

12. Ojdanić submits that the proposed variation of current paragraph 66 alleges an error not specified in his Notice of Appeal.³² The Appeals Chamber observes that under the seventh ground of his Notice of Appeal, Ojdanić alleges that the Trial Chamber erred in law in holding that for crimes against humanity, the requirement for the perpetrator to have knowledge of the existence of a widespread and systematic attack against the civilian population is met where the “intermediary perpetrator” possesses such knowledge, provided that the perpetrator planned, ordered or instigated

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ Motion, para. 11; *see also* Notice of Appeal, paras 66-71.

²⁸ Motion, para. 11.

²⁹ Motion, para. 12.

³⁰ Motion, para. 13, referring to *Nahimana et al.* Decision of 17 August 2006, para. 12.

³¹ Motion, paras 14-17.

³² Motion, para. 11.

the acts of the physical perpetrator or, alternatively, that the “intermediary perpetrator” was a member of the joint criminal enterprise.³³ He further alleges that the Trial Chamber failed to analyze the “directness or proximity” between the “intermediary perpetrator” and the underlying offence which it found to be “inherent” for the modes of responsibility of commission, planning, ordering and instigating.³⁴

13. Conversely, in his Motion Ojdanić contends that the Trial Chamber erred in applying the standard of recklessness, notably in concluding that the *mens rea* requirement for crimes against humanity is satisfied by the accused “taking the risk” that the conduct of the physical perpetrator comprises part of an attack against the civilian population.³⁵ The Appeals Chamber understands that whereas in his Notice of Appeal, Ojdanić alleges an error of law as to whether the “intermediary perpetrator’s” knowledge of the context of the offence would suffice for criminal responsibility to be attributed to the perpetrator, the error of law alleged in his Motion relates specifically to the requisite level of such knowledge. As such, the argument presented in his Motion, although related, is distinct from those advanced under Ground 7 of his Notice of Appeal, and indeed alleges a new error of law, thus broadening the scope of the appeal.

14. With respect to the “good cause” requirement, the Appeals Chamber notes that in granting extensions of time for the filing of appellant’s briefs,³⁶ the Pre-Appeal Judge in the present case held that:

[...] the Defence will have the opportunity, if they so wish, to request any variations or amendments after the appellants have read the Serbian translation of the Trial Judgement and discussed it with their counsel, provided that they show good cause under Rule 108 of the Rules.³⁷

15. Ojdanić submits that the present Motion is filed pending the receipt of the translation of the Trial Judgement, as the result of “the continuous process of review and discussion” between him and his legal team.³⁸ The Appeals Chamber recalls that “further analysis undertaken over the course of time”³⁹ cannot, in and of itself, constitute good cause for an amendment as this would effectively amount to allowing the appellant to “restart the appeal process at will.”⁴⁰ In addition, the Motion fails to explain how the newly alleged error resulted from Ojdanić’s personal insight. The alleged

³³ Notice of Appeal, para. 66.

³⁴ Notice of Appeal, paras 67-68.

³⁵ Motion, para. 10.

³⁶ Joint Defence Motion Seeking Extension of Time to File Appeal Briefs, 12 June 2009.

³⁷ Decision on Joint Defence Motion Seeking Extension of Time to File Appeal Briefs, 29 June 2009, p. 4; *see also* Decision on Motions for Extension of Time to File Notices of Appeal, 23 March 2009, p. 3.

³⁸ Motion, para. 5.

³⁹ *Muvunyi* Decision of 19 March 2007, para. 9, referring to *Aloys Simba v. The Prosecutor*, Case No. ICTR-01-76-A, Decision on “Prosecutor’s Motion for Variation of Notice of Appeal Pursuant to Rule 108”, 17 August 2006 (“*Simba* Decision of 17 August”), para. 9; *see also Seromba* Decision of 26 July 2007, para. 7.

⁴⁰ *Muvunyi* Decision of 19 March 2007, para 9, referring to *Simba* Decision of 17 August, para. 9.

error concerns an issue of law and Ojdanić's counsel is principally responsible for the assessment of potential legal errors in the Trial Judgement.⁴¹ The Appeals Chamber therefore finds that Ojdanić fails to demonstrate good cause for not having alleged this error in his Notice of Appeal. Rather, the Appeals Chamber finds that the failure to present it in the Notice of Appeal constitutes inadvertence or negligence on the part of Ojdanić's counsel.⁴²

16. In the circumstances of the present case, the Appeals Chamber observes that if Ojdanić indeed prevails on the merits of his argument, this would lead to the conclusion that the Trial Chamber convicted him on the basis of a legally erroneous interpretation of the *mens rea* element of crimes against humanity, which could have a direct implication on his criminal responsibility. Without pronouncing itself on the merits of the appeal, the Appeals Chamber concurs with Ojdanić's submission that the amendment sought is "of substantial importance to the success" of his appeal, such that disallowing it would be prejudicial. It is therefore in the interests of justice that the proposed amendment be granted. The Appeals Chamber is further cognisant of the fact that none of the parties opposed the requested variation and that allowing for such variation would not unduly interfere with the expeditious administration of justice.

17. Turning to the proposed introduction of a new paragraph 69, the Appeal Chamber notes that the paragraph in question would in fact clarify the sub-grounds of appeal advanced in amended paragraph 66, and does not, in itself, broaden the scope of the appeal. As for the requested variation of current paragraph 69, it merely identifies the additional findings challenged in light of the newly alleged error of law under amended paragraph 66. Finally, the sought variations of current paragraphs 70 and 71 relate to the relief sought, thus meaningfully reflecting the allowed amendments of paragraph 66 of the Notice of Appeal. Accordingly, the Appeals Chamber is satisfied that these amendments are necessary in order to articulate the newly alleged error.

IV. DISPOSITION

18. For the foregoing reasons, the Appeals Chamber **GRANTS** the Motion and **ACCEPTS AS VALIDLY FILED** the amended Notice of Appeal attached to the Motion as Annex B.

⁴¹ *Blagojević and Jokić* Decision of 24 November 2005, para. 10.

⁴² *See supra*, para. 6.

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

Done this second day of September 2009,

At The Hague,
The Netherlands.

A handwritten signature in black ink, appearing to read 'Liu Daqun', with a long horizontal flourish extending to the right.

Judge Liu Daqun, Presiding

[Seal of the Tribunal]