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**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: 09 September 2009
Original: English

IN THE APPEALS CHAMBER

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

Registrar: Mr. John Hocking

Decision of: 09 September 2009

PROSECUTOR

v.

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

PUBLIC

**DECISION ON NEBOJŠA PAVKOVIĆ'S MOTION TO AMEND
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 Pavković Motion for Amendment to his Notice of Appeal” (“Motion”), filed by Counsel for Nebojša Pavković (“Pavković”) on 28 August 2009. The Office of the Prosecutor (“Prosecution”) did not file a response.

I. BACKGROUND

2. On 26 February 2009 Trial Chamber III convicted Pavković pursuant to Article 7(1) of the Statute for committing, through participation in a joint criminal enterprise, the crimes of deportation, other inhumane acts (forcible transfer), murder and persecutions as crimes against humanity under Article 5 of the Statute, and the crime of murder as a violation of the laws or customs of war under Article 3 of the Statute.¹ The Trial Chamber sentenced Pavković to 22 years of imprisonment.² Pavković filed his Notice of Appeal on 27 May 2009 challenging the Trial Judgement on 12 grounds.³ Under his first ground of appeal to which the present Motion is related, Pavković alleges that the Trial Chamber erroneously convicted him on the basis of joint criminal enterprise.⁴

3. The Trial Judgement has also been appealed by Nikola Šainović, Dragoljub Ojdanić, Vladimir Lazarević, Sreten Lukić and the Prosecution.⁵ The Prosecution filed its Appeal Brief on 10 August 2009.⁶ The Appeal Briefs by the 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

¹ *Prosecutor v. Milutinović et al.*, Case No. IT-05-87-T, Judgement, 26 February 2009 (“Trial Judgement”), Vol. III, paras 788, 790; See also Trial Judgement, Vol. I, para. 6.

² Trial Judgement, vol. III, para. 1210.

³ Notice of Appeal from the Judgement of 26 February 2009, 27 May 2009 (“Notice of Appeal”).

⁴ Notice of Appeal, p. 3.

⁵ Defence Submission Notice of Appeal, 27 May 2009 (filed by Counsel for Nikola Šainović); General Ojdanić’s [sic] Amended Notice of Appeal, 29 July 2009 (see Decision on Dragoljub Ojdanić’s Motion to Amend Ground 7 of his Notice of Appeal, 2 September 2009); Vladimir Lazarević’s [sic] Defence Notice of Appeal, 27 May 2009 (confidential) and Defence Submission: Lifting Confidential Status of the Notice of Appeal, 29 May 2009; Sreten Lukić’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 21 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.

grounds of appeal” contained in the notice of appeal. Such motion should be submitted “as soon as possible after identifying the new alleged error” or after discovering any other basis for seeking a 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 of the Rules.⁹

5. It has been held 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.¹⁰ The factors considered by the Appeals Chamber in determining whether “good cause” exists include: (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” might also, under certain circumstances, be established.¹² The Appeals Chamber recalls that no cumulative list of requirements that must be met each time a substantive amendment is to be granted has been established.¹³ Rather, each proposed amendment is to be considered in light of the particular circumstances of the case.¹⁴

6. The Appeals Chamber further recalls that the “good cause” requirement is to be interpreted restrictively at late stages in the appeal proceedings, when amendments would cause undue delay by requiring, for instance, briefs already filed to be revised and resubmitted.¹⁵

⁸ *Prosecutor v. Sainović et al.*, Case No. IT-05-87-A, Decision on Dragoljub Ojdanić’s Motion to Amend Ground 7 of his Notice of Appeal, 2 September 2009 (“*Sainović* Decision of 2 September 2009”), para. 4 and reference cited therein.

⁹ *Ibid.*

¹⁰ *Prosecutor v. Ljube Boškoski 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 (“*Boškoski and Tarčulovski* Decision of 26 March 2009”), para. 17, referring to *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 *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. 10, referring to *Blagojević and Jokić* Decision of 26 June 2006, para. 7; *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, pp. 3-4.

¹² *Sainović* Decision of 2 September 2009, para. 5 and references cited therein.

¹³ *Boškoski 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.

¹⁵ *Nahimana et al.* Decision of 17 August 2006, para. 11, referring to *Blagojević and Jokić* Decision of 26 June 2006, para. 8.

III. DISCUSSION

A. Submissions

7. Pavković submits that pending the receipt of the translation of the Trial Judgement “his defence team have [*sic*] been working diligently with him in reviewing portions of the *Judgement* so he can understand, at least partially, the *Judgement* and contribute to the Appeal Brief.”¹⁶ He avers that following discussions with his defence team, “certain parts of the *Judgement* have been revealed to the defence team as errors on the part of the Trial Chamber.”¹⁷ Pavković submits that in light of the Appeals Chamber’s jurisprudence that a motion for variation of a ground of appeal shall be submitted as soon as possible after the moving party has identified the alleged error, he seeks authorisation for amending his Notice of Appeal prior to receiving the translation of the Trial Judgement.¹⁸

8. Specifically, Pavković seeks leave to amend Ground 1 of his Notice of Appeal, to include a new alleged error in the Trial Chamber’s finding at paragraph 665, Volume III of the Trial Judgement, notably that Pavković “by-passed the chain of command.”¹⁹ He argues that the alleged error is significant and is of considerable importance to the success of his appeal.²⁰ In addition, Pavković submits that the variation sought would neither prejudice the parties nor delay the appeals proceedings.²¹

B. Analysis

9. The Appeals Chamber recalls that in granting extensions of time for the filing of appellants’ notices of appeal, the Pre-Appeal Judge in the present case held, *inter alia*, that:

[...] Pavković and Lukić will have the opportunity, if they so wish, to request variation of their grounds of appeal after having read the B/C/S translation of the Trial Judgement, provided that they show good cause under Rule 108 of the Rules [...]²²

10. The Appeals Chamber considers that pending the receipt of the translation of the Trial Judgement, Pavković has been trying to understand the latter with the assistance of his defence

¹⁶ Motion, para. 7 (emphasis in the original).

¹⁷ *Ibid.* (emphasis in the original).

¹⁸ Motion, para. 8, referring to *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; *Nahimana et al.* Decision of 17 August 2006, para. 9.

¹⁹ Motion, para. 10.

²⁰ Motion, para. 12.

²¹ Motion, para. 9.

²² Decision on Motions for Extension of Time to File Notices of Appeal, 23 March 2009, p. 3; see also Decision on Joint Defence Motion Seeking Extension of Time to File Appeal Briefs, 29 June 2009, p. 4.

team so that he can effectively contribute to the Appeal Brief.²³ Pavković asserts that the requested amendment of his Notice of Appeal became apparent to his defence team only as a result of this review process.²⁴ The Appeals Chamber notes that the variation sought concerns an alleged error of fact in the Trial Chamber's finding that as a member of the Joint Command, Pavković "by-passed the chain of command."²⁵ As such, it can be reasonably inferred that Pavković's understanding of the Trial Judgement has been central to the identification of the alleged error, and that the unavailability of the B/C/S translation of the Trial Judgement at the time the Notice of Appeal was filed had prevented him from instructing his counsel to that effect.²⁶ The Appeals Chamber is therefore satisfied that good reason for not including the alleged error in the Notice of Appeal has been shown.

11. Moreover, the Appeals Chamber notes that none of the parties has opposed the variation and that allowing the variation would not result in any undue delay in the appeals proceedings. Consequently, in the circumstances of this case, the Appeals Chamber finds that Pavković has shown good cause for amending his Notice of Appeal.

IV. DISPOSITION

12. For the foregoing reasons, the Appeals Chamber **GRANTS** the motion and **ACCEPTS AS VALIDLY FILED** the amended Notice of Appeal attached to the Motion.

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

Done this ninth day of September 2009

At The Hague,
The Netherlands.



Judge Liu Daqun, Presiding

[Seal of the Tribunal]

²³ Motion, para. 7

²⁴ *Ibid.*

²⁵ Motion, para. 10.

²⁶ *Cf. Protais Zigiranyirazo v. The Prosecutor*, Case No. ICTR-01-73-A, Decision on Protais Zigiranyirazo's Motion for Leave to Amend Notice of Appeal, 18 March 2009, para. 5.