

**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-98-32/1-A
Date: 16 December 2009
Original: English

BEFORE THE APPEALS CHAMBER

Before: Judge Mehmet Güney, Presiding
Judge Fausto Pocar
Judge Liu Daqun
Judge Theodor Meron
Judge Carmel Agius

Registrar: Mr. John Hocking

Decision of: 16 December 2009

PROSECUTOR

v.

**MILAN LUKIĆ
SREDOJE LUKIĆ**

PUBLIC

**DECISION ON MILAN LUKIĆ'S MOTION TO AMEND HIS
NOTICE OF APPEAL**

The Office of the Prosecutor:

Mr. Paul Rogers

Counsel for Milan Lukić:

Mr. Tomislav Višnjić
Mr. Dragan Ivetić

Counsel for Sredoje Lukić:

Mr. Đuro J. Čepić
Mr. Jens Dieckmann
Prof. G.G.J. Knoops, Legal Consultant

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 "Milan Lukic's [*sic*] Motion to Vary His Notice of Appeal" ("Motion"),¹ filed 26 November 2009. The Office of the Prosecutor ("Prosecution") has not filed a response.² In addition, the Appeals Chamber is seized of the "Corrigendum to Milan Lukic's [*sic*] Amended Notice of Appeal" ("Corrigendum"), filed on 4 December 2009.

I. PROCEDURAL BACKGROUND

2. On 20 July 2009, Trial Chamber III ("Trial Chamber") found Milan Lukić responsible, pursuant to Article 7(1) of the Statute of the Tribunal ("Statute"), for murder and cruel treatment as violations of the laws or customs of war under Article 3 of the Statute and for murder, persecution, extermination and inhumane acts as crimes against humanity under Article 5 of the Statute. The Trial Chamber sentenced him to a term of imprisonment for the remainder of his life.³

3. The Appeals Chamber is currently seized of three appeals against the Trial Judgement by Milan Lukić, Sredoje Lukić and the Prosecution.⁴ Sredoje Lukić and the Prosecution both filed their Appeal Briefs on 2 November 2009.

4. On 30 October 2009, the Appeals Chamber granted Milan Lukić's motion seeking an extension of time to file his Appeal Brief in light of the appointment of Mr. Tomislav Višnjić, who replaced Mr. Jason Alarid as lead counsel for Milan Lukić on 14 October 2009.⁵ The Appeals Chamber extended the deadline for the filing of Milan Lukić's Appeal Brief to 17 December 2009, and granted the Prosecution's consequential request for a 10-day extension to file its Response Brief, which is now due by 5 February 2010.⁶

II. SUBMISSIONS

5. Milan Lukić seeks leave to amend his Notice of Appeal in light of the appointment of a new defence team.⁷ He further submits that only one of the six members of the current defence team was

¹ Public Annex 1 (with a confidential Annex C) containing "Milan Lukić's Amended Notice of Appeal" was appended to the Motion ("Amended Notice of Appeal").

² The Prosecution informed the Appeals Chamber on 3 December 2009 that it would not respond to the Motion.

³ *Prosecutor v. Milan Lukić and Sredoje Lukić*, Case No. IT-98-32/1-T, Judgement, 20 July 2009 ("Trial Judgement"), paras 1099-1101. The Trial Chamber also convicted co-defendant Sredoje Lukić of persecutions (Count 1), murder (Counts 9 and 10), inhumane acts (Counts 11 and 20) and cruel treatment (Counts 12 and 21); and sentenced him to a term of 30 years in prison. Trial Judgement, paras 1104-1106.

⁴ Notice of Appeal from Trial Judgement, 19 August 2009; Notice of Appeal on Behalf of Sredoje Lukić, 19 August 2009; Prosecution Notice of Appeal, 19 August 2009.

⁵ Decision on Milan Lukić's Motion Seeking Extension of Time to File Appeal Brief and Motion for Stay of Proceedings, 30 October 2009 ("Decision of 30 October 2009"). See also Decision by the Registrar, 14 October 2009.

⁶ Decision of 30 October 2009.

⁷ Motion, paras 12-14.

a member of the defence team that represented him at trial,⁸ none of the new team members previously worked on his case⁹ and the reconstitution of the defence team was not fully completed before November 2009.¹⁰ Therefore, upon appointment, the new defence team members lacked sufficient familiarity with the case to immediately determine whether the Notice of Appeal filed by the former lead counsel and defence team should have been modified.¹¹ The new defence team allegedly filed the Motion as soon as possible, given the time necessary to review and analyse the voluminous case record.¹²

6. Milan Lukić argues that most of the variations do not affect the substantive content of the Notice of Appeal but clarify it.¹³ In particular, he submits that the majority of the grounds of appeal in the Amended Notice of Appeal are not new grounds, but rather grounds that were already pleaded in the original Notice of Appeal in a different format.¹⁴ He claims that these grounds have merely been reorganised according to the various incidents in the case, in order to clarify the issues on appeal by following the structure of the Trial Judgement.¹⁵ The Motion also seeks to eliminate one ground of appeal and seven sub-grounds of appeal that were pleaded in the original Notice of Appeal.¹⁶ Milan Lukić argues that the process of reorganising certain grounds and dispensing with others facilitates the “expeditious administration of justice”.¹⁷

7. Moreover, Milan Lukić seeks to add four new grounds of appeal,¹⁸ submitting that these amendments might be of substantial importance to the success of his appeal and would lead to a miscarriage of justice if denied.¹⁹ In particular, he claims that the Trial Chamber erred in law and in fact on various grounds.²⁰ Milan Lukić submits that he would be acquitted of certain crimes if the Appeals Chamber ruled in his favour on these grounds of appeal,²¹ and therefore claims that

⁸ Motion, para. 13.

⁹ *Ibid.*

¹⁰ Motion, para. 14.

¹¹ Motion, paras 13-14.

¹² Motion, paras 14-15.

¹³ Motion, paras 16-20.

¹⁴ Motion, paras 16, 20.

¹⁵ Motion, paras 17, 19.

¹⁶ Motion, para. 22 (grounds of appeal 1(4), 1(5), 1(6), 2(1), 2(3), 4, 9(1) and 9(11)).

¹⁷ Motion, para. 23.

¹⁸ Motion, paras 18, 24.

¹⁹ Motion, para. 29.

²⁰ Under sub-ground 1(B) of the Amended Notice of Appeal, Milan Lukić claims that the Trial Chamber made an error of law by holding that, in a non-Joint Criminal Enterprise case, “the commission of murder is established in the absence of any evidence that Milan Lukic [sic] killed Ekrem Dzafic [sic], Hasan Mutapcic [sic], Hasan Kustura and Amir Kurtalic [sic]”, Motion para. 25. Pursuant to sub-ground 1(J), he posits that the Trial Chamber made an error of law or fact in assessing the elements of Counts 4 and 5 of the Indictment in relation to the survivors of the Drina River Incident, Motion, para. 26. Under sub-ground 2(H) of the Amended Notice of Appeal, Milan Lukić argues that the Trial Chamber erred by reaching an irrational conclusion in convicting Milan Lukić of persecutions in relation to the Varda Factory Incident, Motion, para. 27. Finally, under sub-ground 5(A) of the Amended Notice of Appeal, he states that the Trial Chamber erroneously found that the murder of Hajra Korić was premeditated, Motion, para. 28.

²¹ Motion, paras 25-29, 34.

preventing him from appealing on these grounds would lead to a miscarriage of justice.²² He relies on the Appeals Chamber's recent decision in the *Prosecutor v. Ljube Boškoski and Johan Tarčulovski* case,²³ which held that a change of counsel constitutes "good reason" for showing why grounds were not included in the original notice of appeal and for amending it to include such grounds.²⁴

8. Milan Lukić avers that the proposed amendment to his Notice of Appeal would not prejudice the other parties, as the Prosecution's Notice of Appeal does not make reference to Milan Lukić, and the interests of co-defendant Sredoje Lukić do not conflict with those of Milan Lukić.²⁵ In particular, Milan Lukić contends that granting his Motion would neither preclude the timely filing of his Appeal Brief by the 17 December 2009 deadline, nor the timely filing of the Prosecution's Response Brief by the 5 February 2010 deadline.²⁶ He asserts that the suggested amendment would actually facilitate a faster and easier consideration of his claims due to the clarification and reorganisation of the grounds of appeal.²⁷

III. DISCUSSION

A. Applicable Standard

9. Pursuant to Rule 108 of the Rules of Procedure and Evidence ("Rules"):

A party seeking to appeal a judgement shall, not more than thirty days from the date on which the judgement was pronounced, file a notice of appeal, setting forth the grounds. The Appellant should also identify the order, decision or ruling challenged with specific reference to the date of its filing, and/or the transcript page, and indicate the substance of the alleged errors and the relief sought. The Appeals Chamber may, on good cause being shown by motion, authorise a variation of the grounds of appeal.

10. The concept of "good cause" encompasses both good reason for including the new or amended grounds of appeal, and good reason why those grounds were not included or correctly articulated in the original notice of appeal.²⁸ The Appeals Chamber has considered, *inter alia*, the

²² Motion, paras 29, 34.

²³ *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 ("*Tarčulovski Decision*"), para. 25.

²⁴ Motion, para. 11.

²⁵ Motion, paras 31, 35.

²⁶ Motion, paras 21, 30.

²⁷ Motion, para. 21.

²⁸ *Prosecutor v. Šainović et al.*, Case No. IT-05-87-A, Decision on Dragoljub Ojdanić's Second Motion to Amend his Notice of Appeal, 4 December 2009 ("*Ojdanić Decision of 4 December 2009*"), para. 6; *Prosecutor v. Šainović et al.*, Case No. IT-05-87-A, Decision on Nebojša Pavković's Second Motion to Amend his Notice of Appeal, 22 September 2009 ("*Pavković Decision*"), para. 7; *Prosecutor v. Šainović 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 ("*Ojdanić Decision of 2 September 2009*"), para. 5. See also *Tarčulovski Decision*, para. 17; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No.

following factors in determining whether “good cause” exists: (i) the variation is minor and 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 appellant’s brief.²⁹ Where an appellant seeks a substantive amendment broadening the scope of the appeal, “good cause” might also, under certain circumstances, be established. The Appeals Chamber recalls that no cumulative list of requirements has been established for a substantive amendment to be granted. Rather, each proposed amendment is to be considered in light of the particular circumstances of the case.³⁰

11. The jurisprudence of the Tribunal establishes that the criteria for variation of grounds of appeal should be interpreted restrictively at later stages of the appeal proceedings, when amendments to the grounds of appeal may substantially affect the efficient administration of justice.³¹ To hold otherwise would leave appellants free to change their appeal strategy and essentially restart the appeal process at will, interfering with the expeditious administration of justice and prejudicing the other parties to the proceedings.³² However, the Appeals Chamber has “adopted a relatively liberal approach to amendments in the rare instances in which an appellant’s lead counsel has been changed late in the appeals process”.³³

B. Discussion

12. At the outset, the Appeals Chamber recalls that the Prosecution has declined to respond to Milan Lukić’s Motion to amend his Notice of Appeal. The Prosecution has therefore neither opposed the amendment nor alleged that it would be prejudicial, which is a relevant consideration under the applicable standard.³⁴ The Appeals Chamber must nonetheless assess whether Milan Lukić has demonstrated “good cause” to amend his Notice of Appeal under Rule 108.

13. The Appeals Chamber notes that the new lead counsel was appointed on 14 October 2009, and that the new defence team was not fully assembled before November 2009. The Appeals Chamber considers that, under these circumstances, the change of Milan Lukić’s counsel and

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 (“*Jokić Decision*”), para. 7.

²⁹ *Ojđanić Decision* of 4 December 2009, para. 6; *Pavković Decision*, para. 7; *Ojđanić Decision* of 2 September 2009, para. 5.

³⁰ *Ibid.*

³¹ *Pavković Decision*, para. 9; *Tarčulovski Decision*, para. 18.

³² *Pavković Decision*, para. 9.

³³ *Blagojević and Jokić Decision* of 26 June 2006, para. 10. See also *Momir Nikolić v. Prosecutor*, Case No. IT-02-60/1-A, Decision on Appellant’s Request to Withdraw Previous Motions, to Revise Appellant’s Brief and to Amend Notice of Appeal, 19 July 2005, p. 4 (“*Momir Nikolić Decision* of 19 July 2005”).

³⁴ *Tarčulovski Decision*, para. 17, citing *Blagojević and Jokić Decision* of 26 June 2006, para. 7.

...defence team constitutes good cause for amending the original Notice of Appeal filed by Milan Lukić's former lead counsel on 19 August 2009.³⁵

14. Milan Lukić's new lead counsel filed the Motion on 26 November 2009. The Appeals Chamber finds that the Motion was timely filed given the need for the new defence team to review the lengthy trial record before considering amendments to the Notice of Appeal filed by the former lead counsel. The Appeals Chamber also notes that the amendment will not hinder the expeditious administration of justice, as Milan Lukić submits that he will still file his Appeal Brief by the 17 December 2009 deadline.³⁶

15. Moreover, the Appeals Chamber considers that the Amended Notice of Appeal has the potential to better focus the appellate proceedings by eliminating grounds 1(4), 1(5), 1(6), 2(1), 2(3), 4, 9(1) and 9(11).

16. The Amended Notice of Appeal also raises four new grounds of appeal: 1(B), 1(J), 2(H) and 5(A). The Appeals Chamber considers that the exclusion of these grounds would create the risk of a miscarriage of justice. The Appeals Chamber finds that these new grounds are *prima facie* important to Milan Lukić's appeal, and declines to prejudge their prospect of success at this stage of the proceedings.³⁷ The Appeals Chamber also finds that the Prosecution would not be prejudiced by the inclusion of these new grounds of appeal. Furthermore, the Appeals Chamber considers that these new grounds of appeal do not reflect a change of appeal strategy by Milan Lukić subsequent to reading the Prosecution's Response Brief, which has not yet been filed.³⁸ For all of these reasons, the Appeals Chamber considers that Milan Lukić has demonstrated "good cause" to amend his Notice of Appeal.

17. With regard to the Corrigendum, the Appeals Chamber recalls that "a party may, without requesting leave from the Appeals Chamber, file a corrigendum to [its] previously filed brief or motion whenever a minor or clerical error in said brief or motion is subsequently discovered and where correction of the error is necessary in order to provide clarification".³⁹ The Appeals Chamber considers that the Corrigendum is acceptable since it concerns minor errors regarding the paragraph numbers in Milan Lukić's Amended Notice of Appeal.

³⁵ See *Blagojević and Jokić* Decision of 26 June 2006, para. 10; *Momir Nikolić* Decision of 19 July 2005, pp. 3-4.

³⁶ The Appeals Chamber notes that the grounds of appeal and the arguments in an Appeal Brief must be presented and numbered in the same order as in the Notice of Appeal. See Practice Direction on Formal Requirements for Appeals from Judgement (IT/201), 7 March 2002, para. 4.

³⁷ Cf. *Tarčulovski* Decision, para. 28.

³⁸ Cf. *Tarčulovski* Decision, para. 25; *Ojdanić* Decision of 4 December 2009, para. 18.

³⁹ *Prosecutor v. Željko Mejakić et al.*, Case No. IT-02-65-AR11bis.1, Decision on Joint Defense [sic] Motion for Enlargement of Time to File Appellant's Brief, 30 August 2005, p. 3.

IV.- DISPOSITION

For the foregoing reasons, the Appeals Chamber:

GRANTS the Motion;

ACCEPTS Milan Lukić's Amended Notice of Appeal as appended to his Motion;

ACCEPTS the Corrigendum to Milan Lukić's Amended Notice of Appeal as validly filed; and

AFFIRMS that Milan Lukić's Appeal Brief is due by 17 December 2009.

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

Done this sixteenth day of December 2009
At The Hague,
The Netherlands.



Judge Mehmet Güney
Pre-Appeal Judge

[Seal of the Tribunal]