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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-02-60-A

Date: 20 July 2005

Original: English

BEFORE THE APPEALS CHAMBER

Before: **Judge Theodor Meron, President**
Judge Fausto Pocar
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Inés Mónica Weinberg de Roca

Registrar: **Mr. Hans Holthuis**

Decision: **20 July 2005**

THE PROSECUTOR

v.

Vidoje BLAGOJEVIĆ
Dragan JOKIĆ

DECISION ON PROSECUTION'S REQUEST FOR LEAVE TO AMEND NOTICE OF APPEAL IN RELATION TO VIDOJE BLAGOJEVIĆ

Counsel for the Prosecutor:

Mr. Norman Farrell

Counsel for the Defence:

Mr. Vladimir Domazet for Mr. Vidoje Blagojević
Ms. Cynthia Sinatra for Mr. Dragan Jokić

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 ("International Tribunal");

NOTING the Judgement of Trial Chamber I in this case, rendered orally on 17 January 2005 and in writing on 24 January 2005 ("Judgement");

NOTING the Prosecution's Notice of Appeal, filed 23 February 2005 ("Notice of Appeal");

BEING SEISED OF the Prosecution's Request for Leave to Amend its Notice of Appeal in Relation to Vidoje Blagojević ("Request"), filed on 6 June 2005, which seeks amendments (1) to specify that the Trial Chamber erred in law, and not merely in fact, when it held that no superior-subordinate relationship existed between Mr. Blagojević and Momir Nikolić, and (2) to request that Mr. Blagojević's conviction on Count 5 of his indictment be revised and his sentence increased in order to remedy the errors alleged in Ground 3 of the appeal;

NOTING that the Prosecution argues that there is good cause to permit these requested amendments because they are of substantial importance to the success of the appeal such as to lead to a miscarriage of justice if excluded, because they correct errors made in spite of counsel's due diligence, and because they are of a nature that does not unfairly prejudice Mr. Blagojević;

NOTING that although Mr. Blagojević did not file a separate response to the Prosecution's Request, he did respond in the form of a one-paragraph statement in his Response Brief on Prosecution's Brief on Appeal, filed on 20 June 2005 ("Response Brief"), contending that the Prosecution's failure to include these points in its original notice of appeal "can not be justified in good cause";[1]

CONSIDERING that Rule 108 of the Rules of Procedure and Evidence of the International Tribunal ("Rules") states that the Appeals Chamber "may, on good cause being shown by motion, authorise a variation of the grounds of appeal";

[1] Defence of Accused Vidoje Blagojević's Response Brief on Prosecution's Brief on Appeal, 20 June 2005, para. 4.2 ("Response Brief").

CONSIDERING that the first amendment that the Prosecution seeks is essentially a clarification of an alleged error already set forth in the original notice of appeal,[2] and that this clarification was fully explained in the Prosecution's Appeal Brief;[3]

CONSIDERING also that Mr. Blagojević had the opportunity to respond to the arguments developed by the Prosecution on this matter in his Response Brief[4] and that no unfair prejudice would be caused to him if leave to amend paragraph 13(iii) of the Notice of Appeal was granted;

NOTING that the second requested amendment corresponds to an argument advanced in the Prosecution's original Notice of Appeal, which alleged in the third Ground of Appeal that the Trial Chamber erred in finding that Mr. Blagojević lacked command responsibility over Momir Nikolić, and stated expressly that Mr. Blagojević should be held responsible under a command responsibility theory;

NOTING that the Trial Chamber in this case had specifically found Momir Nikolić responsible only for acts of persecution, such that the relationship between Mr. Blagojević and Mr. Nikolić was germane principally to the persecution count (Count 5 of the Indictment against Mr. Blagojević);

NOTING that for this reason, although the Prosecution did not specifically refer to the persecution count (Count 5) in its third Ground of Appeal and did not request that the Judgement be amended with respect to that count, and thus pled this error with insufficient clarity, it nonetheless impliedly alleged an error with respect to that count by alleging error in the Trial Chamber's assessment of the relationship between Mr. Blagojević and Mr. Nikolić;

NOTING that the Prosecution accordingly now seeks to add the following sentence to its request for relief: "As a result the conviction for Count 5 should be revised and a conviction entered based on the Appellant Blagojević's responsibility under Article 7(3) for failing to prevent and punish Momir Nikolić, and in relation to all mentioned counts, the sentence increased accordingly.";

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[2] Notice of Appeal para. 13(iii).
[3] Prosecution's Brief on Appeal, 9 May 2005, paras. 4.1 and 4.33-4.40.
[4] *See* Response Brief, para. 4.8-4.9.

CONSIDERING that, although the second requested amendment affects the substance of the relief formally requested by the Prosecution, it requests a remedy for errors already raised by implication in the original Notice of Appeal;

CONSIDERING that the second requested amendment brings the Notice of Appeal in conformity with the Appeal Brief, which fully explicated the Prosecution's argument concerning the application of its third ground of appeal to Count 5 of the Indictment; [5]

NOTING that Mr. Blagojević briefly responded in his Response Brief to the Prosecution's arguments concerning Count 5 of the indictment, specifically addressing his relationship with Nikolić and arguing that the requested revision to the Judgement as pertains to Count 5 not be granted;[6]

CONSIDERING the Decision of the Appeals Chamber in the *Kordić and Čerkez* case, which, addressing the requirement that an appellant establish "good cause" for an amendment to a notice of appeal, held that "inadvertence or negligence by an appellant's counsel to plead a ground of appeal with sufficient clarity should not restrict an appellant's right to raise that ground of appeal where that ground could be of substantial importance to the success of an appeal such as to lead to a miscarriage of justice if it is excluded";[7]

CONSIDERING that, if the Prosecution succeeds in demonstrating the errors it alleges with respect to the third ground of appeal, but is not permitted to amend its notice of appeal to expressly specify that this error pertains to Count 5 and to request that the judgement on Count 5 is altered accordingly, there will be no remedy as pertains to Count 5 for an error that affected the Trial Chamber's decision on that count, which illustrates that the amendment sought is indeed "of substantial importance to the success" of the Prosecution's appeal, such that denying it would lead to a miscarriage of justice;

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[5] *Id.* at paras. 4.1 and 4.33-4.78.
[6] Response Brief at paras. 4.3-4.16;
[7] *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Decision Granting Leave to Dario Kordić to Amend His Grounds of Appeal, 9 May 2002, paras. 5 and 8.

CONSIDERING that, for the foregoing reasons, under the particular circumstances of this case, there is "good cause" for both requested amendments within the meaning of Rule 108 of the Rules;

CONSIDERING that although Mr. Blagojević did in fact respond in his Response Brief to the errors alleged by the Prosecution concerning Count 5, he may wish to make further submissions on that Count in light of the amendments granted by the Appeals Chamber, and that permitting such submissions averts any risk that the Prosecution's failure to specify earlier the ways in which its third ground of appeal affects Count 5 will have unfairly prejudiced Mr. Blagojević;

HEREBY GRANTS, Judge Pocar dissenting in part, the Prosecution's Request and **ORDERS** Mr. Blagojević to file any additional submissions in response to the amendments to the Notice of Appeal within 15 days of the date of this order, and the Prosecution to reply to any such submissions within 7 days of their filing.

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

Dated 20 July 2005
At The Hague
The Netherlands

Judge Theodor Meron
Presiding

Judge Pocar appends a dissenting opinion to the present decision.
Judge Shahabuddeen appends a separate opinion to the present decision.

[Seal of the Tribunal]

PARTIAL DISSENTING OPINION OF JUDGE POCAR

1. I dissent from this decision because I do not agree to granting the Prosecution's requested amendment to its Third Ground of Appeal with regard to the appellant Blogjević at paragraph 14 of its Notice of Appeal (hereinafter "amendment" or "second requested amendment"). This requested amendment is impermissible under Rule 108 of the Rules of Procedure and Evidence ("Rules") and our jurisprudence. The majority reasons that allowing this amendment is necessary in order to avoid a "miscarriage of justice." On the contrary, I contend that granting this amendment may lead to a miscarriage of justice.

2. A fundamental principle in our jurisprudence is that where a party fails to timely challenge a Trial Chamber's conviction or sentence against an accused on appeal, then the trial judgement is final. The Appeals Chamber is barred, under the doctrine of *res judicata,*[1] from reviewing, revising or reversing a conviction or sentence where a party has failed to seise the Appeals Chamber by raising them on appeal.[2] Under Rule 108 of the Rules, a party has 30 days from the pronouncement of the Trial Judgement to put the other party on notice of all of its grounds of appeal[3] alleging errors of law or fact occasioned by the Trial Chamber and the impact that these errors have on the conviction and sentence.[4] Once that deadline has passed, no recourse is available to a party for expanding the scope of its appeal. Nevertheless, it may, pursuant to Rule 108, seek a "variation" of the grounds of appeal already raised "upon good cause being shown by motion."[5] While such a good cause determination is necessarily done on a case-by-case basis, generally, the Appeals Chamber has found the existence of the following factors as relevant for supporting a good cause finding: the minor nature of the variation such that it does not affect the content of the notice of appeal; the fact that the variation has been fully addressed in the appeal and response briefs such that the opposing party would not be prejudiced; the opposing party's lack of objection to the

[1] As noted by the ICTR Appeals Chamber in *Kajelijeli v. The Prosecutor,* this doctrine "refers to the situation when 'a final judgment on the merits' issued by a competent court on a claim, demand or cause of action between parties constitutes an absolute bar to 'a second lawsuit on the same claim' between the same parties" (internal citation omitted), *see i.d.* Case No. ICTR-98-44A-A, Judgement 23 May 2005, para. 202.

[2] *See e.g. Prosecutor v. Kupreškić et al.,* Case No. IT-95-16-A, Appeal Judgement, 23 October 2001 ("*Kupreškić* Appeal Judgement"), paras. 468-471(holding that it would not consider the Prosecution's allegation that the Trial Chamber erred in giving the accused a lower sentence for persecutions than for murder because "it was not properly seised of this question" given that it had been raised for the first time in the Prosecution's Amended Appeal Brief and had no relation to the Prosecution's filed grounds of appeal). The Appeals Chamber may examine issues *proprio motu* or alleged errors, even if not properly raised on appeal by a party, when they are of general interest for developing the jurisprudence of the International Tribunal *so long as they do not affect the verdict* in its role as the final arbiter of the law. *See Prosecutor v. Kordić and Čerkez,* Case No. IT-95-14/2-A, Judgement, 17 December 2004, paras. 1031-1032 (*citing Prosecutor v. Krnojelac,* Case No. IT-97-25-A, Judgement, 17 September 2003, paras. 6-7).

[3] In raising a ground, a party is to identify the decision or ruling challenged, the substance of the alleged errors, and the relief sought. *See* Rule 108 of the Rules.

[4] *See* Article 25(1) of the Statute whereby the parties may raise appeals on grounds of an error on a question of law invalidating the decision or of an error of fact occasioning a miscarriage of justice.

[5] Rule 108 of the Rules.

variation; and the fact that the variation would bring the notice of appeal into conformity with the appeal brief.[6] So, for example, the Appeals Chamber has found that good cause clearly exists where the variations sought consist of mere "formal modifications" to the Notice of Appeal such as correcting spelling, grammar, or drafting errors.[7]

3. In this case, the majority errs in finding that good cause exists for allowing the Prosecution's second requested amendment. Only one of the previously mentioned factors exists to support this finding: that the amendment would bring the Prosecution's Notice of Appeal into conformity with its Appeal Brief. This alone is clearly insufficient.

4. First, contrary to the majority's view, this is not a minor amendment that simply clarifies the errors alleged under the Prosecution's Third Ground of Appeal or corrects clerical errors. Rather, this is a substantive amendment clearly affecting the content of the Notice of Appeal such that it broadens the scope of this ground. I note that under Rule 108 of the Rules, in setting forth its grounds of appeal, a party is to identify: 1) the decision or ruling by the Trial Chamber challenged; 2) the substance of the errors alleged in that decision or ruling; and 3) any relief sought. Under this amendment, the Prosecution seeks to challenge an entirely different ruling of the Trial Chamber and to include requests for entirely new remedies for the errors alleged under its Third Ground of Appeal.

5. The Prosecution requests to include, for the first time, a challenge to the Trial Chamber's conviction against Blagojević for persecutions under Count 5. In the original Notice of Appeal, the Prosecution only contests and seeks reversal of Blagojević's acquittal for extermination under Count 2 as well as challenges and seeks revision of Blagojević's convictions for murder under Counts 3-4. I point out that by including a challenge as to Blagojević's conviction for persecutions under Count 5, this includes all of the underlying acts which the Trial Chamber found to constitute persecutions beyond murders including: cruel and inhumane treatment of Bosnian Muslim civilians, terrorizing of Bosnian Muslim civilians, and forcible transfer of Bosnian Muslims.[8] In addition, under this amendment, the Prosecution requests to include, for the first time, relief in the form of an increase of sentence as to all challenged counts, not just revision or reversal of the Trial Chamber's findings as to those counts as previously requested. In the words of the majority, "the second requested amendment affects the *substance* of the relief formally requested by the Prosecution." (Emphasis added).

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[6] *Momir Nikolić v. Prosecutor*, Case No. IT-02-60/1-A, Decision on Appellant's Motion to Amend Notice of Appeal, 21 October 2004, p. 3.
[7] *Id.* At pp. 2-3.
[8] *See Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, Judgement, 17 January 2005 ("Trial Judgement"), para. 797.

6. The majority states that this amendment merely clarifies errors already "impliedly alleged" under the Prosecution's original Third Ground of Appeal. I do not agree. Not a word is stated under this ground with regard to "persecutions" or "Count 5." Rather, the Third Ground of Appeal only alleges that Blagojević should have been held responsible as a commander for the acts of his subordinates in the "murder operation" specifically for their "aiding and abetting murders" and "aiding and abetting extermination."[9] The Prosecution then logically identifies the Trial Chamber's rulings as to Counts 2-4 (with regard to murders and extermination) to be at issue and seeks their revision or reversal. I note that under this ground, the Prosecution points to the Trial Chamber's findings in paragraphs 794 and 795 of the Trial Judgement as being in error. These paragraphs summarize the Trial Chamber's conclusions on Blagojević's command responsibility for his subordinates' participation in *all* of the crimes previously established in the Trial Judgement for which he had been found individually responsible as an aider and abettor: genocide, murder, persecutions, and forcible transfer.[10] While explicit reference is made therein to "persecutions" as one of those crimes, *at least,* in which Momir Nikolić participated,[11] the Prosecution made clear that it was specifically alleging that the Trial Chamber erred in its findings under these paragraphs that Blagojević was not responsible "for failing to prevent or punish his subordinates (members of the Bratunac Brigade *including Momir Nikolić*) for their acts of assistance in the *murder operation.*"[12]

7. Second, although the Prosecution has discussed the substance of the second requested amendment in its Appeal Brief, it is not clear that Blagojević fully addressed the implications of this amendment in his Response Brief. Even though the majority now seeks to allow Blagojević the opportunity to supplement his Response Brief as to this amendment, in light of the substantial nature of the amendment, this does not serve to avoid any unfair prejudice caused to Blagojević by allowing it. Third, it is relevant to consider that, as the majority points out, Blagojević objects to the Prosecution's second requested amendment.

8. A final point bears noting. The Prosecution correctly states that "good cause justifying an amendment of the Notice of Appeal requires the Applicant to demonstrate inability of raising the new ground earlier."[13] I point out that the Prosecution made the present request to amend its Notice

[9] Prosecution's Notice of Appeal, 23 February 2005, paras. 12, 14.
[10] *See* Trial Judgement, paras. 729-787, 794-795, 797.
[11] *Id.* at para. 795.
[12] Prosecution's Notice of Appeal, para. 12 (emphasis added).
[13] Prosecution's Request for Leave to Amend Notice of Appeal in Relation to Vidoje Blagojević, 6 June 2005 ("Prosecution's Request"), para. 8.

of Appeal on 6 June 2005, 103 days after the deadline for filing its Notice of Appeal.[14] The Prosecution claims that its omission of reference to Count 5 and as to revision of Blagojević's sentence on all counts raised in its Third Ground of Appeal was "simply an oversight" of which it only became aware upon preparation of its Appeal Brief.[15] Frankly, I fail to see how an oversight of this nature took over 100 days to bring to the Appeals Chamber's attention.

9. In sum, the Prosecution's second requested amendment is *not* one that simply seeks to rectify "inadvertence or negligence by an appellant's counsel to plead a ground of appeal with sufficient clarity" and the Prosecution has failed to establish good cause for its allowance.[16] While the Prosecution has a right to an appeal under Article 25 of our Statute, neither the Appeals Chamber, nor the opposing party, are responsible for the Prosecution's failure to properly exercise that right. In the words of the Appeals Chamber in *Kupreškić*, "Appellants should not be permitted to side-step procedures fixed within the Statute and the Rules. Nor should they be given the opportunity to continue to point out errors as and when they believe they have been identified."[17] I have no doubt that, as the Prosecution argues, its second requested amendment "could be of substantial importance to the success" of its appeal.[18] I also have no doubt that this amendment could substantially prejudice Blagojević's position on appeal.

10. For these reasons, I dissent.

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

Done this 20th day of July 2005,
At The Hague,
The Netherlands

Fausto Pocar
Appeals Judge

[14] The Prosecution properly filed its original Notice of Appeal on 23 February 2005, 30 days after the issuance of the written Trial Judgement on 24 January 2005.
[15] Prosecution's Request, para. 31.
[16] *Prosecutor v. Dario Kordić and Mario Čerkez,* Case No. IT-95-14/2-A, Decision Granting Leave to Dario Kordić to Amend His Grounds of Appeal, 9 May 2002, para. 5.
[17] *Kupreškić* Appeal Judgement, para. 470.
[18] Prosecution's Request, para. 8.

SEPARATE OPINION OF JUDGE SHAHABUDDEEN

A. Introduction

1. I support today's decision and propose to explain why I consider it to be correct.

2. The Prosecution has requested leave to make two amendments to its notice of appeal, both relating to matters raised in Count 5 of the Indictment against Mr. Blagojević. First, the Prosecution seeks to argue that the Trial Chamber committed an error of law, in addition to an error of fact, in acquitting Mr. Blagojević under the command responsibility theory pursuant to Article 7(3) of the Statute of the International Tribunal. Second, it seeks to argue that, as a consequence of the errors it alleges, Mr. Blagojević should be convicted pursuant to Article 7(3) under that count, and that the sentence should be correspondingly increased. The background may be summarised thus:

3. Count 5 of the Indictment was for persecutions as a crime against humanity, carried out through underlying acts of murder, cruel and inhumane treatment, terrorizing the civilian population, destruction of personal property, and forcible transfer of people. In respect of that count, Mr. Blagojević was charged under Article 7(1) and Article 7(3), with the Article 7(3) charge pertaining to his command responsibility over Mr. Momir Nikolić (who was not charged in this Indictment). In paragraph 795 of its Judgement, the Trial Chamber found that Mr. Nikolić had committed the crime of persecutions, but found that the Prosecution had failed to establish Mr Blagojević's command responsibility over Mr. Nikolić. Mr Blagojević was accordingly acquitted under Article 7(3) but found guilty of aiding and abetting under Article 7(1).[1]

4. The Prosecution's notice of appeal was filed on 23 February 2005. The requests for leave to make the two amendments to the grounds stated in that notice of appeal were first set out in the Prosecution's Appeal Brief, dated 9 May 2005. Thereafter, Mr. Blagojević filed his Response Brief on 20 June 2005. The Prosecution's requests have been repeated in its application of 6 June 2005, which is now being decided.

B. The first proposed amendment

5. As to the first amendment sought by the Prosecution, the Appeals Chamber has unanimously decided to permit this. But it is necessary to appreciate what that amendment is about in order to evaluate the legitimacy of the Prosecution's request for the second amendment.

6. Paragraphs 12 and 13 of the original notice of appeal read as follows:

> 12. The Trial Chamber erred in law and fact in paras. 794 and 795 in finding that Blagojević was not responsible for the acts of his subordinates in the murder operation under Article 7(3), for failing to prevent or punish them. Blagojević should be responsible under Article 7(3) for failing to prevent or punish his subordinates (members of the Bratunac Brigade including Momir Nikolić) for their acts of assistance in the murder operation.
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> 13. This ground consists of four sub-errors:
>
> (i) . . .
>
> (ii) . . .
>
> (iii) The Trial Chamber erred in fact in finding in para. 795 that a superior-subordinate relationship did not exist between Blagojević and Momir Nikolić;
>
> (iv) ...

7. Thus, in paragraphs 12 and 13(iii) of its original notice of appeal, the Prosecution took the position that the Trial Chamber erred in finding, in paragraph 795 of its Judgement, that a superior-subordinate relationship did not exist between the two men and on that ground acquitting Mr Blagojević under Article 7(3). Paragraph 12 said that the Trial Chamber "erred in law and fact"; paragraph 13(iii) said that it "erred in fact". The object of the first amendment is to add an error of law to the latter. As noted above, there is no difficulty concerning that amendment.

C. The second proposed amendment

8. As to the second amendment sought by the Prosecution, paragraph 12 of the *original* notice of appeal stated, as has been noticed, that Mr. "Blagojević should be *responsible* under Article 7(3) for failing to prevent or punish his subordinates (members of the Bratunac Brigade including Momir Nikolić) for their acts of assistance in the murder operation".[2] Now, Mr. Blagojević could hardly be

[1] Judgement, pages 283-286 and 304-305.
[2] Emphasis added.

held by a court to be *"responsible"* (as alleged in the *original* notice of appeal) for so serious a crime as that of command responsibility over persecutions if the court did not proceed to make a formal conviction and to punish him appropriately. In my view, therefore, a request for a remedy was implied in the original notice of appeal; the second proposed amendment makes that request explicit.

9. It might be objected that paragraph 12 of the original notice of appeal does not refer expressly to the persecutions count, that is, to Count 5. In my view, however, it is clear in the context that the statement in that paragraph is meant to refer principally, if not exclusively, to that count. Mr. Blagojević's command responsibility over Mr. Nikolić is relevant only to the extent that Mr. Nikolić was responsible for any of the alleged criminal acts. The Trial Chamber in this case held that Mr. Nikolić was responsible for "crimes including, at least, persecutions".[3] In light of this fact, the natural remedy for the Prosecution to seek (for the alleged error of the Trial Chamber in holding that there was no command relationship between the two men) was an entry of conviction under Article 7(3) for persecutions. Indeed, it is hard to see how the error would be remedied in any other way.

10. Nor is this conclusion affected by the Prosecution's reference in its original notice of appeal to "the murder operation" rather than to "persecutions". Mr. Blagojević was charged with persecutions through underlying acts including, *inter alia,* murder; I cannot draw any useful distinction between "murder" and a "murder operation". The Prosecution's use of the phrase "murder operation" cannot, in light of the context described above, reasonably be interpreted to exclude persecutions.

11. Thus, both the error and the request for relief with respect to Count 5 appear to me to have been posed, by necessary implication, by paragraphs 12 and 13(iii) of the original notice of appeal itself. The second amendment, which seeks to make this explicit, spells out the meaning of the original notice of appeal.

D. Whether Mr. Blagojević Has Been Unfairly Prejudiced

12. Did Mr. Blagojević understand the matter differently? In his response to the appeal brief (which first set out the Prosecution's requests for these two amendments), Mr. Blagojević said that the inability of the Prosecution to include these points in its original notice of appeal "can not be

justified in good cause".[4] So he had an opportunity to respond. And he in fact used that opportunity. He devoted a dozen or more paragraphs[5] to defending the Trial Chamber's holding that he lacked command responsibility over Mr. Nikolić. His arguments responded directly to the errors raised by the Prosecution in paragraphs 12 and 13(iii) of its original notice of appeal. It cannot be said that he had no opportunity to deal with the substance of the matter, or that he did not use that opportunity, or that he is taken by surprise.

13. Today's decision grants Mr. Blagojević a further pleading opportunity. In my view, this should not be read as an acknowledgement that he did not have an opportunity to react to the point in the first place. Rather, the decision recognises that, it being in the interests of justice to hear his views, he should be afforded a further opportunity to present them. In any event, however, the additional pleading opportunity ought to put to rest any lingering fears that Mr. Blagojević will be unfairly prejudiced by the amendments allowed by today's decision.

14. The question of prejudice caused to the respondent is always relevant to a decision whether to permit amendment of a notice of appeal. However, it bears noting that the question cannot be simply whether the respondent is worse off if the amendment is permitted as against its being disallowed; the respondent will be worse off by the granting of virtually any amendment, for parties only seek amendments if they see a benefit from them, which generally comes at the expense of the opposing party. The question, instead, is whether the respondent is *unfairly* harmed by the amendment being made *now*. In my view, in the circumstances of this case, there has been no harm to Mr Blagojević.

15. One could imagine different facts in which this would not be the case. For example, the nature of the amendment might affect the prior strategic choices of the respondent in a way that no supplemental briefing could remedy; but such circumstances are not present here. One could also imagine amendments being denied on the basis that the further submissions that would be necessitated would cause undue delay in the appeal, but this is also not the case here: the appeal hearing is being delayed by the many extensions granted in Mr. Blagojević's own appeal, not by the briefing of the Prosecution's appeal. Here, I see no substantial due process concerns. Mere delay in amending a notice of appeal does not in and of itself present such a concern.

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[3] Judgement, para. 795.
[4] Response, para. 4.2.
[5] *Ibid.*, paras. 4.3-4.14.

16. The Appeals Chamber has granted amendments quite late in the appeals process; in *Jelisić*, it granted an amendment during the oral hearing of the appeal.[6] I also note that the Rules do not provide for different treatment of amendments from the Prosecutor as opposed to the Defence, and that a narrow construction of "good cause" for amendments of the notice of appeal may risk, in other cases, undermining the rights of convicted persons to a full hearing of their own appeals.

17. Under circumstances in many ways similar to those of this case, where the amendments sought were meant to bring the notice of appeal into conformity with the appeal brief and where no prejudice would thereby be caused, the Appeals Chamber granted leave to amend the notices of appeal in *Nikolić* [7] and *Simić* [8]. It is true that, in these cases, the amendment had been effectively agreed to by the other side, and that this was among the several factors cited by the Appeals Chamber. But I am not satisfied that controlling jurisprudence is to the effect that amendments are never permitted unless the other side in one way or another agrees. At any rate, I am not persuaded that the agreement of the other side should govern the outcome where the point is not new in substance, and where what is sought is permission to use language designed to bring out the logical consequences of what is implicit in the original notice of appeal.

E. Whether Substantive Amendments to the Notice of Appeal Are Permitted

18. As explained above, I believe that the second amendment sought by the Prosecution is not new in substance. The essence of the addition it seeks was implicitly contained in the fact that the original notice of appeal did aver that Mr. Blagojević was responsible for the crime of persecutions on the specific ground (denied by the Trial Chamber) that he had a superior-subordinate relationship with Mr. Nikolić. What can be the point of asking in the original notice of appeal for a finding that Mr. Blagojević was "responsible under Article 7(3)" if a conviction and sentence to reflect that responsibility are not also to follow? The amendment is concerned with ways and means of giving effect to that responsibility; it does not, in a real sense, broaden the scope of the appeal.

[6] *See Prosecutor v. Jelisić*, Case No. IT-95-10-A, Appeals Judgement, 5 July 2001, para. 18.
[7] *Momir Nikolić v. Prosecutor*, Case No. IT-02-60/1-A, Decision on Appellant's Motion to Amend Notice of Appeal, 21 October 2004.
[8] *Prosecutor v. Blagoje Simić*, Case No. IT-95-9-A, Decision on Motion of Blagoje Simić to Amend Notice of Appeal, 16 September 2004.

19. However, even if the Prosecution were seeking a substantive amendment broadening the scope of the appeal, in my view that would not be a reason to deny the request in the circumstances of this case. It is not, of course, the case that *any* amendment of a notice of appeal will be permitted without any sense of restriction. Nor will an amendment automatically be granted so long as it brings the notice into conformity with the appeal brief. The question turns on whether there is "good cause" under Rule 108 of the Rules of Procedure and Evidence.

20. The meaning of "good cause" can be collected from various places in the case law of the Tribunal. One aspect was considered in *Kordić and Čerkez*,[9] in which the Pre-Appeal Judge stated as follows:

> "Good cause" justifying an amendment to an appellant's grounds of appeal is a protean concept, and whether it is established depends on the circumstances of each case. Its application in the circumstances of this case depends to a large extent upon the importance which the ground could have to the success of any appeal. Inadvertence or negligence by an appellant's counsel to plead a ground of appeal with sufficient clarity should not restrict an appellant's right to raise that ground of appeal where that ground could be of substantial importance to the success of an appeal such as to lead to a miscarriage of justice if it is excluded.

21. The *Kordić and Čerkez* case, though decided by a single Judge, has been cited with approval in today's decision. There is and can be no dispute about the importance of the amendment sought, as the Prosecution will have no effective remedy for the errors it alleges in Ground 3 of its appeal if it is not permitted. The reference to the inadvertence of counsel is also apt in this case. As the Prosecution explains, and Mr. Blagojević does not contest, the failure to refer specifically to Count 5 in Ground 3 of its original notice was simply a mistake. This error was of the technical kind that surfaces in the mind of any busy legal practitioner who subsequently reflects on the matter. If on such reflection he finds it prudent to seek the help of the court in setting forth his true argument, that help should not be withheld where no prejudice is caused to the other side, as I believe none is caused here.

22. Naturally, the further one goes from the commencement of the appeal, there is less likelihood of a finding that there is "good cause", which will include the public interest in the finality of a judgement. But I should like to maintain the competence of the Appeals Chamber to find that there is "good cause" at any time, whether or not there is a broadening of the scope of the appeal. As

[9] *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, 9 May 2002, para. 5 (Hunt, J.).

noted above, this has previously been done even during the appeal hearing. At this point in this case, the appeal hearing is still many months away.

23. Finally, I do not think that the Appeals Chamber would be wise to put aside the experience of national courts which, subject to terms, can grant an amendment to argue a new ground in a criminal appeal even in the course of the oral hearing of the merits of the appeal, that is to say, even where the original notice of appeal did not include the substance of the amendment.[10] What that experience shows is that, where an amendment is necessary in order to enable a party to put its true case forward, and the opposing party will not be unfairly prejudiced, and the administration of justice will not be significantly harmed, it should be allowed. As illustrated above, these conditions are satisfied here.

F. Conclusion

24. The rule underlying the jurisdiction of the Appeals Chamber to grant an amendment of a notice of appeal rests on the responsibility of the Tribunal to do justice. The jurisprudence shows that the interests of justice are served by ensuring that the real case of the parties is ventilated. It is not of course the law that an amendment must be allowed wherever the refusal of the amendment will prejudice the applicant in that he would not be able to put forward his case. But that is a factor to be taken into account together with others. In this case, as mentioned above, there are other factors; in my opinion, they justify the granting of leave to make both amendments.

[10] A request, in a criminal matter, to add to the original grounds of appeal a new ground was made during the oral hearing in *Miah*, (1997) 2 Cr. App. Rep. 12 at 23-24. It was refused, but only because, as the Court of Appeal said at p. 24, "the proposed additional ground of appeal is simply unarguable".

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

Mohamed Shahabuddeen

Dated 20 July 2005

At The Hague

The Netherlands

[Seal of the Tribunal]