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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: 22 September 2009

Original: English

IN THE APPEALS CHAMBER

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

Registrar: **Mr. John Hocking**

Decision of: **22 September 2009**

PROSECUTOR

v.

NIKOLA ŠAINOVIĆ
DRAGOLJUB OJDANIĆ
NEBOJŠA PAVKOVIĆ
VLADIMIR LAZAREVIĆ
SRETEN LUKIĆ

PUBLIC

DECISION ON NEBOJŠA PAVKOVIĆ'S SECOND MOTION TO AMEND HIS NOTICE OF APPEAL

The Office of the Prosecutor:

Mr. Paul Rogers
Ms. Christine Dahl

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 seised of "General Pavković Request to Amend his Notice of Appeal to Adopt Ground Seven of his Co-appellant Ojdanić's Amended Notice of Appeal" ("Motion"), filed by Counsel for Nebojša Pavković ("Pavković") on 15 September 2009. The Office of the Prosecutor ("Prosecution") responded on 18 September 2009.[1] Pavković indicated to the Appeals Chamber that he will not file a reply.[2]

I. BACKGROUND

2. On 26 February 2009 Trial Chamber III convicted Pavković pursuant to Article 7(1) of the Statute of the Tribunal ("Statute") of 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.[3] The Trial Chamber sentenced Pavković to 22 years of imprisonment.[4]

3. Pavković filed his Notice of Appeal on 27 May 2009 challenging the Trial Judgement on 12 grounds.[5] Pursuant to Rule 108 of the Tribunal's Rules of Procedure and Evidence ("Rules"), on 28 August 2009 Pavković requested authorisation from the Appeals Chamber to amend the first ground of his Notice of Appeal.[6] The Appeals Chamber granted the request on 9 September 2009.[7]

4. The Trial Judgement has also been appealed by Nikola Šainović, Dragoljub Ojdanić ("Ojdanić"), Vladimir Lazarević, Sreten Lukić and the Prosecution.[8] On 29 July 2009 Ojdanić

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[1] Prosecution's Response to General Pavković's Request to Amend his Notice of Appeal to Adopt Ground Seven of his Co-Appellant Ojdanić's Notice of Appeal, 18 September 2009 ("Response").
[2] Internal correspondence, 18 September 2009.
[3] *Prosecutor v. Milan 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.
[4] Trial Judgement, Vol. III, para. 1210.
[5] *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-A, Notice of Appeal from the Judgement of 26 February 2009, 27 May 2009 ("Notice of Appeal").
[6] General Pavković Motion for Amendment to his Notice of Appeal, 28 August 2009; see also Annex A thereto ("Amended Notice of Appeal").
[7] Decision on Nebojša Pavković's Motion to Amend his Notice of Appeal, 9 September 2009 ("*Pavković* Decision of 9 September 2009").
[8] *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-A, Defence Submission Notice of Appeal, 27 May 2009 (filed by Counsel for Nikola Šainović); *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-A, General Ojdanic's [*sic*] Amended Notice of Appeal, 29 July 2009 (filed by Counsel for Dragoljub Ojdanić as Annex B to General Ojdanić's Motion to Amend Ground 7 of his Notice of Appeal, 29 July 2009); *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-A, Vladimir Lazarevic's [*sic*] Defence Notice of Appeal, 27 May 2009 (confidential) and Defence Submission: Lifting Confidential Status of the Notice of Appeal, 29 May 2009; *Prosecutor v. Milan Milutinović et al.*, Case No. IT-05-87-A, 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.

submitted a motion requesting to amend the seventh ground of his Notice of Appeal.[9] The Appeals Chamber granted Ojdanić's Motion on 2 September 2009 and accepted as validly filed the Amended Notice of Appeal attached thereto.[10]

5. The Prosecution filed its Appeal Brief on 10 August 2009.[11] The Appeal Briefs by the other appellants are due to be filed no later than 23 September 2009.[12]

II. APPLICABLE LAW

6. Pursuant to Rule 108 of the Rules, the Appeals Chamber "may, on good cause being shown by motion, authorise a variation of the 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.[13] 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.[14]

7. 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 phrased) in the original notice of appeal.[15] 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.[16] 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 that must be met each time a substantive amendment is to be granted has been established. Rather, each proposed amendment is to be considered in light of the particular circumstances of the case.[17]

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[9] General Ojdanic's Motion to Amend Ground 7 of his Notice of Appeal, 29 July 2009 ("Ojdanić's Motion").
[10] Decision on Dragoljub Ojdanić's Motion to Amend Ground 7 of his Notice of Appeal, 2 September 2009 ("*Ojdanić* Decision of 2 September 2009"); see also Annex B to Ojdanić's Motion, General Ojdanić's Amended Notice of Appeal ("Ojdanić's Amended Notice of Appeal").
[11] 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.
[12] Decision on Joint Defence Motion Seeking Extension of Time to File Appeal Briefs, 29 June 2009 ("Decision on Extension of Time"), p. 5.
[13] *Pavković* Decision of 9 September 2009, para. 4 and references cited therein.
[14] *Ibid.*
[15] *Id.*, para. 5.
[16] *Ibid.*
[17] *Ibid.*

8. 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 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.[18] 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.[19]

9. The jurisprudence of the Tribunal establishes that the criteria for variation of grounds of appeal should be interpreted restrictively at the stages in the appeal proceedings when amendments would necessitate a substantial slowdown in the progress of the appeal – for instance, when they would require briefs already filed to be revised and resubmitted.[20] 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 case.[21]

III. DISCUSSION

A. Submissions of the parties

10. Pavković seeks authorisation to further vary his Amended Notice of Appeal in order to "adopt and join" the seventh ground of Ojdanić's Amended Notice of Appeal.[22] Referring in particular to the *Ojdanić* Decision of 2 September 2009, Pavković argues that the seventh ground of Ojdanić's Amended Notice of Appeal "would, if successful, apply equally to General Pavković thereby having a direct effect on his criminal responsibility."[23]

11. As to the existence of a good cause for further variation of his Amended Notice of Appeal, Pavković submits that ongoing discussions, as well as the analysis of the other appellants' notices of appeal and respective requests for their amendment have revealed that errors, such as the one alleged under the seventh ground of Ojdanić's Amended Notice of Appeal, apply equally to him.[24]

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[18] *Ojdanić* Decision of 2 September 2009, para. 6.
[19] *Ibid.*
[20] *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. 11, 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, para. 8.
[21] *Ibid.*
[22] Motion, para. 18.
[23] *Id.*, para 7; see also *id.* para. 5.
[24] *Id.*, para. 12.

Alternatively, he argues that should the Appeals Chamber find that good cause has not been shown, it should still, in the interests of justice, allow the variation in light of its significance and considerable importance to the success of his appeal.[25] In Pavković's view, if the Appeals Chamber were to find the Trial Chamber's interpretation of the *mens rea* element of the crimes against humanity to be erroneous, this would have an impact not only on Ojdanić's conviction but also on "all other similarly situated parties".[26]

12. Pavković further submits that in light of the Appeals Chamber's jurisprudence requiring motions to vary grounds of appeal to be filed as soon as possible after the moving party has identified the alleged error, he seeks authorisation to further amend his Amended Notice of Appeal prior to receiving the translation of the Trial Judgement and without prejudice to any further application he may seek to file.[27] In addition, he asserts that the variation would neither delay the proceedings nor prejudice any of the parties.[28]

13. Finally, Pavković submits that he "will merely adopt ground seven of the Ojdanić appeal brief without need for further discussion or elaboration in his brief", thus observing the word limit set out by the Appeals Chamber in this case.[29]

14. The Prosecution responds that allowing Pavković to join the seventh ground of appeal of Ojdanić's Amended Notice of Appeal and subsequently articulated in the appellant's brief of the latter, by merely referring to the arguments contained therein would provide Pavković with an unfair advantage.[30] In the Prosecution's view, such reference would enable Pavković to circumvent the word limit prescribed for his appellant's brief, whereas the Prosecution will have to respond to both appellants within the word limit allowed for its respondent's brief.[31] Furthermore, the Prosecution argues that incorporating an argument by way of a mere reference to a co-appellant's submission falls short of meeting the standard on appeal which requires an appellant to identify the alleged error of law, present arguments in support of his claim, and explain the way in which the alleged error invalidates the trial judgement.[32] Accordingly, whereas the Prosecution agrees that the Appeals Chamber can allow Pavković to further vary his Amended Notice of Appeal in the interests of justice, it argues that Pavković should be required to (i) file a newly amended Notice of Appeal

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[25] *Id.*, paras 14-15.
[26] *Id.*, para. 14.
[27] *Id.*, para. 13.
[28] *Id.*, para. 16.
[29] *Id.*, para. 17; see also *id.* para. 8; Decision on Defence Motions for Extension of Word Limit, 8 September 2009 ("Decision on Extension of Word Limit"), p. 5.
[30] Response, para. 3.
[31] *Ibid.*
[32] *Id*, para. 3, referring to *Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, Case No. IT-95-13/1-A, Appeal Judgement, 5 May 2009 ("*Mrkšić and Šljivančanin* Appeal Judgement"), para. 11.

that includes the new ground of appeal with references to the specific findings of the Trial Chamber that he challenges; and (ii) adhere to the word and time limits for filing his appellant's brief, as set out by the Appeals Chamber.[33]

B. Analysis

15. The Appeals Chamber recalls that an appellant seeking variation of the grounds of appeal contained in a notice of appeal bears the burden of demonstrating that each proposed amendment meets the "good cause" requirement of Rule 108 of the Rules.[34] With respect to Pavković's submission that the sought amendment is the result of the ongoing discussions between him and his counsel, as well as the analysis of the other appellants' notices of appeal,[35] the Appeals Chamber reiterates that further analysis undertaken over the course of time, taken alone, cannot constitute good cause for an amendment as this would effectively amount to allowing the appellant to restart the appeal process at will.[36] Moreover, an appellant's counsel is the one primarily responsible for the identification of potential legal errors in a trial judgement.[37] These considerations are equally applicable in multiple-appellants proceedings. The Appeals Chamber therefore finds that Pavković has failed to demonstrate good cause for not having included in his Notice of Appeal the allegations of errors contained in the seventh ground of Ojdanić's Amended Notice of Appeal.

16. The Appeals Chamber notes however, that in certain exceptional circumstances it has allowed amendments even in the absence of good cause being shown.[38] In this respect, it observes that the arguments presented under the seventh ground of Ojdanić's Amended Notice of Appeal which Pavković seeks to adopt, generally allege that the Trial Chamber erroneously expanded the definition of the crimes against humanity with regard to (i) the *mens rea* requirement for crimes against humanity, and (ii) the individual whose knowledge of the context of the offence would suffice for criminal responsibility for crimes against humanity to be attributed to the perpetrator.[39] The Appeals Chamber recalls that Pavković has been convicted of the crimes of deportation, other inhumane acts (forcible transfer), murder and persecutions as crimes against humanity under Article 5 of the Statute.[40] Accordingly, and without pronouncing itself on the merits of the appeal, the Appeals Chamber finds that allowing Pavković to vary further his Amended Notice of Appeal in order to join the merits of Ojdanić's seventh ground of appeal is of substantial importance to the

[33] Response, paras 1, 2, referring to the Decision on Extension of Word Limit, p. 5 and the Decision on Extension of Time, p. 5.
[34] See *supra*, para. 6.
[35] Motion, para. 12.
[36] *Ojdanić* Decision of 2 September 2009, para. 15 and references cited therein.
[37] *Ibid.*
[38] See *supra*, para. 8.
[39] Ojdanić's Amended Notice of Appeal, paras 157-163.
[40] Trial Judgement, Vol. III, paras 788, 790. See also Trial Judgement, Vol. I, para. 6.

success of his appeal such as to lead to a miscarriage of justice if denied. The Appeals Chamber further finds that the failure to assert these arguments earlier constitutes negligence on the part of Pavković's counsel.

17. Nonetheless, the Appeals Chamber recalls that pursuant to the Practice Direction on Formal Requirements for Appeals from Judgement,[41] a notice of appeal should clearly specify with respect to each ground of appeal the challenged findings in the trial judgement, providing reference to the page and paragraph number.[42] Similarly, in an appellant's brief, one is required to present arguments in support of each ground of appeal announced in the notice of appeal, including precise references to any relevant exhibit, transcript page, decision, or paragraph number in the judgement.[43] The Appeals Chamber further recalls that it is settled jurisprudence of this Tribunal that a party alleging an error of law must, in addition to identifying the alleged error and presenting arguments in support of its claim, explain how the error invalidates the decision.[44] Finally, if the Appeals Chamber agrees with such allegation and finds that the Trial Chamber applied a wrong legal standard, "it is open to the Appeals Chamber to articulate the correct legal standard and to review the relevant findings of the Trial Chamber accordingly", applying the correct legal standard to the evidence contained in the trial record and determining whether it is itself convinced beyond reasonable doubt as to the affected factual finding.[45] Therefore, the party alleging an error of law also has the burden to plead with precision how correcting such an error would affect the relevant conclusions underlying the findings of guilt.

18. In light of these requirements, a party may not dispose of its burden on appeal by merely referring to another party's submissions. Moreover, allowing such reference would incorrectly suggest that in multi-appellant proceedings the parties are relieved of their obligations to comply with the Rules and the relevant Practice Directions. The Appeals Chamber is also concerned that permitting such broad reference would effectively allow Pavković to circumvent the word limit established for his appellant's brief. Therefore, whereas the Appeals Chamber acknowledges that in the circumstances of the present case it may not be necessary for Pavković to replicate in his Notice of Appeal and subsequently in his appellant's brief, all of Ojdanić's legal arguments that he seeks to adopt, it emphasises that in order to meet his burden on appeal Pavković must comply with the requirements recalled above.

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[41] Practice Direction on Formal Requirements for Appeals from Judgement (IT/201), 7 March 2002 ("Practice Direction").
[42] Practice Direction, para. 1.
[43] Practice Direction, para. 4.
[44] *Mrkšić and Šljivančanin* Appeal Judgement, para. 11 and references cited therein.
[45] *Ferdinand Nahimana et al. v. The Prosecutor,* Case No. ICTR-99-52-A, Judgement, 28 November 2007, para. 13 and references cited therein.

IV. DISPOSITION

19. For the foregoing reasons, the Appeals Chamber **GRANTS** the Motion and **ORDERS** Pavković to: (i) file his appellant's brief no later than 23 September 2009 in compliance with the Decision on Extension of Word Limit and the Decision on Extension of Time; (ii) file a newly amended Notice of Appeal no later than 30 September 2009 in accordance with the requirements set out above; and (iii) file, in full compliance with the word limit imposed by the Decision on Extension of Word Limit, an amended appellant's brief by the same date clearly identifying the changes which must be limited solely to the incorporation of the new ground of appeal.

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

Done this 22nd day of September 2009,

At The Hague,
The Netherlands.

Judge Liu Daqun, Presiding

[Seal of the Tribunal]