

IT-08-91-A
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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-08-91-A
Date: 8 October 2013
Original: English

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Carmel Agius
Judge Patrick Robinson
Judge Liu Daqun
Judge Arlette Ramaroson

Registrar: Mr. John Hocking

Decision of: 8 October 2013

PROSECUTOR

v.

**MIĆO STANIŠIĆ
STOJAN ŽUPLJANIN**

PUBLIC

**DECISION ON STOJAN ŽUPLJANIN'S REQUEST TO AMEND
NOTICE OF APPEAL**

The Office of the Prosecutor

Ms. Helen Brady

Counsel for Mićo Stanišić

Mr. Slobodan Zečević and Mr. Stéphane Bourgon

Counsel for Stojan Župljanin

Mr. Dragan Krgović and Ms. Tatjana Čmerić

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 the “[Ž]upljanin Request to Amend Notice of Appeal” filed by Stojan Župljanin (“Župljanin”) on 12 August 2013 (“Motion”). On 14 August 2013, the Office of the Prosecutor (“Prosecution”) filed the Response.¹ Župljanin did not file a reply.

I. BACKGROUND

2. Trial Chamber II of the Tribunal (“Trial Chamber”) rendered the judgement in *Prosecutor v. Mićo Stanišić and Stojan Župljanin*, Case No. IT-08-91-T, on 27 March 2013 (“Trial Judgement”), finding Župljanin guilty of the following crimes: persecution and extermination as crimes against humanity, and murder and torture as violations of the laws or customs of war.²

3. On 13 May 2013, Župljanin filed the “Notice of Appeal on behalf of Stojan [Ž]upljanin” (“Notice of Appeal”), challenging the Trial Judgement on the basis of four grounds of appeal. Mićo Stanišić and the Prosecution also appealed the Trial Judgement.³ Župljanin filed his Appeal Brief on 19 August 2013.⁴

II. SUBMISSIONS

4. Župljanin requests leave to amend the Notice of Appeal by: (i) “inserting a sub-ground (g) in Ground 1”; and (ii) “adding Ground 5 to the existing Notice”.⁵ Specifically, Župljanin requests leave to add to the Notice of Appeal as Sub-Ground 1(g) that “[t]he Trial Chamber erred in law in determining that the arrest and detention of non-Serbs was ‘unlawful’”.⁶ He submits that the insertion of Sub-Ground of Appeal 1(g) results from “the completion of legal research and a fuller appreciation of how that legal research relates to the structure of reasoning adopted by the Chamber” and that he “did not previously apprehend that there was a distinct legal error embedded in the factual findings concerning [his] purported contribution to the JCE, which is otherwise encompassed by sub-Ground 1(c)”.⁷ Župljanin further asserts that Sub-Ground of Appeal 1(g) could not have been previously included in the Notice of Appeal “given the breadth of legal and factual

¹ Prosecution Response to Župljanin Request to Amend Notice of Appeal, 14 August 2013 (“Response”).

² Trial Judgement, Volume 2, para. 956.

³ Notice of Appeal on Behalf of Mićo Stanišić, 13 May 2013; Prosecution Notice of Appeal, 13 May 2013.

⁴ Stojan [Ž]upljanin’s Appeal Brief, 19 August 2013 (confidential) (“Appeal Brief”). Župljanin filed a public redacted version on 23 August 2013.

⁵ Motion, para. 1.

⁶ Motion, para. 1, referring to Trial Judgement, Volume 2, paras 506-512, 518-519.

⁷ Motion, para. 3.

issues potentially raised in the judgement, and the depth of research required in some cases in order to appreciate the relevant legal or factual error”.⁸

5. Regarding the proposed new Ground of Appeal 5, Župljanin submits that “[t]he Trial Chamber erred in law and fact in determining that Stojan [Ž]upljanin committed persecution by way of appropriation of property through a JCE”.⁹ Župljanin argues that the need for this ground of appeal was only recently discovered as the finding made by the Trial Chamber that he ordered appropriation of property as persecutions “is nestled in a section otherwise addressing JCE III”, and “is not otherwise listed as a separate basis of liability in the convictions”.¹⁰ Župljanin further contends that he “did not previously apprehend that this finding was a stand-alone finding of liability for ordering, as opposed to being subsumed within its findings on JCE III”.¹¹

6. Župljanin further submits that the requested amendments do not significantly alter the existing Notice of Appeal and that neither the Prosecution nor Stanišić will suffer any prejudice as a result.¹² Župljanin states that he is ready to present all arguments related to the two requested amendments in his Appeal Brief.¹³

7. Finally, Župljanin argues that it is in the interests of justice that the Appeals Chamber grants the Motion, as Župljanin would otherwise be deprived of the opportunity to contest important issues on appeal and would be denied a remedy.¹⁴

8. The Prosecution responds that it takes no position on the Motion.¹⁵

III. APPLICABLE LAW

9. Pursuant to Rule 108 of the 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 newly alleged error” or “after discovering any other basis for seeking a variation of the notice of appeal”.¹⁶ It is the appellant’s burden to explain precisely what

⁸ Motion, para. 3.

⁹ Motion, para. 1.

¹⁰ Motion, para. 4.

¹¹ Motion, para. 4.

¹² Motion, para. 5.

¹³ Motion, para. 5.

¹⁴ Motion, para. 6, referring to *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.

¹⁵ Response, p. 1.

¹⁶ *Prosecutor v. Nikola Šainović et al.* Case No. IT-05-87-A, Decision on Sreten Lukić’s Re-Filed Second Motion for Leave to Vary his Notice of Appeal and Appeal Brief, 9 September 2011 (“*Šainović et al.* Decision of 9 September 2011”), para. 5; *Prosecutor v. Nikola 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 (“*Šainović et al.* Decision of 2 September 2009”), para. 4.

amendments are sought and to demonstrate that each proposed amendment meets the “good cause” requirement of Rule 108 of the Rules.¹⁷

10. The concept of “good cause” covers 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.¹⁸ The “good cause” requirement is assessed on a case-by-case basis, and several factors can be taken into account.¹⁹

11. The Appeals Chamber has considered, *inter alia*, the following factors in determining whether “good cause” exists: (i) the variation is so minor that 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.²⁰ Where an appellant seeks a substantive amendment broadening the scope of the appeal, “good cause” might also, under certain circumstances, be established.²¹ 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.²²

12. 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” was not shown by the appellant.²³ Such cases have required a showing that the variation sought, assuming its merits, is of substantial importance to the success of the appeal such that it would result in a miscarriage of justice.²⁴ In these limited circumstances, the interests of justice require that an appellant not be held responsible for the

¹⁷ *Šainović et al.* Decision of 9 September 2011, para. 5; *Prosecutor v. Nikola 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 (“*Šainović et al.* Decision of 22 September 2009”), para. 6; *Šainović et al.* Decision of 2 September 2009, para. 4. *See also* Practice Direction on Formal Requirements for Appeals from Judgement (IT/201), 7 March 2002, para. 2.

¹⁸ *Šainović et al.* Decision of 9 September 2011, para. 6; *Šainović et al.* Decision of 22 September 2009, para. 7; *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; *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.

¹⁹ *Šainović et al.* Decision of 22 September 2009, para. 7; *Boškoski and Tarčulovski* Decision of 26 March 2009, para. 17.

²⁰ *Šainović et al.* Decision of 9 September 2011, para. 6; Decision of 22 September 2009, para. 7; *Boškoski and Tarčulovski* Decision of 26 March 2009, para. 17 quoting *Blagojević and Dragan Jokić* Decision of 26 June 2006, para. 7.

²¹ *Šainović et al.* Decision of 9 September 2011, para. 6; *Prosecutor v. Nikola 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 (“*Šainović et al.* Decision of 4 December 2009”), para. 6.

²² *Šainović et al.* Decision of 9 September 2011, para. 6; *Šainović et al.* Decision of 4 December 2009, para. 6.

²³ *Šainović et al.* Decision of 9 September 2011, para. 7.

failures of his counsel.²⁵ However, it must be shown that the previous pleadings failed to address the issue adequately and that the amendments sought would correct that failure.²⁶

13. 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 such amendments would require briefs to be revised and re-filed.²⁷ To hold otherwise would leave the 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.²⁸

IV. DISCUSSION

14. With respect to the first amendment seeking the insertion of Sub-Ground of Appeal 1(g), the Appeals Chamber notes that Župljanin requests the inclusion of an additional substantive ground of appeal on the basis of an error of law. The Appeals Chamber recalls that “further analysis undertaken over the course of time” cannot, in and of itself, constitute good cause for an amendment to the Notice of Appeal, as this would effectively amount to allowing Župljanin to “restart the appeal process at will”.²⁹ Accordingly, the Appeals Chamber finds that Župljanin has failed to demonstrate good cause for having omitted to include this error of law in the Notice of Appeal.

15. The Appeals Chamber recalls, however, that in certain exceptional circumstances, it has allowed amendments to the notice of appeal in the absence of good cause being shown.³⁰ In the circumstances of the present case, the Appeals Chamber observes that if Župljanin prevails on the merits of this sub-ground of appeal, this would lead to the conclusion that the Trial Chamber convicted him on the basis of a legally erroneous determination underpinning a finding regarding his contribution to the JCE. Without pronouncing itself on the merits of the appeal, the Appeals Chamber finds that the inclusion of Sub-Ground 1(g) is of substantial importance to the success of his appeal, such that a denial of Župljanin’s request in this regard would result in a miscarriage of justice.

²⁴ Šainović *et al.* Decision of 2 September 2009, para. 6.

²⁵ Šainović *et al.* Decision of 9 September 2011, para. 7; Šainović *et al.* Decision of 2 September 2009, para. 6.

²⁶ Šainović *et al.* Decision of 9 September 2011, para. 7; Šainović *et al.* Decision of 2 September 2009, para. 6.

²⁷ Šainović *et al.* Decision of 9 September 2011, para. 8; Šainović *et al.* Decision of 4 December 2009, para. 8.

²⁸ Šainović *et al.* Decision of 9 September 2011, para. 8; Šainović *et al.* Decision of 4 December 2009, para. 8.

²⁹ Šainović *et al.* Decision of 22 September 2009, para. 15; Šainović *et al.* Decision of 2 September 2009, para. 15, and references contained therein.

³⁰ *See supra*, para. 12.

16. The Appeals Chamber further recalls that the question of prejudice to an opposing party is an important factor to be considered when assessing a request for variation of grounds of appeal.³¹ In the present case, the Appeals Chamber notes that the Prosecution does not oppose the inclusion of Sub-Ground 1(g) in the Notice of Appeal.³² Moreover, the Appeals Chamber considers that allowing for the variation of the Notice of Appeal will not unduly interfere with the expeditious administration of justice, given that Župljanin has already addressed the proposed amendment in his appeal brief, thereby providing the Prosecution with sufficient time to respond to the additional ground of appeal. Lastly, the Appeals Chamber notes that the addition of Sub-Ground 1(g) would bring the Notice of Appeal into conformity with Župljanin's appeal brief.

17. Turning to the proposed new Ground 5 of the Notice of Appeal, the Appeals Chamber does not consider that Župljanin has demonstrated good cause by submitting that he only recently discovered the Trial Chamber's findings that he committed persecution by appropriating property through a JCE, and that he misapprehended the nature of his liability with respect thereto.³³ The alleged error concerns an issue of law and Župljanin's counsel is principally responsible for the assessment of potential legal errors in the Trial Judgement.³⁴ Rather, the Appeals Chamber finds that the failure to include Ground 5 in the Notice of Appeal constitutes inadvertence or negligence on the part of Župljanin's counsel.³⁵

18. However, as noted above, the Appeals Chamber recalls that in certain exceptional circumstances, it has allowed amendments to the notice of appeal in the absence of good cause being shown.³⁶ In this particular circumstance, the Appeals Chamber observes that if Župljanin prevails on the merits of Ground 5 of Appeal, this would lead to the conclusion that the Trial Chamber convicted for persecution as a crime against humanity pursuant to the legally erroneous determination that he ordered his subordinates to commit the crime of appropriation of property.³⁷ Without pronouncing itself on the merits of the appeal, the Appeals Chamber finds that Ground 5 of the Notice of Appeal is of substantial importance to the success of his appeal, such that a denial of Župljanin's request in this regard would result in a miscarriage of justice.

19. The Appeals Chamber again recalls that the question of prejudice to an opposing party is an important factor to be considered when assessing a request for variation of grounds of appeal.³⁸ In

³¹ See *supra*, para. 11.

³² See Response, p. 1.

³³ See Motion, para. 4.

³⁴ See *Šainović et al.* Decision of 2 September 2009, para. 15.

³⁵ Cf. *Šainović et al.* Decision of 2 September 2009, para. 15.

³⁶ See *supra*, paras 12, 15.

³⁷ See Trial Judgement, Volume 2, para. 526.

³⁸ See *supra*, paras 11, 16.

this instance, the Appeals Chamber notes that the Prosecution does not oppose the amendment to Ground 5 of the Notice of Appeal.³⁹ Moreover, the Appeals Chamber considers that allowing for the variation of the Notice of Appeal will not unduly interfere with the expeditious administration of justice, given that Župljanin has already addressed the proposed amendment in his appeal brief, thereby providing the Prosecution with sufficient time to respond to the additional ground of appeal. Lastly, the Appeals Chamber notes that Ground 5 would bring the Notice of Appeal into conformity with Župljanin’s appeal brief.

20. Accordingly, the Appeals Chamber is satisfied that the proposed amendments in the form of Grounds of Appeal 1(g) and 5 are necessary in order to articulate the newly alleged errors.

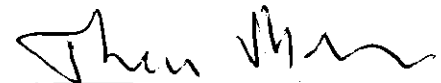
IV. DISPOSITION

21. In light of the foregoing, and pursuant to Rule 108 of the Rules, the Appeals Chamber:

- (i) **GRANTS** the Motion; and
- (ii) **ORDERS** Župljanin to file an amended Notice of Appeal no later than 16 October 2013;
- (iii) **ORDERS** that the Prosecution respond to the amendments within the time-frame scheduled.⁴⁰

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

Done this 8th day of October 2013,
At The Hague,
The Netherlands.



Judge Theodor Meron
Presiding

[Seal of the Tribunal]

³⁹ See Response, p. 1.

⁴⁰ See Decision on Mićo Stanišić’s and Stojan Župljanin’s Motions Seeking Variation of Time and Word Limits to File Appeal Briefs, 4 June 2013, p. 5. The briefs in response are due to be filed on Monday, 21 October 2013, and the briefs in reply on Monday, 11 November 2013.