



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-95-13/1-A
Date: 25 August 2008
Original: English

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Liu Daqun
Judge Andrézia Vaz

Registrar: Mr. Hans Holthuis

Decision of: 25 August 2008

PROSECUTOR

v.

**MILE MRKŠIĆ
VESELIN ŠLJIVANČANIN**

PUBLIC

**DECISION ON THE PROSECUTION'S MOTION TO ORDER
VESELIN ŠLJIVANČANIN TO SEEK LEAVE TO FILE AN
AMENDED NOTICE OF APPEAL AND TO STRIKE NEW
GROUNDS CONTAINED IN HIS APPEAL BRIEF**

The Office of the Prosecutor:

Ms. Helen Brady

Counsel for Veselin Šljivančanin:

Mr. Novak Lukić and Mr. Stéphane Bourgon

Counsel for Mile Mrkšić:

Mr. Miroslav Vasić and Mr. Vladimir Domazet

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 “International Tribunal”, respectively) is seized of the “Prosecution Motion to Order Šljivančanin to Seek Leave to File an Amended Notice of Appeal and to Strike New Grounds contained in his Appeal Brief” filed on 18 July 2008 (“Motion”). On 22 July 2008, Veselin Šljivančanin (“Šljivančanin”) filed the “Response on Behalf of Veselin Šljivančanin to ‘Prosecution Motion to Order Šljivančanin to Seek Leave to File an Amended Notice of Appeal and to Strike New Grounds contained in his Appeal Brief’” (“Response”).¹

A. Procedural background and submissions of the Parties

2 The Appeals Chamber is seized of three appeals in this case.² Šljivančanin’s Appeal Brief was filed on 8 July 2008.³ In his Appeal Brief, he abandons Ground 5, Ground 6, paragraphs 27, 28 and 29, and sub-error 1, (a), (b), (c), and (g) articulated in his Notice of Appeal, and explains that he has reorganised the remaining grounds and sub-grounds of appeal “with a view to facilitating adjudication of this Appeal”.⁴ On 23 July 2008, the Appeals Chamber ordered the Prosecution to file its consolidated Respondent’s Brief by 28 August 2008, which shall not address Ground 2, sub-grounds A and C; Ground 5, sub-grounds A and B; Ground 1, sub-ground D; and Ground 6 sub-grounds A (I) and (II) of Šljivančanin’s Appeal Brief, and informed the Prosecution that it may be allowed to supplement its Respondent Brief upon the Appeals Chamber’s determination of the issues raised in the Motion.⁵

3 In its Motion, the Prosecution argues that while Šljivančanin contends that he simply reorganised and restructured the grounds of appeal contained in his Notice of Appeal,⁶ he in fact introduces the equivalent of two new grounds and three new sub-grounds of appeal, which is a “substantial departure from his Notice of Appeal”.⁷ It does not object to the filing of an amended notice of appeal pursuant to Rule 108 of the Rules of Procedure and Evidence (“Rules”) dropping or reorganising certain grounds of appeal.⁸ However, it objects to the introduction of significant new grounds and sub-grounds of appeal at this stage of the appellate proceedings because it has

¹ On 23 July 2008, the Prosecution orally informed the Appeals Chamber that it would not file a reply to the Response.

² Prosecution’s Notice of Appeal, filed on 29 October 2007 (amended 7 May 2008); Mr. Mrkšić’s Defence Notice of Appeal and Request for Leave to Exceed the Word Limit, filed on 29 October 2007; Notice of Appeal from the Judgement of 27 September 2007 by the Defence of Šljivančanin (“Šljivančanin’s Notice of Appeal”), filed on 29 October 2007.

³ Appellant’s Brief on Behalf of Veselin Šljivančanin, filed on 8 July 2008 (“Šljivančanin’s Appeal Brief”).

⁴ Šljivančanin’s Appeal Brief, para. 19.

⁵ Order Concerning the Prosecution’s Respondent’s Brief, 23 July 2008, pp. 3-4.

⁶ Šljivančanin’s Appeal Brief, para. 19.

⁷ Motion, para. 1.

operated for eight months on the basis of the grounds and sub-grounds set out in Šljivančanin's Notice of Appeal.⁹

4. The Prosecution further contends that even accepting Šljivančanin's explanation that the changes introduced in his Appeal Brief are due to his "review and analysis of the Judgement in [The Bosnian/Serbian/Croatian languages ("B/C/S")]"¹⁰ – which he received on 29 May 2008¹¹ – he did not seek to amend his Notice of Appeal within 30 days of his receipt of the B/C/S Trial Judgement, and therefore the new grounds and sub-grounds of appeal raised in his Appeal Brief should accordingly be struck.¹²

5. The Prosecution requests as relief that the Appeals Chamber order Šljivančanin to seek leave to file an amended notice of appeal under Rule 108 of the Rules to reflect any dropping of grounds of appeal articulated in his Appeal Brief, and to strike new grounds of appeal contained therein.¹³ Should the Appeals Chamber allow Šljivančanin's alleged new arguments set out in his Appeal Brief, the Prosecution argues that he should be ordered to include reference to these in an amended notice of appeal and requests an additional 21 days to file its Respondent's Brief to Šljivančanin's Appeal Brief.¹⁴

6. Šljivančanin opposes the Motion.¹⁵ He argues that his Appeal Brief reflects a reorganisation of the alleged errors of law and fact comprised in his Notice of Appeal under six main grounds of appeal to facilitate the adjudication of the appeal, that there are no new grounds of appeal, that the Prosecution did not suffer any prejudice as his Notice of Appeal provided sufficient information and adequate notice concerning the errors alleged, and consequently that he does not need to submit an amended notice of appeal.¹⁶ He further contends that, should the Appeals Chamber take the view that the filing of an amended notice of appeal is required, it is in the interest of justice that all the arguments raised in his Appeal Brief be adjudicated by the Appeals Chamber.¹⁷ In his view, the adjudication of all the submissions in his Appeal Brief is necessary to avoid a miscarriage of justice.¹⁸ Should the Appeals Chamber decide that he needs to submit an amended notice of appeal,

⁸ Motion, paras 1 and 3.

⁹ Motion, paras 1 and 4.

¹⁰ Šljivančanin's Appeal Brief, para. 19.

¹¹ Šljivančanin's Appeal Brief, para. 17.

¹² Motion, para. 4.

¹³ Motion, para. 5.

¹⁴ Motion, para. 6.

¹⁵ Response, para. 1.

¹⁶ Response, paras 1, 11, 14, 47-48.

¹⁷ Response, para. 7.

¹⁸ Response, para. 54.

he requests the Appeals Chamber to consider the amended notice of appeal enclosed with his Response.¹⁹

B. Discussion

7 The question for the Appeals Chamber is, firstly, whether Šljivančanin's Appeal Brief departs substantially from his Notice of Appeal by setting forth new grounds or sub-grounds of appeal. If the Appeals Chamber finds that the grounds or sub-grounds of appeal set out in Šljivančanin's Appeal Brief are adequately covered by his Notice of Appeal, it need not pursue the matter further; the Motion may be denied forthwith. Should the Appeals Chamber find, however, that Šljivančanin's Appeal Brief contains new grounds or sub-grounds of appeal not covered by the grounds set out in his Notice of Appeal, it must then decide whether to strike these new grounds of appeal, or alternatively, to require Šljivančanin to submit an amended notice of appeal including these new grounds or sub-grounds of appeal.

8. The Appeals Chamber recalls that under Rule 108 of the Rules, a party seeking to appeal a judgement must set forth the grounds of appeal in a notice of appeal, indicating "the substance of the alleged errors and the relief sought". Under paragraph 1(c) (i) and (ii) of the Practice Direction on Formal Requirements for Appeals from Judgement of 7 March 2002,²⁰ a notice of appeal shall contain, *inter alia*, the grounds of appeal, clearly specifying in respect of each ground of appeal "any alleged error on a question of law invalidating the decision" and/or "any alleged error of fact which has occasioned a miscarriage of justice." The only formal requirement under the Rules is that the notice of appeal contains a list of the grounds of appeal; it does not need to detail the arguments that the parties intend to use in support of the grounds of appeal, the place for detailed arguments being the Appellant's brief.²¹ The purpose of listing all the grounds of appeal in the notice of appeal is "to focus the mind of the Respondent, right from the day the notice of appeal is filed, on the arguments which will be developed subsequently in the Appeal brief".²² The grounds of appeal and the arguments in an Appellant's brief must be set out and numbered in the same order as in the Appellant's notice of appeal, unless otherwise varied with leave of the Appeals Chamber.²³

¹⁹ Response, paras 5, 56-57. See Amended Notice of Appeal on Behalf of Veselin Šljivančanin, 22 July 2008, attached to his Response as "Enclosure".

²⁰ Practice Direction on Formal Requirements for Appeals from Judgement (IT/201), 7 March 2002.

²¹ See *Prosecutor v. Ignace Bagilishema*, No. ICTR-95-1A-A, Decision on Motion to Have the Prosecution's Notice of Appeal Declared Inadmissible, 26 October 2001 ("*Bagilishema* Decision of 26 October 2001"), p. 3; *Momir Nikolić v. Prosecutor*, Case No. IT-02-60/1-A, Decision on Motion to Strike Parts of Defence Appeal Brief and Evidence Not on Record, Motion to Enlarge Time, Motion for Leave to File a Rejoinder to the Prosecution's Reply, 1 September 2004, para. 22.

²² *Bagilishema* Decision of 26 October 2001, p. 3.

²³ Practice Direction on Formal Requirements for Appeals from Judgement (IT/201), 7 March 2002, para. 4.

9 Any variation of the grounds of appeal must be done by motion in accordance with the Rules, setting out the specific Rule under which the variation is sought and the arguments in support of the request to vary the grounds of appeal as required by that Rule.²⁴ These rules are based on principles of fair trial and effectiveness, aimed at ensuring that both parties have adequate opportunity to be fully apprised of each others' submissions and to respond in good time to these.²⁵ They also clarify for the parties, and for the public, which arguments have been considered by the Appeals Chamber in reaching a particular decision.²⁶ Where new grounds of appeal have been presented for the first time in an Appellant's brief or in a brief in reply, the Appeals Chamber may strike them at the request of a party or disregard them.²⁷

10. The Prosecution identifies four parts of Šljivančanin's Appeal Brief as new grounds or sub-grounds of appeal.²⁸ In each case, Šljivančanin argues that his Notice of Appeal sufficiently covers the ground or sub-ground of appeal in question.²⁹ The Appeals Chamber will address these grounds or sub-grounds of appeal in the order in which they are presented in Šljivančanin's Appeal Brief.

1. Preliminary issue

11. In view of the number of grounds and sub-grounds of appeal argued in his Appeal Brief which are challenged in the Motion, Šljivančanin requests leave to extend the word limit of 3000 words in his Response as established in the Practice Direction on the Length of Brief and Motions of 16 September 2005³⁰ to under 4000 words.³¹ The Appeals Chamber reminds Šljivančanin that, in accordance with paragraph C (7) of the Practice Direction on the Length of Briefs and Motions, a party must seek authorisation in advance from the Appeals Chamber to exceed the word limit and

²⁴ Practice Direction on Formal Requirements for Appeals from Judgement (IT/201), 7 March 2002, para. 2.

²⁵ See *Momir Nikolić v. Prosecutor*, Case No. IT-02-60/1-A, Decision of Prosecution's Motion to Strike, 20 January 2005 ("Nikolić Decision of 20 January 2005"), para. 25 (holding that the "benefit of striking out parts of a submission is [...] to guarantee the fairness of the proceedings [...]"); *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. 51 (noting that "unjustified amendments [to notices of appeal] would result in appellants being free to change their appeal strategy after they have had the advantage of reviewing the arguments in a response brief, interfering with the expeditious administration of justice and prejudicing the other parties to the case, [...] which is unacceptable"; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Decision on Motion to Strike Ground One of Jokić Appeal Brief, 31 August 2006, para. 12 (denying a motion to strike because the Prosecution was not prejudiced by the inclusion of another ground at that stage of proceedings and because it had fair notice of the alleged errors).

²⁶ *Nikolić* Decision of 20 January 2005, para. 25.

²⁷ *Aloys Simba v. The Prosecutor*, Case No. ICTR-01-76-A, Judgment, 27 November 2007, paras 319, 325-326; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Judgment, 30 November 2006, para. 78. See also *Prosecutor v. Naser Orić*, Case No. IT-03-68-A, Judgment, 3 July 2008, para. 65; *Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-A, Judgment, 25 February 2004, para. 15; *Nikolić* Decision of 20 January 2005, para. 18.

²⁸ Motion, para. 2, namely: Ground 2, sub-grounds A and C; Ground 5, sub-grounds A and B; Ground 1, sub-ground D; and Ground 6, sub-ground A on sentence.

²⁹ Response, paras 2, 15-46.

³⁰ Practice Direction on the Length of Brief and Motions (IT/184/Rev. 2), 16 September 2005, para. 5.

³¹ Response, para. 6.

provide an explanation of the exceptional circumstances that necessitate the oversized filing.³² The Appeals Chamber considers that mere reference to the number of grounds challenged by the Prosecution does not amount to an explanation of “exceptional circumstances”.³³ However, considering that the Prosecution, by not filing a Reply, does not appear to oppose Šljivančanin’s request and that, in view of the significance of the Motion, it is in the interests of justice in this particular case to accept the Response as filed, the Appeals Chamber decides to recognise the oversized Response as validly filed.³⁴

2. Ground 1, sub-ground D of Šljivančanin’s Appeal Brief

12. Under Ground 1, sub-ground D of his Appeal Brief, Šljivančanin submits that the Trial Chamber’s finding regarding his presence at Ovčara is inconsistent with evidence as to his character. Šljivančanin argues that this ground refers to Ground 1, sub-errors 1 and 2 and Ground 3 of his Notice of Appeal.³⁵ The Prosecution argues that Šljivančanin did not include in his Notice of Appeal any sub-ground of appeal as to the Trial Chamber’s finding based on his “character” and that the grounds of appeal in question merely address the Trial Chamber’s alleged errors as to its disregarding the testimonies of certain witnesses (sub-error 1), the time frame in which Šljivančanin was allegedly present at Ovčara (sub-error 2), and the finding regarding his presence at the Yugoslav Peoples’ Army (JNA) Barracks (Ground 3).³⁶

13. Šljivančanin contends that the Prosecution’s argument is based on an “overly restrictive” view of Ground 1 of his Appeal Brief, in that the evidence concerning his character is “directly related to the testimony of witnesses whose evidence was found to be not credible by the Trial Chamber”.³⁷ He argues that Ground 1 of his Notice of Appeal makes clear that he alleged errors of fact and law, which led to the Trial Chamber’s finding that he was present at Ovčara on 20 November 1991, at about 14:30 or 15:00 hours.³⁸

14. Ground 1, sub-ground D of Šljivančanin’s Appeal Brief is at its core an argument to counter the Trial Chamber’s finding that he was present at Ovčara on 20 November 1991, broadly covered by Ground 1 of his Notice of Appeal, which alleges that “the Trial Chamber committed an error in law and fact by finding that [he] was present at Ovčara on 20 November at about 14.30 or 15.00”.³⁹

³² Practice Direction on the Length of Brief and Motions (IT/184/Rev. 2), 16 September 2005, para. C (7).

³³ *Nikolić* Decision of 20 January 2005, para. 13 (finding that “mere reference to the Prosecution’s arguments does not amount to a proper ‘explanation’.”)

³⁴ See *Nikolić* Decision of 20 January 2005, para. 13.

³⁵ Šljivančanin’s Appeal Brief, paras 21, 166-174.

³⁶ Motion, para. 2 (c) (iii).

³⁷ Response, para. 16.

³⁸ Response, para. 17.

³⁹ Šljivančanin’s Notice of Appeal, para. 7(i).

However, neither Ground 1 sub-error 1, sub-error 2, nor Ground 3 of Šljivančanin's Notice of Appeal raise any specific ground of appeal relating to his character. As previously noted, a notice of appeal need not detail the arguments to be presented in an Appellant's brief, but it must nonetheless list all of the grounds of appeal.⁴⁰ The Appeals Chamber fails to see any direct link between the Witnesses whose testimonies were found by the Trial Chamber not to be credible (sub-error 1 of Šljivančanin's Notice of Appeal)⁴¹ and the evidence concerning Šljivančanin's character.

15. Accordingly, the Appeals Chamber finds that Ground 1, sub-ground D of Šljivančanin's Appeal Brief constitutes a new ground of appeal not covered by his Notice of Appeal.

3. Ground 2, sub-grounds A and C of Šljivančanin's Appeal Brief

16. Under Ground 2, sub-grounds A and C of his Appeal Brief, Šljivančanin argues respectively that aiding and abetting by omission is not a mode of liability included in the jurisdiction of the International Tribunal and that, if it exists, the Trial Chamber did not properly define it.⁴² Ground 2 refers, according to his Appeal Brief, to Ground 1, sub-error 4 of his Notice of Appeal.⁴³ Ground 1, sub-error 4 raises an allegation of an error of law by the Trial Chamber in finding that he had notice that the Prosecution's case relied in part on aiding and abetting by omission.⁴⁴ As Ground 2, sub-grounds A and C, is a challenge to the finding of aiding and abetting by omission as a mode of liability, the Prosecution argues that this ground amounts to a wholly new ground of appeal.⁴⁵

17. Šljivančanin submits that the Prosecution's argument is based on an "overly restrictive view" of Ground 2 of his Appeal Brief, as his challenge to the Trial Chamber's finding of aiding and abetting by omission as a mode of liability and the elements thereof as articulated by the Trial Chamber is "intrinsically implied" in his argument at paragraph 7 (iv) of his Notice of Appeal.⁴⁶ In support of his contention, Šljivančanin notes that the paragraph of the Trial Judgement referred to in paragraph 7 (iv) of his Notice of Appeal contains the specific finding that "a person may aid and abet by omission", and posits that there is a relationship between the lack of notice and the challenge to the finding of aiding and abetting by omission as a mode of liability.⁴⁷ In addition, he argues that "it is evident" that his ground of appeal relating to the lack of notice also challenges the finding on the mode of liability, as in adjudicating his ground of appeal related to the lack of notice,

⁴⁰ See *supra* para. 8.

⁴¹ *Prosecutor v. Mile Mrkšić et al*, Case No. IT-95-13/1-T, Judgement, 27 September 2007 ("Trial Judgement"), paras 378-382.

⁴² Šljivančanin's Appeal Brief, paras 22, 190-193, 198-199, 201-235, 253-266.

⁴³ Šljivančanin's Appeal Brief, para. 23.

⁴⁴ Motion, para. 2 (c) (i), referring to Šljivančanin's Notice of Appeal, para. 7 (iv).

⁴⁵ Motion, para. 2 (c) (i).

⁴⁶ Response, para. 22.

⁴⁷ Response, paras 23- 24.

the Appeals Chamber would necessarily have to pronounce itself on whether aiding and abetting by omission is a mode of liability under the jurisdiction of the International Tribunal and the elements thereof.⁴⁸ Šljivančanin also notes that, in his response to the Prosecution's appeal, he underscored his conviction that the basis of aiding and abetting by omission is a first before the International Tribunal, and, referring to his Notice of Appeal, reiterated that this mode of liability would be challenged as part of his appeal.⁴⁹ He notes in that respect that the Prosecution, in its reply to his response brief, acknowledged his challenge to aiding and abetting as a mode of liability and undertook to respond to this argument in its response brief.⁵⁰ He also contends that the Prosecution was provided with an outline of his submissions contained in his Appeal Brief on 18 June 2008.⁵¹

18. Sub-error 4 of Ground 1 of Šljivančanin's Notice of Appeal alleges that the Trial Chamber "made an error in law when it determined in para. 662 of the Judgment that the Defence had notice that the Prosecution case in part relied on aiding and abetting by omission".⁵² Šljivančanin argues that the Prosecution only articulated its thesis regarding this mode of liability in its final trial brief, which resulted in a violation of his right under Article 24(1) (a) of the Statute to be informed promptly and in detail of the nature and cause of the charge against him.⁵³

19. The Appeals Chamber finds that the plain wording of Šljivančanin's Notice of Appeal only mentions lack of notice and does not directly challenge aiding and abetting by omission as a mode of liability. Although a notice of appeal need not detail the arguments an appellant intends to use in support of his grounds of appeal, he must at least identify with sufficient clarity the errors of law and/or fact on which it intends to rely, so as to focus the mind of the respondent on the arguments which will be subsequently developed.⁵⁴ The practice of the Appeals Chamber indicates that implied errors of law have only been accepted as a basis for amending notices of appeal upon request in circumstances where the amendment corresponds to or clarifies an argument already advanced in the original notice of appeal.⁵⁵ This is not the case for the issue under consideration in this Motion. The issue of whether aiding and abetting by omission is a recognised mode of liability is one related to the jurisdiction of the International Tribunal, and is quite distinct from the question

⁴⁸ Response, para. 25.

⁴⁹ Response, para. 26, referring to Response Brief on Behalf of Veselin Šljivančanin (Confidential), filed on 18 June 2008, para. 161, footnote 173.

⁵⁰ Response, para. 27, referring to Prosecution's Consolidated Reply to Mile Mrkšić and Veselin Šljivančanin Response Briefs (Confidential), filed on 3 July 2008 (Public Redacted Version filed on 9 July 2008) ("Prosecution Reply Brief"), para. 45.

⁵¹ Response, para. 50.

⁵² Šljivančanin's Notice of Appeal, para. 7 (iv).

⁵³ Šljivančanin's Notice of Appeal, para. 7 (iv).

⁵⁴ See *supra* para. 8.

⁵⁵ See *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 ("*Blagojević and Jokić* Decision of 20 July 2005"), p. 3.

of notice, which is a matter related to the rights of the accused. If Šljivančanin had intended to allege an error of law with respect to the Trial Chamber's finding that a person may aid and abet a crime by omission, the proper avenue was to file a motion pursuant to Rule 108 of the Rules to amend his Notice of Appeal, which he failed to do.

20. Accordingly, the Appeals Chamber finds that sub-grounds A and C of Ground 2 of Šljivančanin's Appeal Brief are new grounds of appeal not covered by his Notice of Appeal.

4. Ground 5, sub-grounds A and B of Šljivančanin's Appeal Brief

21. Under Ground 5, sub-grounds A and B of his Appeal Brief, Šljivančanin argues that the Trial Chamber erred in finding, respectively, that his failure to act pursuant to his legal duty to ensure the security of the prisoners of war had a substantial effect on the commission of crimes at Ovčara, and that he must have been aware that by his omission he facilitated the commission of crimes.⁵⁶ In his Appeal Brief, Šljivančanin states that this ground of appeal refers to Ground 4 (paragraphs 18, 19, and 20) of his Notice of Appeal.⁵⁷ The Prosecution argues that these paragraphs "address completely different matters", which are unrelated to the challenge in Šljivančanin's Appeal Brief of the Trial Chamber's finding that his omission substantially contributed to the crimes, and that his awareness that his failure to act assisted their commission.⁵⁸

22. Šljivančanin submits that the Prosecution's assertion is "without foundation".⁵⁹ He argues that paragraphs 18 and 19 of his Notice of Appeal allege "errors of fact and law concerning the findings of the Trial Chamber related to the *mens rea* required for Count 7", thereby providing adequate notice about the aim and purpose of Ground 5 of his Appeal Brief, which concerns errors relating to his *mens rea*.⁶⁰ He further points out that paragraph 19 of his Notice of Appeal refers specifically to alleged errors in paragraph 670 of the Trial Judgement, in which the Trial Chamber found that his omission substantially contributed to the crimes, and that he must have been aware that his failure to act assisted their commission.⁶¹ In addition, he argues, both paragraphs 19 and 20 of his Notice of Appeal reference paragraphs of the Trial Judgment in which findings are made concerning his prior knowledge.⁶²

23. Under his fourth ground of appeal as set out in his Notice of Appeal, Šljivančanin alleges that the Trial Chamber erred in fact and law "in determining factors relevant for establishing [his]

⁵⁶ Šljivančanin's Appeal Brief, paras 28-29, 424-430, 435-454.

⁵⁷ Šljivančanin's Appeal Brief, para. 29.

⁵⁸ Motion, para. 2 (c) (ii).

⁵⁹ Response, para. 31.

⁶⁰ Response, para. 32.

⁶¹ Response, para. 33.

mens rea".⁶³ Under Ground 5 of his Appeal Brief, Šljivančanin contends that the Trial Chamber erred by finding that his omission had a substantial effect on the commission of crimes at Ovčara in the afternoon of 20 November 1991 *and* that he must have been aware that through his omission, he facilitated the commission of those crimes.⁶⁴

24. With regard to sub-ground A of Ground 5, the Appeals Chamber finds that the fourth ground of appeal as set out in Šljivančanin's Notice of Appeal does not touch upon the finding of the Trial Chamber that his failure to act pursuant to his legal duty to ensure the security of the prisoners of war had a substantial effect on the commission of crimes at Ovčara, except by an oblique reference to paragraph 670 of the Trial Judgement, in which the Trial Chamber found that his failure to act had a substantial effect on the commission of crimes at Ovčara. It is not sufficient for a notice of appeal to merely refer to a paragraph of the Trial Judgement in the expectation that the opposing party will understand which ground of appeal is being presented. Paragraph 19 of Šljivančanin's Notice of Appeal, which refers, *inter alia*, to paragraph 670 of the Trial Judgement, clearly states that his ground of appeal relates to the Trial Chamber's alleged misapplication of the law in relation to the *mens rea* requirement; there is no mention of any other ground of appeal raised against other findings of the Trial Chamber in the paragraphs of the Trial Judgement cited.

25. As sub-ground A concerns the *actus reus* of aiding and abetting, namely, whether an accused by his conduct directly and substantially contributed to the commission by another person of the *actus reus* of a crime, the Appeals Chamber accordingly finds that sub-ground A of Ground 5 of Šljivančanin's Appeal Brief is a new ground of appeal that goes beyond the scope of Šljivančanin's Notice of Appeal.

26. The Appeals Chamber finds that Šljivančanin's fourth ground of appeal in his Notice of Appeal is comprised in sub-ground B of Ground 5 of Šljivančanin's Appeal Brief, since the latter clearly addresses the *mens rea* aspect of his responsibility, which is the core of the submission under the fourth ground of his Notice of Appeal.⁶⁵

⁶² Response, para. 33.

⁶³ Paragraph 18 of the Šljivančanin's Notice of Appeal submits that the Trial Chamber "erred in fact/law with respect to the conclusions on the Appellant's knowledge of prior crimes and antagonism which affected the degree of *mens rea* necessary for the responsibility established by the Judgment", while paragraph 19 alleges that the Trial Chamber "misapplied the law in relation to *mens rea* requisite for the crime [he] was found guilty of", citing paragraphs 658, 664, 666, and 670 of the Trial Judgement.

⁶⁴ Šljivančanin's Appeal Brief, para. 28.

⁶⁵ See Trial Judgement, para. 556, in which the Trial Chamber set out the *mens rea* for aiding and abetting by omission, as "knowledge that, by his or her conduct, the aider and abettor is assisting or facilitating the commission of the offence, a knowledge which need not have been explicitly expressed and may be inferred from all the relevant circumstances" (footnotes omitted).

27. The Appeals Chamber accordingly finds that Ground 5, sub-ground B is covered by Šljivančanin's Notice of Appeal.

5. Ground 6, sub-ground A of Šljivančanin's Appeal Brief

28. Under Ground 6, sub-ground A of his Appeal Brief, Šljivančanin argues that the Trial Chamber erred in imposing the sentence against him based upon its finding that the prisoners of war ("POWs") at Ovčara were under his immediate responsibility and its failure to consider the presence of other officers at Ovčara who were in a better position than him to act.⁶⁶ He states that this ground of appeal refers to Ground 7 of his Notice of Appeal.⁶⁷ The Prosecution argues that given that Ground 7 of Šljivančanin's Notice of Appeal, relates to the Trial Chamber's consideration of aggravating and mitigating circumstances, Ground 6, sub-grounds A (I) and (II) of his Appeal Brief thereby constitute two new grounds of appeal.⁶⁸

29. Šljivančanin responds that Ground 7 of his Notice of Appeal makes clear that he alleges errors of fact and law, which led to the imposition of the five year sentence, which he submits was excessive.⁶⁹ He contends that the Prosecution was well aware of the aim, nature, and relief sought in his appeal against sentence.⁷⁰ He points out that paragraphs 31 and 32 of his Notice of Appeal, which relate to Ground 7, refer to paragraphs of the Trial Judgement in which the Trial Chamber found, as an aggravating circumstance, that the POWs at Ovčara were under his immediate responsibility,⁷¹ and which show that the Trial Chamber failed to consider the presence, superior position, capacity and authority of other officers present as a mitigating factor,⁷² thereby constituting an error in sentencing.⁷³ In addition, he argues that paragraphs 31 and 32 of his Notice of Appeal make it clear that the alleged "sentencing errors" of the Trial Chamber in relation to the relevant aggravating and mitigating circumstances are to be considered on the basis of all other grounds of appeal and in relation to the offence itself.⁷⁴ As these findings of the Trial Chamber are directly related to the issue of aggravating and mitigating circumstances, he submits that they are properly comprised in Ground 7 of his Notice of Appeal.⁷⁵

30. Šljivančanin's Notice of Appeal, under Ground 7, very broadly sets out his arguments concerning his sentence, paragraph 31 dealing with the Trial Chamber's consideration of

⁶⁶ Šljivančanin's Appeal Brief, paras 30-31, 496-506.

⁶⁷ Šljivančanin's Appeal Brief, para. 31.

⁶⁸ Motion, para. 2 (c) (iv) (citing Šljivančanin's Notice of Appeal, paras 31-33).

⁶⁹ Response, para. 39.

⁷⁰ Response, para. 39.

⁷¹ Response, para. 40.

⁷² Response, paras 42-43.

⁷³ Response, para. 43.

⁷⁴ Response, para. 44.

aggravating circumstances with specific reference to paragraphs 690 and 704 of the Trial Judgement, paragraph 32 dealing with the Trial Chamber's consideration of mitigating circumstances, with specific reference to paragraphs 704 and 716 of the Trial Judgement.

31. The Appeals Chamber considers that Ground 6, sub-ground A (I) of Šljivančanin's Appeal Brief, which submits that the Trial Chamber erred in finding that the POWs at Ovčara were under his immediate responsibility, is covered by Ground 7, paragraph 31 of his Notice of Appeal, which refers to the Trial Chamber's establishment of aggravating circumstances and, in particular, to paragraph 704 of the Trial Judgement, where the Trial Chamber found that the circumstances of the his conduct "reveal a failure to act to protect from severe criminal abuse the prisoners of war who were his immediate responsibility".⁷⁶

32. Ground 6, sub-ground A (II) of Šljivančanin's Appeal Brief, which submits that the Trial Chamber failed to consider as a mitigating factor the presence of other officers at Ovčara who were in a better position than Šljivančanin to act is not specifically pleaded in his Notice of Appeal. It could be argued that this ground of appeal is covered by paragraph 32 of Ground 7 as set out in Šljivančanin's Notice of Appeal, which alleges that the Trial Chamber erred in fact and law by not sufficiently evaluating mitigating circumstances in relation to the offence. The Appeals Chamber recalls, however, that the purpose for setting forth the grounds of appeal in a notice of appeal is to focus the mind of the respondent, right from the day the notice of appeal is filed, on the arguments which will be developed subsequently in the appeal brief.⁷⁷ Therefore the Appeals Chamber considers that the argument that there were other officers at Ovčara who were in a better position to act than Šljivančanin was not raised in his Notice of Appeal.

33. Hence, Ground 6, sub-ground A (II) of Šljivančanin's Appeal Brief is a new ground of appeal not covered by his Notice of Appeal.

6. Conclusions

34. The Appeals Chamber found that the following grounds or sub-grounds of Šljivančanin's Appeal Brief are covered by his Notice of Appeal: sub-ground B of Ground 5 and sub-ground A (I) of Ground 6. The following grounds or sub-grounds of Šljivančanin's Appeal Brief are new grounds of appeal that go beyond the scope of his Notice of Appeal: sub-ground D of Ground 1; sub-grounds A and C of Ground 2; sub-ground A of Ground 5; and sub-ground A (II) of Ground 6.

⁷⁵ Response, para. 45.

⁷⁶ Trial Judgement, para. 704.

⁷⁷ See *supra* para. 8.

35. As set out in paragraph 17 of the Practice Direction on Formal Requirements for Appeals from Judgment, where a party fails to comply with the requirements laid down in the Practice Direction – in this case, by not clearly specifying each ground of appeal in its notice of appeal as required under Paragraph 1 (c) – the Appeals Chamber may, within its discretion, decide upon an appropriate sanction, which can include an order for clarification or re-filing, or reject a filing or dismiss submissions therein.⁷⁸ The question of whether to strike new grounds of appeal or alternatively, to order an appellant to file an amended notice of appeal reflecting these grounds, is premised on two competing considerations, both of which have elements of validity. The first is the consideration of whether or to what extent the respondent has been prejudiced by not having had adequate and timely notice about these grounds of appeal. Related to this is also a procedural consideration that “[a]ppellants 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.”⁷⁹ The second consideration is whether the adjudication of these grounds or sub-grounds of appeal in an appellant’s case is of substantial importance to the appeal such that without their inclusion there is a risk of a miscarriage of justice.⁸⁰ The Appeals Chamber will review each of these new sub-grounds of appeal in light of these considerations.

36. Sub-ground D of Ground 1 of Šljivančanin’s Appeal Brief contains the submission that the Trial Chamber erred by failing to consider that its finding – that Šljivančanin was present at Ovčara on 20 November 1991 – is inconsistent with the evidence concerning his character. The purpose of Šljivančanin’s sub-ground of appeal, as for all the sub-grounds under Ground 1, is to contest the finding of his presence at Ovčara on the relevant day. Given that four other sub-grounds are presented in his Appeal Brief with this same purpose, the Appeals Chamber does not consider that this sub-ground of appeal is of such substantial importance to the success of his appeal such as to lead to a miscarriage of justice if it is excluded. In view of this, the interest in the inclusion of this sub-ground of appeal is outweighed by the claim of prejudice of the Prosecution for not having been included in Šljivančanin’s Notice of Appeal. The Appeals Chamber therefore strikes this sub-ground of appeal.

⁷⁸ Practice Direction on Formal Requirements for Appeals from Judgement (IT/201), 7 March 2002, para. 17.

⁷⁹ *Prosecutor v. Zoran Kupreškić*, Case No. IT-95-16-T, Judgement, 23 October 2001, para. 470.

⁸⁰ The Appeals Chamber held in the *Kordić and Čerkez* case 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” (*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 June 2002 (“*Kordić and Čerkez* Decision of 9 June 2002”), paras 5 and 8). The Appeals Chamber also upheld motions to amend a notice of appeal where the amendment was “of substantial importance to the success” of the appeal “such that denying it would lead to a miscarriage of justice” (*Blajojević and Jokić* Decision of 20 July 2005, p. 4). See also *Nahimana et al.* Decision of 17 August 2006, para. 12.

37. Sub-grounds A and C of Ground 2 of Šljivančanin's Appeal Brief allege, respectively, that aiding and abetting by omission is not a mode of liability included in the jurisdiction of the International Tribunal and that, if it exists, the Trial Chamber did not properly define it.⁸¹ As Šljivančanin's conviction for torture under Article 7(1) of the Statute was based upon the mode of liability of aiding and abetting by omission,⁸² the Appeals Chamber finds that these sub-grounds of appeal could be of substantial importance to the success of Šljivančanin's appeal such as to lead to a miscarriage of justice if they are excluded. In these circumstances, any inadvertence or negligence by Šljivančanin's Counsel to plead these sub-grounds of appeal with sufficient clarity in his Notice of Appeal should not restrict his right to raise these sub-grounds of appeal.⁸³ The Appeals Chamber notes that the prejudice that the Prosecution may have suffered as a result of not having had notice of these sub-grounds of appeal is minimal given that, as pointed out by Šljivančanin, the Prosecution indicated its awareness of these sub-grounds of appeal at least by the time of filing of the Prosecution's Reply Brief.⁸⁴ Any prejudice that may have arisen will in any case be cured by allocating additional time to the Prosecution to file supplemental submissions to its Respondent's Brief on these sub-grounds of appeal.

38. Sub-ground A of Ground 5 of Šljivančanin's Appeal Brief argues that the Trial Chamber erred by finding that Šljivančanin's omission had a substantial effect on the commission of crimes at Ovčara in the afternoon of 20 November 1991. Given that the test of "substantial effect" is central to the elements of the mode of liability of aiding and abetting a crime by omission,⁸⁵ this sub-ground of appeal is clearly of substantial importance to Šljivančanin's appeal. Indeed, if this finding of the Trial Chamber was overturned by the Appeals Chamber, there would be no need to proceed to the question of whether Šljivančanin had the required *mens rea* for this offence, as pleaded in his Notice of Appeal. Therefore, although the Prosecution may have suffered some prejudice by not having had adequate notice about this sub-ground of appeal from Šljivančanin's Notice of Appeal, the Appeals Chamber is of the view that this consideration is outweighed by the potential miscarriage of justice that might result from this sub-ground of appeal not being adjudicated by the Appeals Chamber. Furthermore, the prejudice that may have arisen will be cured by allocating additional time to the Prosecution to file supplemental submissions to its Respondent's Brief on this sub-ground of appeal.

39. Sub-ground A (II) of Ground 6 of Šljivančanin's Appeal Brief presents the argument that the Trial Chamber erred in failing to consider the presence at Ovčara of officers who had reason to

⁸¹ Šljivančanin's Appeal Brief, paras 22, 190-193, 198-199, 201-235, 253-266.

⁸² Trial Judgement, paras 662-670, 715.

⁸³ *Kordić and Čerkez* Decision of 9 June 2002, paras 5 and 8.

⁸⁴ Response, para. 27, referring to Prosecution Reply Brief, para. 45.

take measures, the material ability to act and who were in a better position than him to do so.⁸⁶ Šljivančanin identifies this as a “discernible error” in the Trial Chamber’s appreciation of his role and responsibility in the torture of the prisoners of war at Ovčara.⁸⁷ However, the Appeals Chamber is not convinced that the exclusion of this argument would result in a miscarriage of justice or that the Prosecution has not been prejudiced by its inclusion.⁸⁸ The Appeals Chamber therefore strikes this sub-ground of appeal.

40. The Appeals Chamber is mindful that the proper procedure under which a notice of appeal may be amended is by its authorising a variation of the grounds of appeal upon good cause being shown by motion under Rule 108 of the Rules. Nonetheless, the Appeals Chamber retains its discretion to deal with the issues that are raised in this Motion, which requires similar considerations in deciding whether or not to strike these new sub-grounds of appeal from Šljivančanin’s Appeal Brief. Therefore, in view of the interests of judicial economy, the Appeals Chamber finds it expedient and appropriate to order Šljivančanin to file an amended notice of appeal reflecting the additional sub-grounds of appeal as identified in this decision that have not been struck, rather than to order him to request leave to submit an amended notice of appeal including these sub-grounds of appeal, as the issues have already been adjudicated.

41. In reaching its decision to allow Šljivančanin to submit an amended notice of appeal rather than to strike all of the new sub-grounds of appeal in his Appeal Brief, the Appeals Chamber also takes into account the practice of the International Tribunal to interpret the “good cause” rule more restrictively at later stages in the appeal proceedings when variations to the grounds of appeal may have a deleterious effect upon the efficient administration of justice.⁸⁹ In the present case, the inclusion of these sub-grounds of appeal in an amended notice of appeal does not unduly interfere with the expeditious administration of justice as these arguments do not reflect a change to an

⁸⁵ See Trial Judgement, paras 552 and 670.

⁸⁶ Šljivančanin’s Appeal Brief, paras 502-506.

⁸⁷ Šljivančanin explains this ground of appeal more fully at paragraph 506 of his Appeal Brief: “Had the Trial Chamber properly considered the presence and involvement of other officers at Ovčara, it could only have concluded that [his] role and responsibility [...] in the tortures committed at Ovčara was by no means substantial, and in fact, minimal.”

⁸⁸ See *Nahimana et al.* Decision of 17 August 2006, para. 14 (holding that it is the appellant’s burden to demonstrate that each amendment should be permitted under the standards).

⁸⁹ *Prosecutor v. Miroslav Bralo*, Case No. IT-95-17-A, Decision on Miroslav Bralo’s Motion for Leave to Supplement Appeal Brief in Light of New Information Concerning Ex Parte Portion of the Trial Record, 9 January 2007 (“*Bralo* Decision of 9 January 2007”), para. 11 (finding that “the jurisprudence of the Tribunal establishes that the ‘good cause’ requirement *must be interpreted restrictively at late stages in 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*. To hold otherwise would leave appellants free to change their appeal strategy and essentially restart the appeal process at will (including after they have had the advantage of reviewing the arguments in a response brief), thus interfering with the expeditious administration of justice and prejudicing the other parties to the case” (citations omitted, emphases added).

appeal strategy by Šljivančanin subsequent to reading the Prosecution's Respondent's brief, which has not yet been filed.⁹⁰

C. Disposition

For the foregoing reasons, the Appeals Chamber

GRANTS the Motion to strike sub-ground D of Ground 1 and sub-ground A (II) of Ground 6 of Šljivančanin's Appeal Brief;

ORDERS Šljivančanin to file, within three days of the present decision, an amended Notice of Appeal, dropping the grounds that he has decided not to pursue, including sub-grounds A and C of Ground 2 and sub-ground A of Ground 5, and presenting his arguments in the same order as they appear in his Appeal Brief, pursuant to paragraph 4 of the Practice Direction on Formal Requirements for Appeals from Judgement (IT/201), and an amended and public version of his Appeal Brief, dropping sub-ground D of Ground 1 and sub-ground A (II) of Ground 6 of his Appeal Brief;

ALLOWS the Prosecution to file supplemental submissions to its Respondent's Brief on sub-grounds A and C of Ground 2, sub-grounds A and B of Ground 5, and sub-ground A (I) of Ground 6 of Šljivančanin's Appeal Brief, within 15 days of the issuing of the present decision;

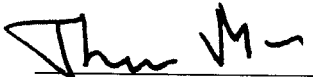
ORDERS Šljivančanin to file his reply to the Prosecution's supplemental submissions within 7 days of their filing, and

DISMISSES the remaining parts of the Motion.

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

Done this twenty fifth day of August 2008,

At The Hague,
The Netherlands.


Judge Theodor Meron
Presiding Judge

[Seal of the International Tribunal]

⁹⁰ The Appeals Chamber has held previously that "unjustified amendments [to notices of appeal] would result in appellants being free to change their appeal strategy after they have had the advantage of reviewing the arguments in a response brief, interfering with the expeditious administration of justice and prejudicing the other parties to the case, [...] which is unacceptable" (*Nahimana et al.* Decision of 17 August 2006, para. 51). See also *Bralo* Decision of 9 January 2007, para. 11.