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-95-13/1-A
		Date:	5 May 2009
		Original:	English

IN THE APPEALS CHAMBER

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

Acting Registrar: **Mr. John Hocking**

Judgement of: **5 May 2009**

PROSECUTOR
V.
MILE MRKŠIĆ
VESELIN ŠLJIVANČANIN

PUBLIC

JUDGEMENT

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I. INTRODUCTION

A. Background

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 ("International Tribunal") is seized of three appeals[1] from the judgement rendered by Trial Chamber II ("Trial Chamber"), on 27 September 2007, in the case of *Prosecutor v. Mile Mrksić, Miroslav Radić and Veselin Šljivančanin*, Case No. IT-95-13-/1-T ("Trial Judgement").

2. Mile Mrkšić ("Mrkšić") was born on 20 July 1947 near Vrginmost, in present-day Croatia. During the time relevant to the Indictment, he was a colonel in the JNA and commander of the Gmtbr and OG South. As commander of OG South, he had command of all Serb forces including JNA, TO and paramilitary forces. Veselin Šljivančanin ("Šljivančanin") was born on 13 June 1953 in Pavez, Zabljak municipality, in present-day Montenegro. During the time relevant to the Indictment, he was a major in the JNA and held the post of head of the security organ of both the Gmtbr and the OG South.

3. The events giving rise to this case took place on 20/21 November 1991 and concern the mistreatment and execution of Croat and other non-Serb persons taken from the Vukovar hospital by Serb forces on 20 November 1991. The city of Vukovar had been the object of attack by the JNA, from August until November 1991. During the course of the three-month siege, the city was largely destroyed by JNA shelling and hundreds of people were killed. When the Serb forces occupied the city, hundreds more non-Serbs were killed by Serb forces. The majority of the remaining non-Serb population of the city was expelled within days of the fall of Vukovar. In the last days of the siege, several hundred people sought refuge at the Vukovar Hospital in the hope that it would be evacuated in the presence of international observers. The Trial Chamber found that 194 people identified in the Schedule to the Trial Judgement,[2] were taken from the Vukovar hospital to Ovčara, where Serb forces mistreated them and later executed them.[3]

4. Mrkšić was convicted under Articles 3 and 7(1) of the Statute for: (a) murder as a violation of the laws or customs of war, for having aided and abetted the murder of 194 individuals identified in the Schedule to the Trial Judgement, at a site located near the hangar at Ovčara on 20 and 21 November 1991; (b) torture as a violation of the laws or customs of war, for having aided and

[1] *See* Prosecution Notice of Appeal; Mrkšić Notice of Appeal; Šljivančanin Notice of Appeal.
[2] *See* Schedule to the Trial Judgement.
[3] Trial Judgement, paras 509, 539.

abetted the torture of prisoners of war at the hangar at Ovčara on 20 November 1991; and (c) cruel treatment as a violation of the laws or customs of war, for having aided and abetted the maintenance of inhumane conditions of detention at the hangar at Ovčara on 20 November 1991.[4] He was acquitted of all crimes charged as crimes against humanity which included persecutions, extermination, murder, torture and inhumane acts.[5] The Trial Chamber sentenced Mrkšić to a single sentence of 20 years' imprisonment.[6]

5. The Trial Chamber found that Šljivančanin failed to discharge his legal duty to protect the prisoners of war held in Ovčara from acts of mistreatment.[7] It convicted him under Articles 3 and 7(1) of the Statute, for having aided and abetted the torture of prisoners of war at the hangar at Ovčara on 20 November 1991.[8] It acquitted him of all crimes charged as crimes against humanity as well as for murder as a violation of the laws or customs of war.[9] Further, while the Trial Chamber found that Šljivančanin had aided and abetted cruel treatment as a violation of the laws and customs of war, it did not enter a conviction under that count as it was impermissibly cumulative.[10] The Trial Chamber sentenced him to a single sentence of five years' imprisonment.[11]

B. Prosecution's Appeal

6. On 29 October 2007, the Prosecution filed a notice of appeal. This notice of appeal was amended on 7 May 2008, setting forth four grounds of appeal against the Trial Judgement and requesting the Appeals Chamber to: (a) reverse the acquittal of Šljivančanin and Mrkšić under Article 5 of the Statute,[12] and therefore (i) enter a conviction for torture and murder as a crime against humanity under Article 5 of the Statute against Šljivančanin[13] and (ii) enter convictions for murder, torture and inhumane acts as crimes against humanity under Article 5 of the Statute against Mrkšić;[14] (b) overturn the acquittal of Šljivančanin for murder, and enter a conviction against him under Article 3 of the Statute for having aided the murder of 194 prisoners killed at the grave site near Ovčara on 20/21 November 1991;[15] (c) revise and increase Šljivančanin's sentence in order to properly reflect the gravity of his criminal conduct;[16] (d) revise and increase Mrkšić's sentence in

[4] Trial Judgement, para. 712.
[5] Trial Judgement, para. 711.
[6] Trial Judgement, para. 713.
[7] Trial Judgement, para. 674.
[8] Trial Judgement, para. 715.
[9] Trial Judgement, paras 711, 715.
[10] Trial Judgement, paras 674, 679, 681.
[11] Trial Judgement, para. 716.
[12] *See* Prosecution Notice of Appeal, paras 3-6.
[13] Prosecution Notice of Appeal, paras 6(i), 11.
[14] Prosecution Notice of Appeal, para. 6(ii).
[15] Prosecution Notice of Appeal, paras 8-10.
[16] Prosecution Notice of Appeal, paras 13-15.

order to properly reflect the gravity of his criminal conduct;[17] and (e) revise and increase Šljivančanin and Mrkšić's sentences in case the Appeals Chamber enters new convictions under Article 5 of the Statute.[18]

C. Šljivančanin's Appeal

7. On 29 October 2007, Šljivančanin filed a notice of appeal setting forth seven grounds of appeal against the Trial Judgement. This notice of appeal was amended on 28 August 2008, setting forth six grounds of appeal against the Trial Judgement, requesting the Appeals Chamber to reverse the Trial Judgement and find him not guilty on Count 7 of the Indictment (torture as a violation of the laws and customs of war, under Article 3 of the Statute)[19] or in the alternative to order a new trial on this count,[20] or if the conviction is upheld, to reduce the sentence of five years' imprisonment imposed by the Trial Chamber.[21]

D. Mrkšić's Appeal

8. On 29 October 2007, Mrkšić filed a notice of appeal setting forth eleven grounds of appeal against the Trial Judgement and requesting the Appeals Chamber to acquit him of his conviction under Article 3 of the Statute for having aided and abetted the crimes of murder, torture and cruel treatment and challenging his sentence.[22]

E. Appeals Hearing

9. The Appeals Chamber heard oral submissions of the Parties regarding these appeals on 21 and 23 January 2009. Having considered their written and oral submissions, the Appeals Chamber hereby renders its Judgement.

[17] Prosecution Notice of Appeal, paras 16-18.
[18] Prosecution Notice of Appeal, paras 7, 12.
[19] Šljivančanin Notice of Appeal, paras 6, 36.
[20] Šljivančanin Notice of Appeal, para. 37.
[21] Šljivančanin Notice of Appeal, para. 38.
[22] Mrkšić Notice of Appeal, paras 96-97.

II. STANDARD OF REVIEW ON APPEAL

10. On appeal, the Parties must limit their arguments to legal errors that invalidate the judgement of the Trial Chamber and to factual errors that result in a miscarriage of justice within the scope of Article 25 of the Statute. These criteria are well established by the Appeals Chambers of both the International Tribunal[23] and the International Criminal Tribunal for Rwanda ("ICTR").[24] In exceptional circumstances, the Appeals Chamber will also hear appeals where a party has raised a legal issue that would not lead to invalidation of the judgement, but is nevertheless of general significance to the International Tribunal's jurisprudence.[25]

11. A party alleging an error of law must identify the alleged error, present arguments in support of its claim and explain how the error invalidates the judgement. An allegation of an error of law which has no chance of changing the outcome of a judgement may be rejected on that ground.[26] However, even if the party's arguments are insufficient to support the contention of an error, the Appeals Chamber may find for other reasons that there is an error of law.[27]

12. The Appeals Chamber reviews the Trial Chamber's findings of law to determine whether or not they are correct.[28] Where the Appeals Chamber finds an error of law in the Trial Judgement arising from the application of the wrong legal standard by the Trial Chamber, the Appeals Chamber will articulate the correct legal standard and review the relevant factual findings of the

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[23] *Strugar* Appeal Judgement, para. 10; *Orić* Appeal Judgement, para. 7; *Halilović* Appeal Judgement, para. 6; *Limaj et al.* Appeal Judgement, para. 8; *Blagojević and Jokić* Appeal Judgement, para. 6; *Brđanin* Appeal Judgement, para. 8; *Galić* Appeal Judgement, para. 6; *Stakić* Appeal Judgement, para. 7; *Kvočka et al.* Appeal Judgement, para. 14; *Vasiljević* Appeal Judgement, paras 4-12; *Kunarac et al.* Appeal Judgement, paras 35-48; *Kupreškić et al.* Appeal Judgement, para. 29; *Čelebići* Appeal Judgement, paras 434-435; *Furundžija* Appeal Judgement, paras 34-40; *Tadić* Appeal Judgement, para. 64.

[24] *Seromba* Appeal Judgement, para. 9; *Nahimana et al.* Appeal Judgement, para. 11; *Muhimana* Appeal Judgement, para. 6; *Kajelijeli* Appeal Judgement, para. 5; *Semanza* Appeal Judgement, para. 7; *Musema* Appeal Judgement, para. 15; *Akayesu* Appeal Judgement, para. 178; *Kayishema and Ruzindana* Appeal Judgement, paras 177, 320. Under the Statute of the ICTR, the relevant provision is Article 24.

[25] *Orić* Appeal Judgement, para. 7; *Halilović* Appeal Judgement, para. 6; *Limaj et al.* Appeal Judgement, para. 8; *Blagojević and Jokić* Appeal Judgement, para. 6; *Brđanin* Appeal Judgement, para. 8; *Galić* Appeal Judgement, para. 6; *Stakić* Appeal Judgement, para. 7; *Kupreškić et al.* Appeal Judgement, para. 22; *Tadić* Appeal Judgement, para. 247. *See* also *Nahimana et al.* Appeal Judgement, para. 12.

[26] *Strugar* Appeal Judgement, para. 11; *Orić* Appeal Judgement, para. 8; *Halilović* Appeal Judgement, para. 7; *Limaj et al.* Appeal Judgement, para. 9; *Blagojević and Jokić* Appeal Judgement, para. 7; *Brđanin* Appeal Judgement, para. 9; *Galić* Appeal Judgement, para. 7; *Stakić* Appeal Judgement, para. 8; *Kvočka et al.* Appeal Judgement para. 16, citing *Krnojelac* Appeal Judgement, para. 10.

[27] *Strugar* Appeal Judgement, para. 11; *Orić* Appeal Judgement, para. 8; *Halilović* Appeal Judgement, para. 7; *Limaj et al.* Appeal Judgement, para. 9; *Blagojević and Jokić* Appeal Judgement, para. 7; *Brđanin* Appeal Judgement, para. 9; *Galić* Appeal Judgement, para. 7; *Stakić* Appeal Judgement, para. 8; *Kvočka et al.* Appeal Judgement, para. 16; *Kordić and Čerkez* Appeal Judgement, para. 16; *Vasiljević* Appeal Judgement, para. 6; *Kupreškić et al.* Appeal Judgement, para. 26. *See* also *Seromba* Appeal Judgement, para. 10; *Nahimana et al.* Appeal Judgement, para. 12; *Muhimana* Appeal Judgement, para. 7; *Gacumbitsi* Appeal Judgement, para. 7; *Ntagerura et al.* Appeal Judgement, para. 11; *Semanza* Appeal Judgement, para. 7; *Kambanda* Appeal Judgement, para. 98.

[28] *Strugar* Appeal Judgement, para. 12; *Orić* Appeal Judgement, para. 9; *Halilović* Appeal Judgement, para. 8; *Limaj et al.* Appeal Judgement, para. 10; *Blagojević and Jokić* Appeal Judgement, para. 8; *Brđanin* Appeal Judgement, para. 10; *Galić* Appeal Judgement, para. 8; *Stakić* Appeal Judgement, para. 9; *Krnojelac* Appeal Judgement, para. 10.

Trial Chamber accordingly.[29] In so doing, the Appeals Chamber not only corrects the legal error, but applies the correct legal standard to the evidence contained in the trial record, where necessary, and determines whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by the appellant before that finding is confirmed on appeal.[30] The Appeals Chamber will not review the entire trial record *de novo*. Rather, it will in principle only take into account evidence referred to by the Trial Chamber in the body of the judgement or in a related footnote, evidence contained in the trial record and referred to by the parties, and additional evidence admitted on appeal.[31]

13. When considering alleged errors of fact, the Appeals Chamber will apply a standard of reasonableness. Only an error of fact which has occasioned a miscarriage of justice will cause the Appeals Chamber to overturn a decision by the Trial Chamber.[32] In reviewing the findings of the Trial Chamber, the Appeals Chamber will only substitute its own finding for that of the Trial Chamber when no reasonable trier of fact could have reached the original decision.[33] The Appeals Chamber applies the same reasonableness standard to alleged errors of fact regardless of whether the finding of fact was based on direct or circumstantial evidence.[34]

14. In determining whether or not a Trial Chamber's finding was one that no reasonable trier of fact could have reached, the Appeals Chamber "will not lightly disturb findings of fact by a Trial

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[29] *Strugar* Appeal Judgement, para. 12; *Orić* Appeal Judgement, para. 9; *Halilović* Appeal Judgement, para. 8; *Limaj et al.* Appeal Judgement, para. 10; *Blagojević and Jokić* Appeal Judgement, para. 8; *Brđanin* Appeal Judgement, para. 10; *Galić* Appeal Judgement, para. 8; *Stakić* Appeal Judgement, para. 9; *Kvočka et al.* Appeal Judgement, para. 17; *Kordić and Čerkez* Appeal Judgement, para. 17; *Blaškić* Appeal Judgement, para. 15. *See* also *Nahimana et al.* Appeal Judgement, para. 13.

[30] *Strugar* Appeal Judgement, para. 12; *Orić* Appeal Judgement, para. 9; *Halilović* Appeal Judgement, para. 8; *Limaj et al.* Appeal Judgement, para. 10; *Blagojević and Jokić* Appeal Judgement, para. 8; *Brđanin* Appeal Judgement, para. 10; *Galić* Appeal Judgement, para. 8; *Stakić* Appeal Judgement, para. 9; *Kvočka et al.* Appeal Judgement, para. 17; *Kordić and Čerkez* Appeal Judgement, para. 17; *Blaškić* Appeal Judgement, para. 15. *See* also *Nahimana et al.* Appeal Judgement, para. 13.

[31] *Strugar* Appeal Judgement, para. 15; *Brđanin* Appeal Judgement, para. 15; *Galić* Appeal Judgement, para. 8; *Stakić* Appeal Judgement, para. 9; *Blaškić* Appeal Judgement, para. 13; *Kordić and Čerkez* Appeal Judgement, para. 21, fn. 12.

[32] *Strugar* Appeal Judgement, para. 13; *Orić* Appeal Judgement, para. 10; *Halilović* Appeal Judgement, para. 9; *Simić* Appeal Judgement, para. 10; *Kvočka et al.* Appeal Judgement, para. 18; *Vasiljević* Appeal Judgement, para. 8. *See* also *Seromba* Appeal Judgement, para. 11 ; *Muhimana* Appeal Judgement, para. 6; *Kamuhanda* Appeal Judgement, para. 6; *Kajelijeli* Appeal Judgement, para. 5.

[33] *Strugar* Appeal Judgement, para. 13; *Orić* Appeal Judgement, para. 10; *Halilović* Appeal Judgement, para. 9; *Limaj et al.* Appeal Judgement, para. 12; *Blagojević and Jokić* Appeal Judgement, para. 9; *Brđanin* Appeal Judgement, para. 13; *Galić* Appeal Judgement, para. 9; *Stakić* Appeal Judgement, para. 10; *Kvočka et al.* Appeal Judgement, para. 18; *Kordić and Čerkez* Appeal Judgement, para. 18; *Blaškić* Appeal Judgement, para. 16; *Čelebići* Appeal Judgement, para. 435; *Furundžija* Appeal Judgement, para. 37; *Aleksovski* Appeal Judgement, para. 63; *Tadić* Appeal Judgement, para. 64. *See* also *Seromba* Appeal Judgement, para. 11 ; *Nahimana et al.* Appeal Judgement, para. 14.

[34] *Strugar* Appeal Judgement, para. 13; *Orić* Appeal Judgement, para. 10; *Limaj et al.* Appeal Judgement, para. 12; *Blagojević and Jokić* Appeal Judgement, para. 226; *Brđanin* Appeal Judgement, para. 13; *Galić* Appeal Judgement, para. 9; *Stakić* Appeal Judgement, para. 220; *Čelebići* Appeal Judgement, para. 458. Similarly, the type of evidence, direct or circumstantial, is irrelevant to the standard of proof at trial, where the accused may only be found guilty of a crime if the Prosecution has proved each element of that crime and the relevant mode of liability beyond a reasonable doubt. *See Stakić* Appeal Judgement, para. 219; *Čelebići* Appeal Judgement, para. 458.

Chamber".[35] The Appeals Chamber recalls, as a general principle, the approach adopted by the Appeals Chamber in the *Kupreškić et al.* case, according to which:

> Pursuant to the jurisprudence of the Tribunal, the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber. Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is "wholly erroneous" may the Appeals Chamber substitute its own finding for that of the Trial Chamber.[36]

15. The same standard of reasonableness and the same deference to factual findings of the Trial Chamber apply when the Prosecution appeals against an acquittal. Thus, when considering an appeal by the Prosecution, the Appeals Chamber will only hold that an error of fact was committed when it determines that no reasonable trier of fact could have made the impugned finding.[37] However, since the Prosecution bears the burden at trial of proving the guilt of the accused beyond reasonable doubt, the significance of an error of fact occasioning a miscarriage of justice is somewhat different for a Prosecution appeal against acquittal than for a defence appeal against conviction.[38] An accused must show that the Trial Chamber's factual errors create a reasonable doubt as to his guilt. The Prosecution must show that, when account is taken of the errors of fact committed by the Trial Chamber, all reasonable doubt of the accused's guilt has been eliminated.[39]

16. On appeal, a party may not merely repeat arguments that did not succeed at trial, unless the party can demonstrate that the Trial Chamber's rejection of them constituted such an error as to warrant the intervention of the Appeals Chamber.[40] Arguments of a party which do not have the

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[35] *Strugar* Appeal Judgement, para. 13; *Orić* Appeal Judgement, para. 10; *Halilović* Appeal Judgement, para. 10; *Limaj et al.* Appeal Judgement, para. 12; *Blagojević and Jokić* Appeal Judgement, para. 9; *Galić* Appeal Judgement, para. 9; *Stakić* Appeal Judgement, para. 10; *Kvočka et al.* Appeal Judgement, para. 19; *Krnojelac* Appeal Judgement, para. 11; *Furundžija* Appeal Judgement, para. 37; *Aleksovski* Appeal Judgement, para. 63; *Tadić* Appeal Judgement, para. 64. *See* also *Seromba* Appeal Judgement, para. 11; *Nahimana et al.* Appeal Judgement, para. 14; *Muhimana* Appeal Judgement, para. 8; *Kamuhanda* Appeal Judgement, para. 7; *Kajelijeli* Appeal Judgement, para. 5; *Ntakirutimana* Appeal Judgement, para. 12; *Musema* Appeal Judgement, para. 18.

[36] *Kupreškić et al.* Appeal Judgement, para. 30.

[37] *Strugar* Appeal Judgement, para. 14; *Orić* Appeal Judgement, para. 12; *Limaj et al.* Appeal Judgement, para. 13; *Blagovević and Jokić* Appeal Judgement, para. 9; *Brdanin* Appeal Judgement, para. 14. *See* also *Seromba* Appeal Judgement, para. 11; *Bagilishema* Appeal Judgement, para. 13.

[38] *Strugar* Appeal Judgement, para. 14; *Orić* Appeal Judgement, para. 12; *Halilović* Appeal Judgement, para. 11; *Limaj et al.* Appeal Judgement, para. 13; *Krnojelac* Appeal Judgement, para. 14.

[39] *Seromba* Appeal Judgement, para. 11; *Rutaganda* Appeal Judgement, para. 24; *Bagilishema* Appeal Judgement, paras 13-14. *See* also *Strugar* Appeal Judgement, para. 14; *Orić* Appeal Judgement, para. 12; *Halilović* Appeal Judgement, para. 11; *Limaj et al.* Appeal Judgement, para. 13; *Blagojević and Jokić* Appeal Judgement, para. 9; *Brdanin* Appeal Judgement, para. 14.

[40] *Strugar* Appeal Judgement, para. 16; *Orić* Appeal Judgement, para. 13; *Halilović* Appeal Judgement, para. 12; *Limaj et al.* Appeal Judgement, para. 14; *Blagojević and Jokić* Appeal Judgement, para. 10; *Brdanin* Appeal Judgement, para. 16; *Galić* Appeal Judgement, para. 10; *Stakić* Appeal Judgement, para. 11; *Blaškić* Appeal Judgement, para. 13. *See* also *Seromba* Appeal Judgement, para. 12; *Muhimana* Appeal Judgement, para. 9; *Gacumbitsi* Appeal Judgement, para. 9; *Kajelijeli* Appeal Judgement, para. 6, citing *Niyitegeka* Appeal Judgement, para. 9; *Rutaganda* Appeal Judgement, para. 18.

potential to cause the impugned judgement to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits.[41]

17. In order for the Appeals Chamber to assess a party's arguments on appeal, the appealing party is expected to provide precise references to relevant transcript pages or paragraphs in the Trial Judgement to which the challenges are being made.[42] Further, "the Appeals Chamber cannot be expected to consider a party's submissions in detail if they are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies".[43]

18. It should be recalled that the Appeals Chamber has inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing and may dismiss arguments which are evidently unfounded without providing detailed reasoning.[44]

[41] *Orić* Appeal Judgement, para. 13; *Halilović* Appeal Judgement, para. 12; *Limaj et al.* Appeal Judgement, para. 14; *Blagojević and Jokić* Appeal Judgement, para. 10; *Brdanin* Appeal Judgement, para. 16; *Galić* Appeal Judgement, para. 10; *Stakić* Appeal Judgement, para. 11. *See* also *Seromba* Appeal Judgement, para. 12; *Nahimana et al.* Appeal Judgement, para. 16; *Muhimana* Appeal Judgement, para. 9; *Gacumbitsi* Appeal Judgement, para. 9; *Ntagerura et al.* Appeal Judgement, para. 13; *Kajelijeli* Appeal Judgement, para. 6, citing *Blaškić* Appeal Judgement, para. 13; *Niyitegeka* Appeal Judgement, para. 9; *Rutaganda* Appeal Judgement, para. 18.

[42] *Orić* Appeal Judgement, para. 14; *Halilović* Appeal Judgement, para. 13; *Limaj et al.* Appeal Judgement, para. 15; *Blagojević and Jokić* Appeal Judgement, para. 11; *Brdanin* Appeal Judgement, para. 15; *Galić* Appeal Judgement, para. 11; *Stakić* Appeal Judgement, para. 12; *Blaškić* Appeal Judgement, para. 13; *Vasiljević* Appeal Judgement, para. 11; Practice Direction on Appeals Requirements, para. 4(b). *See* also *Seromba* Appeal Judgement, para. 13; *Nahimana et al.* Appeal Judgement, para. 16; *Muhimana* Appeal Judgement, para. 10; *Kajelijeli* Appeal Judgement, para. 7; *Niyitegeka* Appeal Judgement, para. 10; *Rutaganda* Appeal Judgement, para. 19; *Kayishema and Ruzindana* Appeal Judgement, para. 137.

[43] *Strugar* Appeal Judgement, para. 16; *Orić* Appeal Judgement, para. 14; *Halilović* Appeal Judgement, para. 13; *Limaj et al.* Appeal Judgement, para. 15; *Blagojević and Jokić* Appeal Judgement, para. 11; *Galić* Appeal Judgement, para. 11; *Stakić* Appeal Judgement, para. 12; *Vasiljević* Appeal Judgement, para. 12; *Kunarac et al.* Appeal Judgement, paras 43, 48. *See* also *Seromba* Appeal Judgement, para. 13; *Nahimana et al.* Appeal Judgement, para. 16; *Muhimana* Appeal Judgement, para. 10; *Gacumbitsi* Appeal Judgement, para. 10; *Ntagerura et al*. Appeal Judgement, para. 13; *Kajelijeli* Appeal Judgement, para. 7; *Niyitegeka* Appeal Judgement, para. 10.

[44] *Strugar* Appeal Judgement, para. 16; *Orić* Appeal Judgement, para. 14; *Halilović* Appeal Judgement, para. 12; *Limaj et al.* Appeal Judgement, para. 16; *Galić* Appeal Judgement, para. 12; *Brdanin* Appeal Judgement, para. 16; *Stakić* Appeal Judgement, paras 11, 13; *Vasiljević* Appeal Judgement, para. 12; *Kunarac et al.* Appeal Judgement, paras 47-48. *See* also *Seromba* Appeal Judgement, para. 13; *Nahimana et al.* Appeal Judgement, para. 17; *Muhimana* Appeal Judgement, para. 10; *Gacumbitsi* Appeal Judgement, paras 9-10; *Ntagerura et al.* Appeal Judgement, paras 13-14; *Kajelijeli* Appeal Judgement, paras 6, 8; *Niyitegeka* Appeal Judgement, para. 11; *Rutaganda* Appeal Judgement, para. 19.

III. PROSECUTION'S APPEAL

19. On 7 May 2008, the Prosecution filed an amended notice of appeal setting forth four grounds of appeal against the Trial Judgement. In its first ground of appeal, it argues that the Trial Chamber erred in law by excluding persons *hors de combat* from being victims of crimes against humanity. It therefore requests the Appeals Chamber to reverse the acquittal of Šljivančanin and Mrkšić under Article 5 of the Statute,[45] and therefore: (i) enter a conviction for torture as a crime against humanity under Article 5 of the Statute against Šljivančanin;[46] and (ii) enter convictions for murder, torture, and inhumane acts as crimes against humanity under Article 5 of the Statute against Mrkšić.[47] Under its second ground of appeal, it requests the Appeals Chamber to overturn Šljivančanin's acquittal for murder, and enter a conviction against him under Article 3 of the Statute for having aided and abetted the murder of 194 prisoners killed at the grave site near Ovčara on 20/21 November 1991.[48] The Prosecution's third and fourth grounds of appeal request the Appeals Chamber to: (i) revise and increase Šljivančanin's sentence in order to properly reflect the gravity of his criminal conduct;[49] (ii) revise and increase Mrkšić's sentence in order to properly reflect the gravity of his criminal conduct;[50] and (iii) revise and increase Šljivančanin and Mrkšić's sentences in case its first or second grounds of appeal succeed and the Appeals Chamber enters new convictions under Articles 3 or 5 of the Statute.[51] The Prosecution's appeal against Šljivančanin's and Mrkšić's sentences is addressed in the sentencing section.[52]

A. First Ground of Appeal: Acquittal of Šljivančanin and Mrkšić for Article 5 Crimes

20. The Prosecution argues that the Trial Chamber erred in law by requiring that the individual victims of crimes against humanity under Article 5 of the Statute be civilians as defined by Article 50 of Additional Protocol I, thereby excluding persons *hors de combat*, and as a result erred in entering convictions for war crimes only.[53] In its Appeal Brief, the Prosecution argues that Article 5 of the Statute is applicable to persons *hors de combat* for two reasons: (i) Article 5 of the Statute does not require that individual victims must be civilians but only that the crimes take place as part of a widespread or systematic attack against a civilian population; and (ii) in determining whether the civilian population is the primary object of the attack, all non-participants in the

[45] *See* Prosecution Notice of Appeal, paras 3-6.
[46] Prosecution Notice of Appeal, para. 6(i).
[47] Prosecution Notice of Appeal, para. 6(ii).
[48] Prosecution Notice of Appeal, paras 8-10. Should the Appeals Chamber allow its first ground of appeal, the Prosecution also requests the Appeals Chamber to enter a conviction against Šljivančanin for murder as a crime against humanity under Article 5 of the Statute (Prosecution's Notice of Appeal, para. 11).
[49] Prosecution Notice of Appeal, paras 13-15.
[50] Prosecution Notice of Appeal, paras 16-18.
[51] Prosecution Notice of Appeal, paras 7, 12.
[52] *See infra* Section VI: "Appeals Against Sentence".

hostilities, including persons *hors de combat*, should be regarded as civilians.[54] However, at the Status Conference held on 16 October 2008, the Prosecution informed the Presiding Judge in this case that, in light of the *Martić* Appeal Judgement recently rendered, it would not be pursuing the second sub-ground of its first ground of appeal ("C. Error 2"),[55] namely, the allegation that all non-participants in the hostilities should be regarded as civilians.[56] Should its first ground of appeal succeed, the Prosecution requests the Appeals Chamber to reverse Šljivančanin's and Mrkšić's acquittals under Article 5 of the Statute for the crimes committed in Ovčara and to increase their sentences accordingly.[57]

21. Mrkšić opposes the Prosecution's first ground of appeal,[58] states that the Trial Chamber's conclusions are consistent with the Appeals Chamber's case-law,[59] and that it would be a "dreadful menace" to depart from this case-law.[60] He argues that the victims of crimes against humanity must be civilians as defined under Article 50 of Additional Protocol I,[61] and that members of the armed forces not armed or not taking part in the hostilities cannot be considered civilians.[62] He emphasizes that the civilian status of the victims is a very important element of crimes against humanity.[63]

22. Šljivančanin opposes the Prosecution's arguments as an "inappropriate attempt to expand the scope of Article 5 of the Statute".[64] In his view, the victims of crimes against humanity must be civilians and cannot be soldiers, members of resistance groups, former combatants who have laid down their arms and/or combatants *hors de combat*.[65] He states that "there is no precedent before the International Tribunal where a crime directed solely and exclusively against a group of combatants/prisoners of war was charged as a crime against humanity".[66] In the present case, he argues, the Trial Chamber was correct not to enter convictions for crimes against humanity because no reasonable trier of fact could have found that the crimes in Ovčara were part of a widespread or systematic attack directed against the civilian population of Vukovar.[67] Should the Appeals Chamber allow the Prosecution's arguments and reverse Šljivančanin's acquittal under Count 5 of

[53] Prosecution Notice of Appeal, para. 3; Prosecution Appeal Brief, paras 12, 25, 62.
[54] Prosecution Appeal Brief, paras 6, 13.
[55] Prosecution Appeal Brief, paras 37-59.
[56] Transcript of Status Conference, 16 October 2008, p. 25: "The Prosecution will not be pursuing subground (2), that's error 2 under ground 1. In light of the recent ruling in the case of Martić, the ground that relates to definitions of civilians that appears under ground 1, subground (c), on our brief, we will not be pursuing".
[57] Prosecution Notice of Appeal, paras 4-7; Prosecution Appeal Brief, paras 63-66; Prosecution Brief in Reply, paras 1, 33.
[58] Mrkšić Respondent's Brief, para. 5.
[59] Mrkšić Respondent's Brief, para. 12.
[60] Mrkšić Respondent's Brief, para. 24.
[61] Mrkšić Respondent's Brief, paras 11, 16.
[62] Mrkšić Respondent's Brief, para. 16.
[63] Mrkšić Respondent's Brief, paras 17-19.
[64] Šljivančanin Respondent's Brief, para. 22. *See* also Šljivančanin Respondent's Brief, para. 23.
[65] Šljivančanin Respondent's Brief, paras 119-120. *See* also Šljivančanin Respondent's Brief, para. 36; AT. 256.
[66] Šljivančanin Respondent's Brief, para. 27.

the Indictment, Šljivančanin submits that the sentence of five years of imprisonment imposed on him should not be revised.[68]

1. Whether the individual victims of crimes against humanity must be civilians

23. The Prosecution contends that the Trial Chamber erred in creating a separate requirement under Article 5 of the Statute that the individual victims must be civilians.[69] It contends that the requirement that the attack be directed against a "civilian population" under Article 5 of the Statute ensures that the primary object of the attack is not a legitimate military target.[70] Hence, this requirement excludes attacks primarily directed at military objectives from being qualified as crimes against humanity,[71] but does not mean that the individual victims must be civilians,[72] as there is no such jurisdictional requirement.[73] It avers that the only requirement is that crimes must be part of a widespread or systematic attack directed against a civilian population,[74] which the Appeals Chamber interpreted as implying that crimes against humanity must be committed as part of a widespread or systematic attack in which the civilian population was the primary object of the attack.[75] In its view, the status of the victims is only one relevant factor in determining whether a civilian population is the object of attack.[76]

24. Šljivančanin concedes that some instruments require that crimes against humanity be committed *as part of* a widespread or systematic attack against any civilian population.[77] He argues, however, that the plain language of Article 5 of the Statute is that crimes against humanity must be *directed* against any civilian population,[78] that this requirement is included in "almost every instrument embodying the prohibition of crimes against humanity"[79] and in many States' legislation concerning crimes against humanity,[80] and implies that the victims must be civilians.[81]

[67] Šljivančanin Respondent's Brief, paras 25-26.
[68] Šljivančanin Respondent's Brief, paras 122-125.
[69] Prosecution Appeal Brief, para. 14, *See* also Prosecution Appeal Brief, para. 12, citing Trial Judgement, paras 462-463.
[70] Prosecution Appeal Brief, para. 16. *See* also Prosecution Appeal Brief, para. 26.
[71] Prosecution Appeal Brief, para. 14.
[72] Prosecution Appeal Brief, paras 15-16.
[73] Prosecution Appeal Brief, paras 17, 29.
[74] Prosecution Appeal Brief, para. 17, citing *Kunarac et al.* Appeal Judgement, paras 85-97; *Tadić* Appeal Judgement, paras 248, 271; *Kordić and Čerkez* Appeal Judgement, paras 93-100; *Galić* Appeal Judgement, paras 142-146.
[75] Prosecution Appeal Brief, para. 17, citing *Kunarac et al.* Appeal Judgement, para. 91.
[76] Prosecution Appeal Brief, paras 15, 18-24.
[77] Šljivančanin Respondent's Brief, para. 44, citing Article 3 of the ICTR Statute and Article 2 of the Statute of the Special Court for Sierra Leone.
[78] Šljivančanin Respondent's Brief, paras 40-41.
[79] Šljivančanin Respondent's Brief, para. 42, citing Article 6(c) of the Charter of the International Military Tribunal of Nuremberg; Article II(1)(c) of Control Council Law No. 10; Article 5(c) of the Charter of the International Military Tribunal for the Far East; Article 7(2)(a) of the Rome Statute of the International Criminal Court; and Article 5.1 of the United Nations Transitional Administration in East Timor, Regulation No. 2000/15.
[80] Šljivančanin Respondent's Brief, para. 43 (references omitted).

25. In the section of the Trial Judgement addressing its jurisdiction over the crimes charged under Article 5 of the Statute, the Trial Chamber recalled that a crime listed under that article can only constitute a crime against humanity when committed in an armed conflict and must be part of a widespread or systematic attack against a civilian population.[82] It then specifically addressed the jurisdictional requirement that crimes against humanity be "directed against any civilian population", and properly recalled that: (i) the civilian population must be the primary object of the attack;[83] (ii) factors relevant to determining whether the attack was so directed include the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, and the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war;[84] and (iii) that the civilian population need only be predominantly civilian.[85]

26. In the following section, the Trial Chamber then addressed what it identified as a "related but distinct legal issue" that arose in the circumstances of the case before it, namely, "whether the notion of crimes against humanity is intended to apply to crimes listed in Article 5 [of the Statute] when the *individual victims* of such crimes are not civilians".[86] The Trial Chamber concluded that the victims of crimes against humanity must be civilians:

> [I]n order for a crime listed in Article 5 to constitute a crime against humanity, it is not sufficient for that crime to be part of a widespread or systematic attack against the civilian population. The victims of the crime must also be civilians. Accordingly, a crime listed in Article 5, despite being part of a widespread or systematic attack against the civilian population, does not qualify as a crime against humanity if the victims were non-civilians.[87]

By so doing, in addition to the jurisdictional requirement that the crimes charged under Article 5 of the Statute be directed against a civilian population, the Trial Chamber imposed a distinct requirement, namely, that the individual victims of the underlying crimes be civilians.

27. The Trial Chamber was aware that the International Tribunal had not yet addressed the issue of whether the individual victims of the underlying crimes under Article 5 of the Statute must be civilians.[88] To support its above conclusion, it sought to rely on the finding in the *Blaškić* Appeal

[81] Šljivančanin Respondent's Brief, para. 46. *See* also Šljivančanin Respondent's Brief, paras 55-57.
[82] Trial Judgement, para. 429.
[83] Trial Judgement, para. 440, quoting *Kunarac et al.* Appeal Judgement, para. 91.
[84] Trial Judgement, para. 440, quoting *Kunarac et al.* Appeal Judgement, para. 91.
[85] Trial Judgement, para. 442, citing *Blaškić* Appeal Judgement, para. 113 and citing Article 50(3) of Additional Protocol I ("The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character"). *See* also Trial Judgement, paras 443, 458, 562.
[86] Trial Judgement, para. 443.
[87] Trial Judgement, para. 463.
[88] Trial Judgement, para. 462: "The Chamber is aware of the fact that, to date, the Tribunal's jurisprudence has not been called upon to address the question whether the individual victims of crimes against humanity need to be civilians".

Judgement that "both the status of the victim as a civilian and the scale on which it is committed or the level of organization involved characterize a crime against humanity".[89] However, as explained below, this finding cannot lend support to the conclusion that the underlying crimes under Article 5 of the Statute can only be committed against civilians.

28. The Appeals Chamber in *Blaškić* first stated that the Trial Chamber "correctly recognised that a crime against humanity applies to acts directed against any civilian population".[90] It then addressed Tihomir Blaškić's argument that he never ordered attacks directed against a civilian population but that the casualties were the unfortunate consequence of an otherwise legitimate and proportionate military operation.[91] In this context, the Appeals Chamber found that the Trial Chamber erred when it stated that "the specificity of a crime against humanity results not from the status of the victim but the scale and organisation in which it must be committed".[92] It further found that "both the status of the victim as a civilian and the scale on which it is committed or the level of organization involved characterize a crime against humanity".[93] The Appeals Chamber's finding was therefore concerned with the issue of whether legitimate military targets were attacked and was not seized of the question of whether the victims of the underlying crimes under Article 5 of the Statute must be civilians. Accordingly the Appeals Chamber's finding is to be understood as only reflecting the jurisdictional requirement of Article 5 of the Statute that crimes against humanity must be committed as part of a widespread attack against a civilian population.[94] It cannot be understood as implying that the underlying crimes under Article 5 of the Statute can only be committed against civilians as the Trial Chamber did in the present case.

29. The Appeals Chamber recently confirmed that "[t]here is nothing in the text of Article 5 of the Statute, or previous authorities of the Appeals Chamber that requires that individual victims of crimes against humanity be civilians".[95] Further, it held that under customary international law, persons *hors de combat* can also be victims of crimes against humanity, provided that all the other necessary conditions are met.[96]

30. This is not to say that under Article 5 of the Statute the status of the victims as civilians is irrelevant. In fact, the status of the victims is one of the factors that can be assessed in determining

[89] *Blaškić* Appeal Judgement, para. 107, relied upon at paragraph 462 of the Trial Judgement.
[90] *Blaškić* Appeal Judgement, para. 107.
[91] *Blaškić* Appeal Judgement, para. 103.
[92] *Blaškić* Appeal Judgement, para. 107, quoting *Blaškić* Trial Judgement, para. 208.
[93] *Blaškić* Appeal Judgement, para. 107.
[94] *Blaškić* Appeal Judgement, Section IV(A)(2).
[95] *Martić* Appeal Judgement, para. 307. *See* also paras 303-306, 308. In *Martić*, the Appeals Chamber entered convictions for crimes committed against persons *hors de combat*, considering that they were victims of a widespread and systematic attack against the civilian population, and that all the elements of the offences were met (*see Martić* Appeal Judgement, paras 318-319, 346, 355).

whether the jurisdictional requirement that the civilian population be the primary target of an attack has been fulfilled,[97] along with, *inter alia*, the means and method used in the course of the attack, the number of victims, the discriminatory nature of the attack, the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war.[98]

31. Further, the fact that a population under the *chapeau* of Article 5 of the Statute must be "civilian" does not imply that such population shall only be comprised of civilians. The status of the victims will thus also be relevant to determining whether the population against which the attack is directed is civilian. In *Kordić and Čerkez*, the Appeals Chamber stated:

> The civilian population comprises all persons who are civilians and the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.[99]

In *Blaškić*, the Appeals Chamber, relying on the ICRC Commentary to Article 50 of Additional Protocol I,[100] held that "in order to determine whether the presence of soldiers within a civilian population deprives the population of its civilian character, the number of soldiers, as well as whether they are on leave, must be examined".[101]

32. Accordingly, whereas the civilian status of the victims, the number of civilians, and the proportion of civilians within a civilian population are factors relevant to the determination of whether the *chapeau* requirement of Article 5 of the Statute that an attack be directed against a "civilian population" is fulfilled, there is no requirement nor is it an element of crimes against humanity that the victims of the underlying crimes be "civilians".

33. In light of the foregoing, the Appeals Chamber finds that the Trial Chamber erred in law at paragraphs 462 and 463 of the Trial Judgement in concluding that, for the purposes of Article 5 of the Statute, the victims of the underlying crime must be civilians, and consequently erroneously creating an additional requirement under Article 5 of the Statute.

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[96] *Martić* Appeal Judgement, paras 311, 313.
[97] *Kunarac et al.* Appeal Judgement, para. 92: "The Appeals Chamber is satisfied that the Trial Chamber correctly defined and identified the "population" which was being attacked and that it correctly interpreted the phrase "directed against" as requiring that the civilian population which is subjected to the attack must be the primary rather than an incidental target of the attack".
[98] *Kunarac et al.* Appeal Judgement, para. 91.
[99] *Kordić and Čerkez* Appeal Judgement, para. 50. *See* also *Galić* Appeal Judgement, para. 136.
[100] ICRC Commentary to Article 50 of Additional Protocol I, para. 1922: "[I]n wartime conditions it is inevitable that individuals belonging to the category of combatants become intermingled with the civilian population, for example, soldiers on leave visiting their families. However, provided that these are not regular units with fairly large numbers, this does not in any way change the civilian character of a population".
[101] *Blaškić* Appeal Judgement, para. 115. *See* also *Galić* Appeal Judgement, para. 137.

34. Having found that the Trial Chamber committed an error of law, the Appeals Chamber turns to consider whether this error invalidates the Trial Judgement.

2. Whether the crimes committed in Ovčara qualify as crimes against humanity

35. Following the Prosecution's decision not to pursue the second sub-ground of its first ground of appeal,[102] the Trial Chamber's finding to the effect that the term "civilian" in Article 5 of the Statute has to be interpreted in accordance with Article 50 of Additional Protocol I and therefore does not include combatants or persons *hors de combat*,[103] remains unchallenged. This finding was based, *inter alia,* on the Appeals Chamber's well-established jurisprudence,[104] reiterated in the *Martić* Appeal Judgement,[105] that the notion of "civilian" under Article 5 of the Statute excludes persons *hors de combat*. In *Blaškić*, the Appeals Chamber found:

> Article 50 of Additional Protocol I to the Geneva Conventions contains a definition of civilians and civilian populations, and the provisions in this article may largely be viewed as reflecting customary law.[106]
>
> Read together, Article 50 of Additional Protocol I and Article 4A of the Third Geneva Convention establish that members of the armed forces, and members of militias or volunteer corps forming part of such armed forces, cannot claim civilian status.[107]

In *Kordić and Čerkez*, the Appeals Chamber found that "Article 50 of Additional Protocol I contains a definition of civilians and civilian populations, and the provisions in this article may largely be viewed as reflecting customary law".[108] In *Galić*, the Appeals Chamber reiterated that "[e]ven *hors de combat*, however, [combatants] would still be members of the armed forces of a party to the conflict and therefore fall under the category of persons referred to in Article 4(A)(1) of the Third Geneva Convention; as such, they are not civilians in the context of Article 50, paragraph 1, of Additional Protocol I".[109] The notion of "civilian" under Article 5 of the Statute is defined through the above provisions of the law of armed conflict.[110] Whereas under Article 3 of the Statute the situation of a victim at the time of the offence may be relevant to its status,[111] the notion

[102] *See supra* para. 20.
[103] Trial Judgement, para. 461.
[104] Trial Judgement, paras 451-453, citing *Blaškić* Appeal Judgement, paras 110, 113-114; *Kordić and Čerkez* Appeal Judgement, para. 97; *Galić* Appeal Judgement, para. 144, fn. 437.
[105] *See Martić* Appeal Judgement, paras 292-295.
[106] *Blaškić* Appeal Judgement, para. 110.
[107] *Blaškić* Appeal Judgement, para. 113.
[108] *Kordić and Čerkez* Appeal Judgement, para. 97.
[109] *Galić* Appeal Judgement, fn. 437.
[110] *See Kunarac et al.* Appeal Judgement, para. 91: "To the extent that the alleged crimes against humanity were committed in the course of an armed conflict, the laws of war provide a benchmark against which the Chamber may assess the nature of the attack and the legality of the acts committed in its midst". *See* also *Kordić and Čerkez* Appeal Judgement, para. 96.
[111] *Strugar* Appeal Judgement, para. 178: "[I]n order to establish the existence of a violation of Common Article 3 under Article 3 of the Statute, a Trial Chamber must be satisfied beyond a reasonable doubt that the victim of the alleged offence was not participating in acts of war which by their nature or purpose are intended to cause actual harm

of "civilian" under Article 5 of the Statute, as correctly noted by the Trial Chamber,[112] is not determined by the position of the victims at the time of the commission of the underlying crime.[113]

36. Pursuant to this jurisprudence and in light of the facts of the case, the Trial Chamber found that the victims were predominantly non-civilians.[114] However, the Appeals Chamber has found that the Trial Chamber erred in law in concluding that, for the purposes of Article 5 of the Statute, the victims of the underlying crime must be civilians, and consequently erroneously creating an additional requirement under Article 5 of the Statute. Accordingly, the Appeals Chamber must determine whether this error has the effect of invalidating the Trial Judgement. To that end and in light of the finding in the *Martić* Appeal Judgement that "[u]nder Article 5 of the Statute, a person *hors de combat* may thus be the victim of an act amounting to a crime against humanity, provided that all other necessary conditions are met, in particular that the act in question is part of a widespread or systematic attack against any civilian population",[115] the Appeals Chamber will assess whether in the instant case all other necessary conditions to enter a conviction for crimes against humanity had been met.

37. When assessing whether the jurisdictional requirements of Article 5 of the Statute were met, the Trial Chamber found that there was a widespread and systematic attack against the civilian population of Vukovar,[116] and then erroneously turned to examine whether the additional requirement it created that the victims of the underlying crimes must be civilians was fulfilled.[117] As noted above, it found that the victims were predominantly non-civilians[118] and, consequently,

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to the personnel or equipment of the enemy's armed forces. Such an enquiry must be undertaken on a case-by-case basis, having regard to the individual circumstances of the victim at the time of the alleged offence". (footnote omitted).

[112] Trial Judgement, para. 455.

[113] *See Blaškić* Appeal Judgement, para. 114, in which the Appeals Chamber overturned the Trial Chamber's finding that the specific situation of the victim at the time the crimes were committed must be taken into account in determining his standing as a civilian. Relying on the ICRC Commentary to Article 43 of Additional Protocol I that "[a] civilian who is incorporated in an armed organization […] becomes a member of the military and a combatant throughout the duration of the hostilities" (ICRC Commentary, p. 515, para. 1676), the Appeals Chamber concluded: "[T]he specific situation of the victim at the time the crimes are committed may not be determinative of his civilian or non-civilian status. If he is indeed a member of an armed organization, the fact that he is not armed or in combat at the time of the commission of crimes, does not accord him civilian status". *See* also *Kordić and Čerkez* Appeal Judgement para. 421: "The Appeals Chamber recalls that during an armed conflict, until a soldier is demobilized, he is considered a combatant whether or not he is in combat, or for the time being armed"; *Martić* Appeal Judgement, paras 292-295.

[114] Trial Judgement, para. 481. The Trial Chamber found that the evidence indicated that of the 194 persons identified as among those alleged in the Indictment to have been murdered at Ovčara in the evening and night hours of 20/21 November 1991, 181 were known to be active in the Croatian forces in Vukovar. The Trial Chamber concluded that the effect of the evidence was that the majority of these men (and two women) were members or reserve members of ZNG (87) and that there was also a considerable number of members of the HV (30) and the Croatian MUP (17); there were some members of the Croatian protection force of Vukovar (9) and a few members of the Croatian paramilitary formation HOS (Croatian's Liberation Forces, *Hrvatske Oslobodilacke Snage*); regarding the cases of nine other victims the Trial Chamber accepted evidence of their military involvement; there were also 13 persons in respect of whom no known military involvement was established by the evidence (Trial Judgement, para. 479).

[115] *Martić* Appeal Judgement, para. 313.

[116] Trial Judgement, para. 472.

[117] Trial Judgement, Section VII(B)(2)(b): "Status of the victims alleged in the Indictment".

[118] Trial Judgement, para. 481.

that "the jurisdictional prerequisites of Article 5 of the Statute ha[d] not been established".[119] As a result of its error of law, the Trial Chamber accordingly did not conduct the relevant enquiry regarding the requirements under Article 5 of the Statute and, in particular, did not seek to establish whether there was a nexus between the crimes committed in Ovčara and the widespread and systematic attack against the civilian population of Vukovar. At the appeals hearing, the Parties were invited to discuss the evidence on the trial record relating to: (i) the requirement of a widespread or systematic attack against a civilian population, especially in relation to the events in Vukovar; and (ii) the nexus between the acts of the accused and such an attack.[120] For the reasons set out below, and in light of the evidence before the Trial Chamber,[121] the Appeals Chamber finds that there was no such nexus and that the crimes committed in Ovčara did not qualify as crimes against humanity.

38. The Trial Chamber found that "at the time relevant to the Indictment, there was in fact, not only a military operation against the Croat forces in and around Vukovar, but also a widespread and systematic attack by the JNA and other Serb forces directed against the Croat and other non-Serb civilian population in the wider Vukovar area".[122] The Prosecution submits that there was a widespread and systematic attack against the civilian population of Vukovar and a nexus between the crimes committed in Ovčara and such an attack.[123] It argues that since the inhumane acts, torture and murder of the prisoners at Ovčara took place as part of that widespread and systematic attack against the civilian population of Vukovar,[124] the requirements for entering convictions under Article 5 of the Statute were met and whether or not the individual victims were civilians was "beside the point".[125] It states that the crimes committed against the prisoners took place as part of the "sustained and relentless attack against Vukovar and its citizens" and was an "inexorable part" of it.[126]

39. Mrkšić responds that the victims in the present case were not civilians.[127] He contends that the evidence at trial showed that the victims were subjected to a triage based on their belonging to the Croatian forces or because they were suspected of having committed war crimes or criminal

[119] Trial Judgement, para. 482.
[120] Addendum to the Scheduling Order for Appeals Hearing, 12 December 2008, Question 1, p. 1.
[121] *See supra* Section II: "Standard of Review on Appeal", para. 12.
[122] Trial Judgement, para. 472.
[123] AT. 238, referring to Trial Judgement, paras 17-59, 465-472.
[124] Prosecution Appeal Brief, para. 25, citing Trial Judgement, para. 472. *See* also Prosecution Appeal Brief, para. 69.
[125] Prosecution Appeal Brief, para. 25, citing *Kordić and Čerkez* Appeal Judgement, para. 480. *See* also Prosecution Appeal Brief, para. 22.
[126] Prosecution Brief in Reply, para. 3. *See* also AT. 238.
[127] Mrkšić Respondent's Brief, para. 13.

acts.[128] Further, Mrkšić argues that there cannot be a nexus between the crimes committed in Ovčara and the widespread and systematic attack against the civilian population of Vukovar because such an attack stopped on 18 November 1991.[129]

40. Šljivančanin responds that the Prosecution's argument that the crimes charged in the Indictment are crimes against humanity, regardless of whether the persons harmed in the attack were civilians, because they took place as part of a widespread and systematic attack against the civilian population of Vukovar, is "unsustainable" because it would imply that the killing of combatants – whether lawful or not – during an attack directed at a military objective could qualify as a crime against humanity.[130] Further, Šljivančanin argues that the requirement that the acts of an accused must be part of a widespread or systematic attack against a civilian population implies that such acts must be "by [their] nature or consequences […] objectively part of the attack",[131] must be sufficiently connected to the attack,[132] and cannot be isolated acts.[133] In his view, the Trial Chamber's finding that the perpetrators of the crimes in Ovčara "acted in the knowledge or belief that […] the victims were prisoners of war, not civilians"[134] and "in the understanding that their acts were directed against members of the Croatian forces"[135] implies that no reasonable trier of fact could have concluded that the perpetrators must have understood that their acts were part of the attack on the civilian population of Vukovar.[136] Šljivančanin also argues that the crimes committed in Ovčara on 20 November 1991 cannot be part of the widespread and systematic attack against the civilian population of Vukovar because such an attack ended on 18 November 1991.[137]

41. The Appeals Chamber recalls that once the requirement of a widespread or systematic attack against a civilian population is fulfilled, there must be a nexus between the acts of the accused and the attack itself. The Appeals Chamber considers that, as correctly noted by the Prosecution,[138] the requirement that the acts of an accused must be part of the "attack" against the civilian population does not, however, require that they be committed in the midst of that attack: a crime which is committed before or after the main attack against the civilian population or away from it could still,

[128] Mrkšić Respondent's Brief, paras 26-32, citing Trial Judgement, paras 477-480. *See* also Mrkšić Respondent's Brief, paras 34-37, 40, 44-46, 50-51. *See* also AT. 245-246, citing Trial Judgement, paras 480-481.
[129] AT. 242-244, 246, citing Trial Judgement, paras 55, 465, 472, 474, 476.
[130] Šljivančanin Respondent's Brief, paras 86-88. *See* also Šljivančanin Respondent's Brief, para. 121.
[131] Šljivančanin Respondent's Brief, para. 93, quoting *Kunarac et al.* Appeal Judgement, para. 99 and fn. 117. *See* also Šljivančanin Respondent's Brief, paras 96, 99; AT. 261-262, 268-269.
[132] Šljivančanin Respondent's Brief, para. 94.
[133] Šljivančanin Respondent's Brief, para. 95.
[134] Trial Judgement, para. 480.
[135] Trial Judgement, para. 481.
[136] Šljivančanin Respondent's Brief, para. 100. *See* also AT. 269-272, citing Trial Judgement, paras 480-481.
[137] AT. 263-268, citing Trial Judgement, paras 130-144, 157, 189, 199, 422, 465, 466, 468, 470, 472.
[138] AT. 301.

if sufficiently connected, be part of that attack.[139] Hence, the fact that the crimes committed in Ovčara took place after the widespread and systematic attack against the civilian population of Vukovar cannot in itself be determinative of whether the nexus requirement was met. Such a nexus consists of two elements:

> (i) the commission of an act which, by its nature or consequences, is objectively part of the attack; coupled with
>
> (ii) knowledge on the part of the accused that there is an attack on the civilian population and that his act is part thereof.[140]

Thus, to convict an accused of crimes against humanity, it must be proven that his acts were related to a widespread or systematic attack against a civilian population and that he knew that his acts were so related. Such an assessment will be made on a case-by-case basis. For example, having considered the context and circumstances in which an act was committed, an act may be so far removed from the attack that no nexus can be established (so called "isolated act") and hence cannot qualify as a crime against humanity.[141]

42. In the present case, after reviewing the evidence before it, the Trial Chamber concluded that the perpetrators of the crimes committed against the prisoners in Ovčara selected the individuals based on their involvement in the Croatian armed forces. The Trial Chamber found:

> While there may have been a small number of civilians among the 194 identified murder victims charged in the Indictment, in the Chamber's finding, the perpetrators of the offences against the prisoners at Ovčara on 20/21 November 1991 charged in the Indictment, *acted in the understanding that their acts were directed against members of the Croatian forces*."[142]

The Appeals Chamber concurs with the Trial Chamber's assessment of the evidence in the trial record. The crimes in Ovčara were directed against a specific group of individuals,[143] the victims of the crimes were selected based on their perceived involvement in the Croatian armed forces,[144] and as such treated "differently from the civilian population".[145] The Prosecution's arguments that the crimes occurred two days after the fall of Vukovar, that Ovčara was located within the geographical scope of the attack against Vukovar, that the perpetrators of the crimes in Ovčara also participated in the attack against the civilian population in Vukovar, and that the perpetrators of the crimes

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[139] *Kunarac et al.* Appeal Judgement, para. 100.
[140] *Tadić* Appeal Judgement, paras 248, 251, 271; *Kunarac et al.* Appeal Judgement, para. 99. For the *mens rea* of crimes against humanity, *see Kunarac et al.* Appeal Judgement, paras 102-103.
[141] *Kunarac et al.* Appeal Judgement, para. 100. *See* also *Blaškić* Appeal Judgement, para. 101.
[142] Trial Judgement, para. 481. *See* also Trial Judgement, para. 207.
[143] Trial Judgement, para. 474.
[144] Trial Judgement, para. 475.
[145] Trial Judgement, para. 476.

"harboured intense feeling of animosity towards persons they perceived as enemy forces,[146] do not undermine the Trial Chamber's findings, unchallenged by the Parties, that the perpetrators of the crimes in Ovčara acted in the understanding that their acts were directed against members of the Croatian armed forces. The fact that they acted in such a way precludes that they intended that their acts form part of the attack against the civilian population of Vukovar and renders their acts so removed from the attack that no nexus can be established.

43. The Appeals Chamber finds that the requirement of a nexus between the acts of the accused and the attack itself was not established and that, in the absence of the required nexus under Article 5 of the Statute between the crimes committed against the prisoners at Ovčara and the widespread or systematic attack against the civilian population of Vukovar, the crimes committed cannot be qualified as crimes against humanity. Thus, even though the Trial Chamber erred in law by adding a requirement that the victims of the underlying crimes under Article 5 of the Statute be civilians, the Appeals Chamber concurs with the Trial Chamber – albeit for different reasons – that the "jurisdictional prerequisites of Article 5 of the Statute have not been established".[147]

44. In light of the foregoing, the Appeals Chamber allows the Prosecution's first ground of appeal, insofar as it argues that the Trial Chamber erred in law in finding that, for the purposes of Article 5 of the Statute, the victims of crimes against humanity must be civilians, thus excluding persons *hors de combat* from being victims of crimes against humanity. The Appeals Chamber dismisses the Prosecution's first ground of appeal in all other respects and upholds the acquittals of Šljivančanin and Mrkšić under Article 5 of the Statute.

B. Second Ground of Appeal: Šljivančanin's Responsibility for Aiding and Abetting Murder

1. Introduction

45. The Trial Chamber found that 194 people identified in the Schedule to the Trial Judgement were taken from the Vukovar hospital to Ovčara, where Serb forces mistreated them and later executed them.[148] It concluded that on 20 November 1991, Šljivančanin exercised command authority (conferred on him by Mrkšić) over the military police involved in the evacuation of prisoners of war from the hospital and guarding them on the buses at the JNA barracks and at Ovčara.[149] The Trial Chamber further found that Šljivančanin could not be held responsible, under Article 7(1) of the Statute, for having ordered the commission of any of the crimes established in

[146] Prosecution Brief in Reply, paras 26, 39-40. *See* also AT. 238-241, 302.
[147] Trial Judgement, para. 482.
[148] *See* Schedule to the Trial Judgement.
[149] *See* Trial Judgement, paras 397, 400, 659, 667.

this case,[150] or under Article 7(3) of the Statute for having failed to prevent the commission of crimes, or to punish the perpetrators.[151] The Trial Chamber found that once all JNA military police withdrew from Ovčara pursuant to Mrkšić's order, Šljivančanin necessarily ceased to be responsible for the security of the prisoners of war.[152] It therefore concluded that Šljivančanin was not responsible for the murders committed by TOs and paramilitary troops after the JNA military police were withdrawn from Ovčara.[153]

46. In its second ground of appeal, the Prosecution avers that "[t]he Trial Chamber erred in fact and in law in paragraphs 674 and 715 [of the Trial Judgement] in failing to find that Veselin Šljivančanin was responsible for aiding and abetting the murder of the 194 prisoners killed at the grave site near Ovčara on the evening and night of 20/21 November 1991".[154] It submits that this finding was reached as a result of erroneous conclusions of law and fact and consequently challenges paragraphs 668, 669, 672, 673 and 691 of the Trial Judgement.[155] It requests that the Appeals Chamber enter a conviction against Šljivančanin under Article 3 of the Statute for aiding and abetting the murder of 194 prisoners killed near Ovčara on the evening and night of 20/21 November 1991[156] and, in the event its first ground of appeal succeeds, to enter a conviction against Šljivančanin under Article 5 of the Statute for murder as a crime against humanity[157] and increase his sentence to a term of 30 years to life imprisonment.[158]

47. The Prosecution submits that Šljivančanin's acquittal is based on two errors: (a) the Trial Chamber's failure to find that Šljivančanin knew, at the time of his visit to Ovčara, that the TOs and paramilitaries would likely kill the prisoners;[159] and (b) the Trial Chamber's erroneous finding that Šljivančanin's legal duty towards the prisoners ended upon the withdrawal of the last JNA troops from Ovčara upon Mrkšić's orders.[160]

48. Šljivančanin responds that this ground of appeal should be dismissed because the Prosecution failed to show any discernible error on the part of the Trial Chamber, is merely

[150] Trial Judgement, para. 654.
[151] Trial Judgement, para. 676.
[152] Trial Judgement, para. 673.
[153] Trial Judgement, paras 674, 715.
[154] Prosecution Notice of Appeal, para. 8.
[155] Prosecution Notice of Appeal, para. 8; Prosecution Appeal Brief, para. 79.
[156] Prosecution Notice of Appeal, para. 10.
[157] Prosecution Notice of Appeal, para. 11.
[158] Prosecution Notice of Appeal, para. 12; Prosecution Appeal Brief, para. 152.
[159] Prosecution Notice of Appeal, para. 8(i); Prosecution Appeal Brief, para. 79(a), citing Trial Judgement, para. 672; Prosecution Appeal Brief, para. 85. *See* also AT. 213.
[160] Prosecution Notice of Appeal, para. 8(ii); Prosecution Appeal Brief, para. 79(b), citing Trial Judgement, paras 668, 673, 691; Prosecution Appeal Brief, para. 109, citing Trial Judgement, paras 668, 673, 691. The Prosecution points out that "the Trial Chamber found that this withdrawal occurred no later than 2100 hours on 20 November 1991". Prosecution Appeal Brief, fn. 200, citing Trial Judgement, para. 294. *See* also AT. 214-15.

repeating on appeal arguments that did not succeed at trial, and is unacceptably seeking to substitute its own evaluation of the evidence for that of the Trial Chamber.[161]

49. At the outset, the Appeals Chamber recalls that to enter a conviction for aiding and abetting murder by omission, at a minimum, all the basic elements of aiding and abetting must be fulfilled.[162] In this regard, the Appeals Chamber in *Orić* recalled that "omission proper may lead to individual criminal responsibility under Article 7(1) of the Statute where there is a legal duty to act".[163] The *actus reus* of aiding and abetting by omission will thus be fulfilled when it is established that the failure to discharge a legal duty assisted, encouraged or lent moral support to the perpetration of the crime and had a substantial effect on the realisation of that crime.[164] The Appeals Chamber recalls that aiding and abetting by omission implicitly requires that the accused had the ability to act, such that there were means available to the accused to fulfil his duty.[165] Meanwhile, the required *mens rea* for aiding and abetting by omission is that "[t]he aider and abettor must know that his omission assists in the commission of the crime of the principal perpetrator and must be aware of the essential elements of the crime which was ultimately committed by the principal".[166] As the Appeals Chamber held in the *Simić* case,

> it is not necessary that the aider and abettor knows either the precise crime that was intended or the one that was, in the event, committed. If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abetter.[167]

Furthermore, the Appeals Chamber recalls that to overturn an acquittal on appeal, the Prosecution must show that all reasonable doubt as to the accused's guilt has been eliminated.[168]

50. While the Appeals Chamber recognises that the consideration of the elements of the *actus reus* of a crime logically precedes the consideration of the *mens rea*, in the present case the Appeals

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[161] *See* Šljivančanin Respondent's Brief, paras 142-144, 280, 289. Šljivančanin further refers to his argument developed in his Appeal Brief that aiding and abetting by omission is not a recognised mode of liability which he submits, if accepted, would be of significance in upholding his acquittal on the murder of the prisoners of war at Ovčara: Šljivančanin Respondent's Brief, paras 133-135, 145-168.
[162] *Orić* Appeal Judgement, para. 43.
[163] *Orić* Appeal Judgement, para. 43, citing *Brdanin* Appeal Judgement, para. 274; *Galić* Appeal Judgement, para. 175; *Ntagerura et al.* Appeal Judgement, paras 334, 370; *Blaškić* Appeal Judgement, para. 663.
[164] *Orić* Appeal Judgement, para. 43, citing *Nahimana et al.* Appeal Judgement, para. 482; *Simić* Appeal Judgement, para. 85.
[165] *Cf. Ntagerura et al.* Appeal Judgement, para. 335.
[166] *Orić* Appeal Judgement, para. 43 (footnotes omitted).
[167] *Simić* Appeal Judgement, para. 86, citing *Blaškić* Appeal Judgement, para. 50. *See* also *Ndindabahizi* Appeal Judgement, para. 122.
[168] *Seromba* Appeal Judgement, para. 11; *Rutaganda* Appeal Judgement, para. 24; *Bagilishema* Appeal Judgement, paras 13-14. *See* also *Strugar* Appeal Judgement, para. 14; *Orić* Appeal Judgement, para. 12; *Halilović* Appeal Judgement, para. 11; *Limaj et al.* Appeal Judgement, para. 13; *Blagojević and Jokić* Appeal Judgement, para. 9; *Brdanin* Appeal Judgement, para. 14.

Chamber will follow the order of the arguments as presented by the Prosecution and will therefore turn first to its arguments regarding Šljivančanin's *mens rea* for aiding and abetting murder.

2. Šljivančanin's *mens rea* for aiding and abetting murder

51. The Prosecution submits that the Trial Chamber erred in finding that Šljivančanin lacked the *mens rea* for aiding and abetting murder,[169] as no reasonable Trial Chamber could have concluded that he could have reasonably believed that the TOs and paramilitaries would not kill the prisoners because of the JNA's presence at Ovčara.[170] In support of its allegation, the Prosecution avers that Šljivančanin had specific knowledge of the murderous inclination of the TOs and paramilitaries operating in Vukovar towards Croatian prisoners[171] due to his knowledge of: (i) crimes (including murder) committed by the TOs and paramilitaries prior to 19 November 1991;[172] (ii) crimes committed at Velepromet on 19 November 1991;[173] (iii) crimes committed at the JNA barracks on the morning of 20 November 1991[174] and (iv) crimes committed at Ovčara on the afternoon of 20 November 1991.[175] According to the Prosecution, this "accumulated knowledge [was] sufficient in itself to establish [Šljivančanin's] *mens rea* for aiding and abetting murder,"[176] even before learning of the order to withdraw the JNA troops.

52. Further, the Prosecution argues that this knowledge of the probability of murder became even greater upon learning that Mrkšić had ordered the JNA to withdraw from Ovčara on the evening of 20 November 1991.[177] In this regard, the Prosecution argues that the only reasonable inference based on the totality of the evidence is that Šljivančanin learned of Mrkšić's order to withdraw upon his return to the command post at Negoslavci in the evening.[178]

53. Šljivančanin responds that the Prosecution merely attempts to substitute its own interpretation of the evidence for that of the Trial Chamber without showing a discernible error.[179] He submits that the issue relevant to his *mens rea* is not his prior knowledge of the TOs' and paramilitaries' propensity to commit crimes but rather the prior conduct of the JNA towards the

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[169] Prosecution Appeal Brief, para. 104. *See* also AT. 215.
[170] Prosecution Appeal Brief, paras 85, 98-100, 104. *See* also AT. 292.
[171] Prosecution Appeal Brief, para. 89.
[172] Prosecution Appeal Brief, para. 86.
[173] *See* Prosecution Appeal Brief, paras 87-92; *see* also Prosecution Brief in Reply, paras 48-51. *See* also AT. 293-294.
[174] Prosecution Appeal Brief, paras 93, 94, citing Trial Judgement, paras 217, 220, 372, 374, 375, 666. *See* also Prosecution Appeal Brief, paras 53-59.
[175] Prosecution Appeal Brief, paras 95-96, citing Trial Judgement, paras 234-235, 663, 667. *See* also Prosecution Brief in Reply, paras 63-68.
[176] Prosecution Appeal Brief, para. 101. *See* also AT. 216-219.
[177] Prosecution Appeal Brief, paras 101-103. *See* also Prosecution Brief in Reply, paras 60-62, 92; AT. 225.
[178] AT. 219-223, 294-295.
[179] Šljivančanin Respondent's Brief, para. 186. *See* also AT. 274.

prisoners of war.[180] In this respect, he avers that the Croatian prisoners of war murdered at Velepromet were not under the guard of the JNA,[181] and that once the JNA took over, they prevented paramilitaries from committing crimes against the prisoners.[182] Similarly, he emphasizes that neither the paramilitaries nor the TOs mistreated the prisoners of war on the buses under JNA control at Ovčara.[183]

54. Concerning his alleged knowledge of the crimes committed at the JNA barracks and at Ovčara on 20 November 1991, Šljivančanin denies that he was present at the JNA barracks when the TOs and paramilitaries mistreated the prisoners,[184] or at Ovčara later that afternoon.[185] He asserts that even if the Trial Chamber's findings regarding his presence at the JNA barracks and Ovčara were affirmed, they would still be insufficient to lead to the conclusion that he witnessed the mistreatment as he could only have been there after the incidents outside the buses were over.[186] He submits that based on the facts of the case, the only conclusion that could have been reached on the basis of his previous knowledge of incidents of mistreatment, was that he must have been aware that at least some of the TOs and paramilitaries were capable of killing. However, he submits that, given the presence of the JNA, he could have reasonably believed that the TOs and paramilitaries would not resort to killing.[187]

55. Finally, Šljivančanin contends that he did not know that Mrkšić had ordered the remaining JNA security to withdraw from Ovčara[188] nor did the Trial Chamber reach any conclusion that would have allowed it to infer that he was informed of the withdrawal that night.[189] He points out that whether he knew of Mrkšić's withdrawal order is irrelevant because his duty to protect the prisoners at Ovčara was at an end.[190]

56. In reply, the Prosecution submits that Šljivančanin obscures the cumulative effect of all the prior events on Šljivančanin's knowledge by separating each strand of knowledge regarding the TOs' and paramilitaries' criminal conduct and focusing on the conduct of the JNA as the only

[180] Šljivančanin Respondent's Brief, paras 183-184.
[181] Šljivančanin Respondent's Brief, paras 174-175, 188-190, 192-198.
[182] Šljivančanin Respondent's Brief, paras 190, 194. *See* also AT. 279.
[183] Šljivančanin Respondent's Brief, para. 205. *See* also AT. 280-281.
[184] Šljivančanin Respondent's Brief, paras 176-177, citing Trial Judgement, para. 372. *See* also Šljivančanin Respondent's Brief, para. 200; AT. 277.
[185] Šljivančanin Respondent's Brief para. 218. *See* also Šljivančanin Notice of Appeal, para. 7; AT. 277.
[186] Šljivančanin Respondent's Brief, paras 201-203, 217-228.
[187] Šljivančanin Respondent's Brief, paras 207, 228, citing Trial Judgement, para. 672. *See* also AT. 275-276, 278-282.
[188] Šljivančanin Respondent's Brief, paras 178, 208-210. *See* also AT. 277, 283-287.
[189] Šljivančanin Respondent's Brief, para. 179. *See* also Šljivančanin Respondent's Brief, para. 215.
[190] Šljivančanin Respondent's Brief, para. 180.

relevant consideration on the issue of *mens rea*.[191] It futher counters that the JNA's presence did not prevent the mistreatment of prisoners.[192]

(a) Šljivančanin's knowledge prior to the order to withdraw the JNA troops from Ovčara

57. The Trial Chamber found that it was only upon the final withdrawal of the military police of the 80 mtbr of the JNA troops from Ovčara on the evening of 20 November 1991 that the killing of the prisoners of war became a likely occurrence and, therefore, that it was possible that Šljivančanin did not foresee the likelihood of the murders prior to learning of the final withdrawal.[193] In reaching this conclusion, the Trial Chamber took into consideration its findings that Šljivančanin was aware of instances of grave mistreatment, including killing, of prisoners of war by TOs and paramilitaries in the preceding weeks,[194] and specifically of the mistreatment and killings of prisoners of war by TOs and paramilitaries at Velepromet on 19 November 1991.[195] Furthermore, with regard to the prisoners of war under Šljivančanin's responsibility who were transferred to Ovčara on 20 November 1991, the Trial Chamber considered Šljivančanin's knowledge of the physical abuse suffered by the prisoners of war at the JNA barracks at the hands of the TOs[196] and found that he must have witnessed the mistreatment of the prisoners of war at Ovčara in the afternoon of 20 November 1991.[197]

58. The Trial Chamber therefore considered the impact of each of the incidents raised in the Prosecution's Appeal Brief regarding Šljivančanin's knowledge of the security situation facing the prisoners of war. The Prosecution does not show any errors in the factual findings of the Trial Chamber on these events but rather relies upon these findings to impugn the conclusion drawn from them and propound a different conclusion. The Prosecution relied on these findings to support the conclusion that Šljivančanin had sufficient accumulated knowledge to fulfil the *mens rea* requirement while the Trial Chamber concluded that it was possible that Šljivančanin's knowledge of the security situation facing the prisoners of war, based on his accumulated knowledge of these incidents of mistreatment, did not lead to an awareness of the likelihood of killings as long as there was a continued presence of JNA troops.[198]

59. In reaching the conclusion that the accumulated knowledge of these previous incidents was insufficient to establish that Šljivančanin was aware that the prisoners of war would probably be

[191] Prosecution Brief in Reply, para. 47.
[192] Prosecution Brief in Reply, paras 48-52, 55, 58.
[193] Trial Judgement, para. 672.
[194] Trial Judgement, paras 664-665.
[195] Trial Judgement, para. 666.
[196] Trial Judgement, para. 375.
[197] Trial Judgement, paras 663, 672.
[198] Trial Judgement, paras 672, 691.

killed, the Trial Chamber did not ignore that the protection by the JNA soldiers was afforded "temporarily and insufficiently".[199] Indeed, the failure of the JNA troops to provide sufficient protection to the prisoners of war formed the basis for Šljivančanin's conviction for the torture.[200] Yet it found that: "although imperfectly, it is clear that the JNA military police present at the buses, and later those who removed the TO members and paramilitaries from the barracks, were preventing effect being given to [the wishes of TOs and paramilitaries to commit crimes of the nature of the crimes described in the Indictment]".[201] It was not unreasonable for the Trial Chamber to have concluded based on the context that, as long as the presence of the JNA troops continued, the JNA troops might have continued to provide a sufficient intervening element to prevent the mistreatment by TOs and paramilitaries from escalating from physical abuse to killing despite their failure to prevent mistreatment altogether. Thus, it was not unreasonable for the Trial Chamber to conclude that Šljivančanin "could reasonably have believed in the circumstances that the TOs and paramilitaries would be unlikely to resort to killing".[202]

60. Accordingly, the Appeals Chamber finds that the Prosecution fails to show that it was unreasonable for the Trial Chamber to find that it was unable to conclude that, at the time of his visit to Ovčara, Šljivančanin was aware that the prisoners of war would probably be murdered[203] with the result that he did not possess the requisite *mens rea* for aiding and abetting murder as long as he was under the understanding that the JNA troops remained at Ovčara. The Prosecution fails to demonstrate that the Trial Chamber made any errors of fact at paragraphs 672 and 691 of the Trial Judgement which resulted in a miscarriage of justice.

(b) Šljivančanin's knowledge following the order to withdraw the JNA troops from Ovčara

61. Turning to the Prosecution's argument that Šljivančanin's accumulated knowledge "became even greater" during the evening of 20 November 1991 when he learned of the JNA's withdrawal,[204] the Appeals Chamber notes that the Trial Chamber did not make a finding or draw any inference as to when or whether Šljivančanin became aware of the order to withdraw the JNA troops on the night of 20 November 1991.[205] The Trial Chamber found that "[t]here is no indication in the evidence that Veselin Šljivančanin was at Negoslavci at the time the order was first given by Mile Mrkšić. He could have been informed by other means but this is merely conjecture".[206] The

[199] Trial Judgement, para. 596.
[200] Trial Judgement, paras 663-667, 672, 674, 715.
[201] Trial Judgement, para. 594.
[202] Trial Judgement, para. 672.
[203] *See* Trial Judgement, paras 672, 691.
[204] Prosecution Appeal Brief, paras 101-103.
[205] *See* Trial Judgement, paras 387-389, 672, 691.
[206] Trial Judgement, para. 661.

Appeals Chamber recalls the following findings from the Trial Judgement: Šljivančanin was not involved in the transmission of Mrkšić's order to withdraw the JNA troops from Ovčara[207] and did not attend the briefing at the command post in Negoslavci on 20 November 1991;[208] upon his return to Negoslavci, Šljivančanin met with his deputy Major Vukašinović who informed him of the problems with the TOs in Ovčara;[209] Šljivančanin then met with Captain Borisavljević who told him about the meeting of the SAO "government";[210] finally, Šljivančanin met with Mrkšić and Panić.[211] There is no direct evidence that Vukašinović or Borisavljević knew of the withdrawal at the time they met with Šljivančanin or that they discussed it.[212] Similarly, there is no direct evidence that Šljivančanin was informed of the withdrawal in the course of his meeting with Mrkšić and Panić[213] although they did discuss the "hospital issue".[214]

62. However, with regard to his meeting with Mile Mrkšić on the night of 20 November 1991, Šljivančanin testified: "I went to see Mrkšić to tell him what I'd seen at the hospital, and what happened at the hospital that day and to see what would be further tasks and duties".[215] Given that Šljivančanin was inquiring about his next duties and had been delegated the responsibility for the security of the prisoners of war by Mrkšić, the only reasonable conclusion that can be drawn is that Mrkšić must have told Šljivančanin that he had withdrawn the JNA protection from the prisoners of war held at Ovčara and thus also Šljivančanin's responsibility for the prisoners of war. The Appeals Chamber therefore finds that Šljivančanin learned of the withdrawal of the JNA troops in the course of his meeting with Mrkšić on the night of 20 November 1991. Given the Trial Chamber's finding that it was Šljivančanin's knowledge of the presence of the JNA troops that precluded him from concluding that the killing of the prisoners of war was a likely occurrence,[216] the only reasonable inference is that upon learning of the order to withdraw the troops, Šljivančanin must have realised that the killing of the prisoners of war at Ovčara had become a likely occurrence.

63. Similarly, knowing that the killing of prisoners of war was the likely outcome of their being left in the custody of the TOs and paramilitaries, Šljivančanin must have also realised that, given his responsibility for the prisoners of war, if he failed to take action to ensure the continued protection of prisoners of war he would be assisting the TOs and paramilitaries to carry out the murders. As a result, the Appeals Chamber finds that upon learning of the order to withdraw the JNA troops from

[207] Trial Judgement, para. 285.
[208] Trial Judgement, para. 387.
[209] *See* Trial Judgement, para. 388; Veselin Šljivančanin, T. 13663; Ljubiša Vukašinović, T. 15046.
[210] *See* Trial Judgement, para. 389; Veselin Šljivančanin, T. 13663-13665.
[211] *See* Trial Judgement, para. 389; Veselin Šljivančanin, T. 13665-13666, 13983-13990.
[212] *See* Trial Judgement, paras 388-389; Veselin Šljivančanin, T. 13663-13665; Ljubiša Vukašinović, T. 15046.
[213] *See* Trial Judgement, para. 389; Veselin Šljivančanin, T. 13665-13666, 13983-13990.
[214] Veselin Šljivančanin, T. 13665. *See* also Veselin Šljivančanin, T. 13983-13988.
[215] Veselin Šljivančanin, T. 13983.
[216] Trial Judgement, para. 672.

Mrkšić at their meeting of the night of 20 November 1991, the only reasonable inference is that Šljivančanin must have been aware that the TOs and paramilitaries would likely kill the prisoners of war and that if he failed to act, his omission would assist in the murder of the prisoners. Accordingly, the Appeals Chamber finds that Šljivančanin formed the *mens rea* for aiding and abetting murder. Consideration of whether the elements of the *actus reus* of aiding and abetting murder were fulfilled will be addressed below.

3. Šljivančanin's legal duty towards the prisoners

64. The Trial Chamber acquitted Šljivančanin of the murder of the prisoners of war on the night of 20 November 1991 at Ovčara on the basis that his responsibility for the welfare and security of the prisoners of war ended with the withdrawal of the last JNA troops from Ovčara.[217] The Prosecution submits that the Trial Chamber erred in delineating the temporal scope of Šljivančanin's legal duty.[218] In this regard, it contends that the Trial Chamber erred in finding that Šljivančanin's legal duty toward the prisoners of war ended upon the withdrawal of the JNA troops from Ovčara; it submits that Šljivančanin had a continuing legal duty under international humanitarian law even after Mrkšić ordered the withdrawal of JNA troops.[219] In support of this argument, in its written submissions, the Prosecution avers that three sources of duty towards the prisoners of war were applicable to him at the relevant time: (i) his duty under the laws and customs of war;[220] (ii) his duty in his capacity as chief of the security organ;[221] and (iii) his duty under Mrkšić's specific delegated authority.[222] However, at the appeals hearing the Prosecution conceded that Šljivančanin was not under a specific duty to protect the prisoners of war by reason of his position as chief of the security organ[223] and further implied that Šljivančanin's specially delegated authority from Mrkšić may also have come to an end upon Mrkšić's order to withdraw.[224]

65. Šljivančanin responds that he did not have continuing legal duties under the laws and customs of war because the duty to protect and treat prisoners of war humanely becomes a legal duty for an agent of the relevant state only when he is specifically invested with it by the Detaining Power or State pursuant to Geneva Convention III.[225] In this respect, he submits that Mrkšić did not

[217] Trial Judgement, paras 672-673.
[218] Prosecution Appeal Brief, para. 109.
[219] Prosecution Notice of Appeal, para. 8(ii); Prosecution Appeal Brief, paras 112, 117, 119. *See* also AT. 226, 228-236.
[220] Prosecution Appeal Brief, paras 111-119, citing Trial Judgement, paras 153, 189, 620, 668-670, 673, 691; Exhibit P396, "SFRY Regulations on the Application of the Rules of International Law of War in the Armed Forces, 1988"; Articles 5 and 13 of Geneva Convention III; ICRC Commentaries, p. 74.
[221] Prosecution Appeal Brief, paras 120-123, citing Trial Judgement, paras 62, 114, 118, 122, 125, 129, 397, 668, 669.
[222] Prosecution Appeal Brief, paras 124-129, citing Trial Judgement, paras 391-394, 396, 397, 400, 667-669, 672, 673, 691.
[223] AT. 101-102, 153, 200, 230.
[224] AT. 231.
[225] *See* Šljivančanin Respondent's Brief, paras 234(a), 240-245, citing Articles 12 and 13 of Geneva Convention III.

delegate to him any responsibility or duty to protect the prisoners at Ovčara.[226] In his Respondent's Brief he submits that if indeed he had a legal duty to protect the prisoners held in Ovčara,[227] such a duty ended with the withdrawal of the JNA troops as ruled by the Trial Chamber[228]; however, at the appeals hearing, he argued that any duty pursuant to Mrkšić's delegation of authority came to an end when the prisoners of war were diverted to Ovčara rather than proceeding to Sremska Mitrovica and he was not informed of the change of plan.[229] Furthermore, he posits that his functions as chief of security did not include any specific duty in relation to the protection of prisoners of war in the absence of a specific responsibility bestowed upon him.[230] Finally, he submits that the Prosecution failed to show any discernible error in the Trial Chamber's assessment of the temporal scope of his alleged duty towards the prisoners.[231]

66. In reply, the Prosecution submits that: (i) under Geneva Convention III military personnel acting as agents of the State acquire individual responsibility for violations of international humanitarian law without requiring a "specific investment";[232] (ii) Šljivančanin mischaracterises the Trial Chamber's findings on the military police and security organs and provides no support for his assertions concerning his functions as chief of security;[233] and (iii) Šljivančanin erroneously seeks to limit the Trial Chamber's findings regarding his delegated authority to individual specified tasks instead of overall responsibility for the evacuation from Vukovar hospital.[234]

67. The Prosecution's contention that there were three sources of duty underlying Šljivančanin's responsibility to protect the prisoners of war is reflected in the Trial Judgement's finding that:

> Šljivančanin was bound by the laws and customs of war, he was also entrusted, as security organ, with the task of implementing some of those laws, as far as the security of prisoners of war in the custody of the JNA was concerned, and he was under specific orders of Mile Mrkšić for the security of the prisoners.[235]

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[226] *See* Šljivančanin Respondent's Brief, paras 236, 268-273.
[227] *See* Šljivančanin Respondent's Brief, paras 245-246.
[228] Šljivančanin Respondent's Brief, para. 247.
[229] AT. 288-289.
[230] Šljivančanin Respondent's Brief, para. 235. *See* also Šljivančanin Respondent's Brief, paras 255-265, citing Trial Judgement, paras 116, 119, 124, 125, 148, 272, 275, 281, 302; Exhibit P107, "Rules of Service of the Security Organs in the Armed forces of SFRY, 1984"; Exhibit D371, "Operational Diary of the 80th mtbr/Motorized Brigade", entry for 18 November 1991 at 14:20 and at 16:00 hours; Exhibit P582, "Instructions on the Methods and Means of Work of the JNA Security Organs, 1986"; Exhibit D868, "Expert Report of Petar Vuga", pp. 21-24; Jovan Šušić, T. 14891. *See* also AT. 153, 200.
[231] Šljivančanin Respondent's Brief, para. 276.
[232] Prosecution Brief in Reply, paras 71-72, 76-77.
[233] Prosecution Brief in Reply, paras 78-80. As noted above, at the appeals hearing the Prosecution conceded that Šljivančanin was not under a specific duty to protect the prisoners of war by reason of his position as chief of the security organ: AT. 101-102, 153, 200, 230.
[234] Prosecution Brief in Reply, paras 81-84.
[235] Trial Judgement, para. 669. *See* also Trial Judgement, para. 668: "Veselin Šljivančanin was under a duty to protect the prisoners of war taken from the Vukovar hospital. The duty to protect prisoners of war was imposed on him by the laws and customs of war. It was also part of his remit as security organ of OG South. Further, the evidence indicates that from the time of removal of the prisoners of war from the hospital until that night when the JNA guards securing

Although the Trial Chamber stated that there were three sources of duty applicable to Šljivančanin with regard to the prisoners of war, when determining whether he was bound to protect the prisoners of war after the order to withdraw the JNA troops, the Trial Chamber only referred to the fact that the duty imposed on him by Mrkšić's delegation of responsibility was no longer binding on him.[236] Having concluded that the delegated duty had been terminated, the Trial Chamber did not proceed to consider whether the order also terminated the other sources of duty or whether they continued to impose on him a responsibility for the protection of the prisoners of war.

68. The Prosecution does not seek to challenge the Trial Chamber's finding regarding the sources of duty applicable to Šljivančanin with regard to the prisoners of war; rather it relies on it in support of its contention that Šljivančanin had a continuing legal duty to protect the prisoners of war throughout the afternoon, evening and night of 20 to 21 November 1991.[237] The essence of the Prosecution's argument is in fact that such a duty did not come to an end after the order to withdraw the JNA troops. Therefore, the Appeals Chamber need not re-examine the existence of the sources of duty. Rather it will consider whether the Trial Chamber erred in concluding that Šljivančanin's duty to protect the prisoners of war came to an end upon Mrkšić's order to withdraw or whether any of the sources of duty identified by the Trial Chamber imposed an ongoing responsibility on Šljivančanin to ensure the security of the prisoners of war after the order to withdraw the JNA troops from Ovčara had been issued.

69. The Appeals Chamber notes that the Trial Chamber did not make a finding as to whether the armed conflict in the municipality of Vukovar at the material time was of an international or non-international nature.[238] However, even in the context of an internal armed conflict, Geneva Convention III applies where the parties to the conflict have agreed that the Convention shall apply.[239] In this respect, the Appeals Chamber recalls the ECMM instructions to its monitors on the implementation of the Zagreb Agreement which indicated that the Geneva Conventions were to be applied to the prisoners of war.[240] In an order issued on 18 November 1991, Lt. General Života Panić directed that JNA units in the Vukovar area, including OG South, were to observe all aspects

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them were withdrawn, Veselin Šljivančanin was responsible for their security, a responsibility which included both their protection and prevention of their escape. This was a responsibility with which he had been entrusted by Mile Mrkšić in relation with the operation of removing war crime suspects from the hospital" (footnotes omitted).

[236] Trial Judgement, para. 673.

[237] *See* Prosecution Appeal Brief, paras 111-129.

[238] Trial Judgement, paras 422, 457.

[239] Geneva Convention III, Article 2: "Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof". *See* also Article 3: "The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention".

[240] Trial Judgement, para. 144, citing Exhibit P315, "ECMM fax to tasking cell regarding Zagreb Agreement, 19 November 1991".

of Geneva Convention III.[241] Furthermore, Colonel Nebojša Pavković advised the ECMM monitors of instructions from General Rašeta that Croat forces would not be evacuated with the rest of the humanitarian convoy but remain as prisoners of war and the Geneva Conventions would apply.[242] The Appeals Chamber considers that, while the Zagreb Agreement makes no mention of the application of Geneva Convention III to the Croat forces at the Vukovar hospital,[243] these documents provide sufficient evidence to conclude that the JNA had agreed that the Croat forces were to be considered prisoners of war and that Geneva Convention III was to apply.[244]

70. Additionally, the Appeals Chamber recalls the finding in the *Krnojelac* Appeal Judgement that "[t]he Geneva Conventions are considered to be the expression of customary international law".[245] In particular, it is well established that Common Article 3 of the Geneva Conventions, which is applicable to both international and non-international armed conflicts, is part of customary international law and therefore binds all parties to a conflict.[246] Common Article 3 enshrines the prohibition against any violence against the life and person of those taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause. The Appeals Chamber considers that Common Article 3 of the Geneva Conventions reflects the same spirit of the duty to protect members of armed forces who have laid down their arms and are detained as the specific protections afforded to prisoners of war in Geneva Convention III as a whole, particularly in its Article 13,[247] which provides that:

> Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention. […]

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[241] Trial Judgement, para. 581, citing Exhibit P415, "Order from 1 MD, 18 November 1991".
[242] Trial Judgement, para. 582, citing Exhibit D333, "ECMM Report of Evacuation of Vukovar, 19 November 1991".
[243] Exhibit P40, "Zagreb Agreement, 18 November 1991".
[244] *See* also Trial Judgement, paras 139, 189.
[245] *Krnojelac* Appeal Judgement, para. 220. *See* also *Čelebići* Appeal Judgement, paras 112-113: "It is indisputable that the Geneva Conventions fall within this category of universal multilateral treaties which reflect rules accepted and recognised by the international community as a whole. The Geneva Conventions enjoy nearly universal participation" (footnote omitted); Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), S/25704, 3 May 1993, para. 35: "The part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions of 12 August 1949 for the Protection of War Victims […]".
[246] *Kunarac et al.* Appeal Judgement, para. 68; *Čelebići* Appeal Judgement, paras 138-139, 147; *Tadić* Jurisdiction Decision, paras 89, 98. *See* also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* Merits, Judgment, I.C.J. Reports 1986, para. 218: "Article 3 which is common to al1 four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called 'elementary considerations of humanity'".
[247] *Cf.* ICRC Commentaries on Article 3 of Geneva Convention III which makes comparisons between Articles 3 and 13, pp. 39-40.

> Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity.

71. The fundamental principle enshrined in Geneva Convention III, which is non-derogable, that prisoners of war must be treated humanely and protected from physical and mental harm,[248] applies from the time they fall into the power of the enemy until their final release and repatriation.[249] It thus entails the obligation of each agent in charge of the protection or custody of the prisoners of war to ensure that their transfer to another agent will not diminish the protection the prisoners are entitled to. This obligation is so well established that it is even reflected in Article 46 of Geneva Convention III,[250] which applies to the transfer of prisoners of war to another location by the Detaining Power, and furthermore in paragraphs 2 and 3 of Article 12 of Geneva Convention III,[251] which applies to the transfer of prisoners of war to another High Contracting Party. The Appeals Chamber recalls that besides the JNA, the TO was one of the two constituent elements of the armed forces of the former Yugoslavia, and they were both subordinated to the Supreme Defence Council.[252] Thus, the military police of the 80 mtbr of the JNA should have satisfied itself of the willingness and ability of the TOs to apply the principle enshrined in Geneva Convention III, before transferring custody of the prisoners of war.

72. Although the duty to protect prisoners of war belongs in the first instance to the Detaining Power, this is not to the exclusion of individual responsibility. The first paragraph of Article 12 of Geneva Convention III places the responsibility for prisoners of war squarely on the Detaining Power; however, it also states that this is "[i]rrespective of the individual responsibilities that may exist". The ICRC Commentaries clarify that "[a]ny breach of the law is bound to be committed by one or more individuals and it is normally they who must answer for their acts".[253] The JNA Regulations further explicitly state that "[e]very individual – a member of the military or a

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[248] Article 13 of Geneva Convention III provides that "[p]risoners of war must at all times be humanely treated". This principle of humane treatment applies not only to physical integrity but also to mental integrity (*see* Article 13 of Geneva Convention III, para. 2 and commentary thereof, p. 141: "The concept of humane treatment implies in the first place the absence of any kind of corporal punishment. [...] The protection extends to moral values, such as the moral independence of the prisoner (protection against acts of intimidation) and his honour (protection against insults and public curiosity)). It was enshrined in the same terms in Article 2 of the Convention relative to the Treatment of Prisoners of War (Geneva, 27 July 1929). *See* also Article 4 of the Hague Regulations (Regulations Respecting the Laws and Customs of War on Land annexed to Hague Convention IV of 18 October 1907). The Hague Regulations undoubtedly form part of customary international law (*see Kordić and Čerkez* Appeal Judgement, para. 92).

[249] *See* Article 5 of Geneva Convention III.

[250] *See* Article 46 of Geneva Convention III, which provides that when transferring prisoners of war from one location to another, "[t]he Detaining Power shall take adequate precautions […] to ensure their safety during transfer".

[251] *See* Article 12 of Geneva Convention III, which provides: "Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention. When prisoners of war are transferred under such circumstances, responsibility for the application of the Convention rests on the Power accepting them while they are in its custody".

[252] *See* Trial Judgement, paras 83-84.

[253] ICRC Commentaries to Geneva Convention III, Article 12, p. 128.

civilian – shall be personally accountable for violations of the laws of war if he/she commits a violation or orders one to be committed".[254] The Prosecution submits that "[t]hus, members of the armed forces 'acquire' these international obligations with regard to prisoners of war. There is no further requirement of 'specific investment'" of authority as argued by Šljivančanin.[255] The Appeals Chamber agrees with this submission.

73. The Appeals Chamber thus finds that Geneva Convention III invests all agents of a Detaining Power into whose custody prisoners of war have come with the obligation to protect them by reason of their position as agents of that Detaining Power. No more specific investment of responsibility in an agent with regard to prisoners of war is necessary. The Appeals Chamber considers that all state agents who find themselves with custody of prisoners of war owe them a duty of protection regardless of whether the investment of responsibility was made through explicit delegation such as through legislative enactment or a superior order, or as a result of the state agent finding himself with *de facto* custody over prisoners of war such as where a prisoner of war surrenders to that agent.

74. The Appeals Chamber therefore considers that Šljivančanin was under a duty to protect the prisoners of war held at Ovčara and that his responsibility included the obligation not to allow the transfer of custody of the prisoners of a war to anyone without first assuring himself that they would not be harmed. Mrkšić's order to withdraw the JNA troops did not relieve him of his position as an officer of the JNA. As such, Šljivančanin remained an agent of the Detaining Power and thus continued to be bound by Geneva Convention III not to transfer the prisoners of war to another agent who would not guarantee their safety.

75. For the foregoing reasons, the Appeals Chamber finds that the Trial Chamber erred in finding that Šljivančanin's duty to protect the prisoners of war pursuant to the laws and customs of war came to an end upon Mrkšić's order to withdraw. Having found that Šljivančanin was under an ongoing duty to protect the prisoners of war at Ovčara and had the requisite *mens rea* for aiding and abetting the murder, the Appeals Chamber will consider whether Šljivančanin failed to act in a way that substantially contributed to the murder of the prisoners of war.

4. Whether Šljivančanin's failure to act substantially contributed to the murders

76. The Prosecution submits that the Trial Chamber did not consider whether Šljivančanin's failure to act, either before or after the JNA troops were withdrawn, substantially contributed to the

[254] Exhibit P396, "Regulations on the Application of International Laws of War in the Armed Forces of the SFRY", Article 20.
[255] Prosecution Brief in Reply, para. 72.

murders of the prisoners of war at Ovčara.[256] In support of this contention, the Prosecution submits that the Trial Chamber failed to consider the additional steps that Šljivančanin could have taken on the afternoon, evening and night of 20 November 1991, using his ample power and authority to protect the prisoners.[257] Its submissions are divided into two categories: the steps that Šljivančanin could have taken during the afternoon and the evening[258] and those further steps he could have taken during the night once he had learned that the JNA troops were being withdrawn.[259] The Prosecution concludes that Šljivančanin's failure to take measures pursuant to his duty to protect the prisoners substantially contributed to the murders of the prisoners by the TOs and paramilitaries.[260]

77. Šljivančanin responds that: (i) the Prosecution merely repeats on appeal arguments which did not succeed at trial and has failed to show any error on the part of the Trial Chamber;[261] (ii) his failure to protect the prisoners from mistreatment in the afternoon of 20 November 1991 could not have contributed to the subsequent killings given that it was only after Mrkšić's withdrawal order that the murders became probable and any added security that could have been provided would have been undone following the withdrawal of the JNA troops;[262] (iii) the Prosecution's contention that Šljivančanin could have made the murders less likely is not the appropriate criterion;[263] (iv) the Trial Chamber's finding that it could not be concluded that he encouraged or gave tacit approval for the TOs and paramilitaries to commit murders was correct;[264] (v) he was not aware of Mrkšić's withdrawal order or of its transmission[265] and in any event he could not "incur criminal liability for aiding and abetting by omission proper, for failing to challenge legal orders issued by his Commander";[266] and (vi) he was not aware that his alleged failure to act to protect the prisoners

[256] Prosecution Appeal Brief, para. 131.
[257] Prosecution Appeal Brief, paras 132-134.
[258] Prosecution Appeal Brief, para. 137. According to the Prosecution, during the afternoon and evening of 20 November 1991, Šljivančanin could have: (i) ordered the removal of the prisoners from Ovčara to a place of safety away from the TOs and paramilitaries; (ii) excluded the TOs and paramilitaries from Ovčara; (iii) kept the status of the prisoners under review and acted to ensure their safety in the event of reports as to security problems; (iv) reported the vicious conduct of the TOs and paramilitaries during the afternoon to Mrkšić and prevailed upon him to act to protect them.
[259] Prosecution Appeal Brief, para. 138. According to the Prosecution, during the night of 20 November 1991, Šljivančanin could have: (i) ensured that the prisoners were not left in the custody of a hostile, lawless and volatile group that had shown that it was unwilling to protect them; (ii) sought to persuade Mrkšić not to allow the TOs access to, or to take control of, the prisoners; (iii) brought to Mrkšić's attention the grave risk of injury and death to the prisoners if the JNA was withdrawn; (iv) reported the situation to General Vasiljević as head of the Security Administration at the Federal Secretariat for National Defence.
[260] Prosecution Appeal Brief, paras 139-143, 148. *See* also Prosecution Brief in Reply, paras 89, 91-93.
[261] Šljivančanin Respondent's Brief, para. 280.
[262] Šljivančanin Respondent's Brief, para. 281. *See* also Šljivančanin Respondent's Brief, paras 287-298.
[263] Šljivančanin Respondent's Brief, para. 282.
[264] Šljivančanin Respondent's Brief, paras 283, 299, 300, citing Trial Judgement, para. 671.
[265] Šljivančanin Respondent's Brief, paras 284, 301-302.
[266] Šljivančanin Respondent's Brief, para. 284.

would substantially contribute to their murders because he did not know at the time of his visit to Ovčara that killings would probably be committed.[267]

78. In reply, the Prosecution submits that (i) neither the fact that other JNA officers took measures to stop the mistreatment of prisoners nor the fact that Šljivančanin may have heard only later about the inadequacy of the security at Ovčara excuse his own failure to act to protect the prisoners;[268] (ii) Šljivančanin could have foreseen that the mistreatment of the prisoners in the afternoon of 20 November 1991 would progress into killing[269] and therefore his knowledge of the probability that murders could occur grew upon learning of Mrkšić's withdrawal order.[270]

79. The Appeals Chamber has already found that it was reasonably open to the Trial Chamber to conclude that Šljivančanin may not have foreseen that the prisoners of war would be killed at the time of his visit to Ovčara.[271] As a result, Šljivančanin lacked the requisite *mens rea* with regard to aiding and abetting murder during the period prior to his learning of the order to withdraw the troops and cannot be convicted for his actions or inaction during that period.[272] Therefore, the Appeals Chamber need not consider whether Šljivančanin's failure to take further steps to protect the prisoners of war in the afternoon and evening of 20 November 1991 substantially contributed to the murders later that night. Notwithstanding this, the Appeals Chamber notes that while the Trial Chamber may not have addressed the additional steps that Šljivančanin could have taken to protect the prisoners of war enumerated by the Prosecution in its submissions,[273] it did consider a number of actions that Šljivančanin could have taken but failed to in concluding that his failure to act had a substantial effect on the commission of the crimes of torture and cruel treatment at Ovčara in the afternoon of 20 November 1991.[274]

80. With regard to the period following Mrkšić's order to withdraw the last JNA troops from Ovčara on the evening of 20 November 1991, the Appeals Chamber recalls that it has found that Šljivančanin owed a continuing duty to the prisoners of war under international humanitarian law[275] and further that the only reasonable inference available on the evidence is that Šljivančanin learned of the order to withdraw at his meeting with Mrkšić upon his return to Negoslavci on the night of

[267] Šljivančanin Respondent's Brief, para. 285, citing Trial Judgement, para. 672; *see* also Šljivančanin Respondent's Brief, paras 304-305.
[268] Prosecution Brief in Reply, paras 87-88.
[269] Prosecution Brief in Reply, para. 89.
[270] Prosecution Brief in Reply, para. 92. *See* also Prosecution Brief in Reply, paras 60-62.
[271] *See supra* para. 60.
[272] *See Blaškić* Appeal Judgement, para. 47.
[273] Prosecution Appeal Brief, para. 137.
[274] Trial Judgement, para. 670.
[275] *See supra* para. 74.

20 November 1991.[276] In light of these findings the Appeals Chamber turns to consider whether Šljivančanin's failure to act upon learning of the order to withdraw the JNA troops from Ovčara substantially contributed to the murder of the prisoners of war by the TOs and paramilitaries.

81. Bearing in mind that the basic elements of the mode of liability of aiding and abetting apply regardless of whether this form of liability is charged as "omission",[277] the Appeals Chamber recalls that the *actus reus* of aiding and abetting consists of acts or omissions[278] which assist, encourage or lend moral support to the perpetration of a specific crime, and which have a substantial effect upon the perpetration of the crime.[279] There is no requirement of a cause-effect relationship between the conduct of the aider and abettor and the commission of the crime or that such conduct served as a condition precedent to the commission of the crime.[280] The *actus reus* of aiding and abetting a crime may occur before, during, or after the principal crime has been perpetrated, and the location at which the *actus reus* takes place may be removed from the location of the principal crime.[281]Accordingly, in order to determine whether Šljivančanin possessed the requisite *actus reus* for aiding and abetting murder, the Appeals Chamber must be satisfied beyond reasonable doubt that the Prosecution has demonstrated that Šljivančanin substantially contributed to their killing by his inaction[282] and that, when account is taken of the errors committed by the Trial Chamber, all reasonable doubt concerning Šljivančanin's guilt has been eliminated.[283]

(a) Šljivančanin's ability to act

82. The Appeals Chamber further recalls that aiding and abetting by omission implicitly requires that the accused had the ability to act but failed to do so.[284] In order to determine whether Šljivančanin had the ability to act but failed to do so, the Appeals Chamber must be satisfied beyond reasonable doubt that the Prosecution has provided sufficient evidence concerning which means were available to Šljivančanin to fulfil his continuing duty towards the prisoners of war.[285]

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[276] *See supra* para. 62.
[277] *Orić* Appeal Judgement, para. 43. *See supra* para. 49.
[278] *Nahimana et al.* Appeal Judgement, para. 482; *Ntagerura et al.* Appeal Judgement, para. 370; *Blaškić* Appeal Judgement, para. 47.
[279] *Nahimana et al.* Appeal Judgement, para. 482; *Blagojević and Jokić* Appeal Judgement, para. 127; *Ndindabahizi* Appeal Judgement, para. 117; *Simić* Appeal Judgement, para. 85; *Ntagerura et al.* Appeal Judgement, para. 370, fn. 740; *Blaškić* Appeal Judgement, paras 45, 48; *Vasiljević* Appeal Judgement, para. 102; *Čelebići* Appeal Judgement, para. 352; *Tadić* Appeal Judgement, para. 229.
[280] *Blaškić* Appeal Judgment, para. 48.
[281] *Blaškić* Appeal Judgment, para. 48.
[282] *Cf. Ntagerura et al.* Appeal Judgement, para. 321.
[283] *Seromba* Appeal Judgement, para. 11; *Rutaganda* Appeal Judgement, para. 24; *Bagilishema* Appeal Judgement, paras 13-14. *See* also *Strugar* Appeal Judgement, para. 14; *Orić* Appeal Judgement, para. 12; *Halilović* Appeal Judgement, para. 11; *Limaj et al.* Appeal Judgement, para. 13; *Blagojević and Jokić* Appeal Judgement, para. 9; *Brdanin* Appeal Judgement, para. 13.
[284] *Cf. Ntagerura et al.* Appeal Judgement, para. 335. *See* also *infra* para. 154.
[285] *Cf. Ntagerura et al.* Appeal Judgement, para. 335. (Where the Appeals Chamber also held that the Prosecution had not indicated which possibilities were open to Bagambiki to fulfil his duties under the Rwandan domestic law).

To reach a determination in this regard, it is necessary to briefly touch upon the structure of the JNA troops concerned with the withdrawal order, in order to assess the scope of Šljivančanin's authority over the relevant troops.

(i) Military police of the 80 mtbr of the JNA

83. The murder of the prisoners of war by the TO and paramilitaries took place after Mrkšić decided that the JNA should relinquish its custody of the prisoners of war by issuing an order to withdraw the military police of 80 mtbr of the JNA from Ovčara.[286] The 80 mtbr of the JNA (also referred to as the Kragujevac Brigade) had one tank battalion, three infantry battalions, a rear, an engineer's battalion, a military police company and a light artillery anti-aircraft battalion.[287] At the time material to the Indictment the commander of the 80 mtbr was LtCol Milorad Vojnović and Captain Dragi Vukosavljević was the chief of the 80 mtbr's security organ.[288] Captain Dragan Vezmarović was the commander of the military police company of the 80 mtbr.[289] While stationed in the zone of responsibility of OG South, the 80 mtbr along with all its component units, and all other units serving in this zone of responsibility came under the *de jure* and the full effective command of Mrkšić.[290]

(ii) Šljivančanin's authority as security organ of OG South

84. Throughout the time relevant to the Indictment, Šljivančanin was the chief of the security organ of the Gmtbr and also of OG South.[291] His deputy was Major Ljubiša Vukašinović.[292] The Gmtbr's main responsibility was to provide security to the political and military leadership of the former Yugoslavia,[293] and the security organs' purpose was to perform counterintelligence activities.[294] Pursuant to the military hierarchy regulated by the Rules of Service of the Security Organs in the Armed Forces of the SFRY, the security organs of the units subordinated to OG South, including the 80 mtbr, were required to report to Šljivančanin as the security organ of OG South.[295]

[286] Trial Judgement, para. 673.
[287] Trial Judgement, para. 74.
[288] Trial Judgement, para. 75.
[289] Trial Judgement, para. 75.
[290] Trial Judgement, paras 70, 74, 77.
[291] Trial Judgement, para. 62.
[292] Trial Judgement, para. 62.
[293] Trial Judgement, para. 61.
[294] Trial Judgement, para. 129.
[295] Trial Judgement, para. 129 citing Rule 18 of the Rules of Service of the Security Organs in the Armed Forces of SFRY. *See* P107, "Rules of Service of the Security Organs in the Armed Forces of SFRY, 1984".

85. The Trial Chamber found that the protection of the prisoners of war "was also part of [Šljivančanin's] remit as security organ of OG South".[296] It further expanded that "he was also entrusted, as security organ, with the task of implementing some of [the laws and customs of war], as far as the security of prisoners of war in the custody of the JNA was concerned […]".[297] However, in its earlier findings on the command structure of the Serb forces involved in the Vukovar operation, the Trial Chamber found that responsibility for guarding prisoners of war belonged to the military police.[298] It found that "the primary functions of security organs are in the field of counterintelligence where they had the sole or primary responsibility, whereas in the field of crime detection and prevention they participated together with the military police and other bodies".[299] In its discussion of the mandate of the security organ, the Trial Chamber made no reference to the security organ having any particular responsibility for the protection of prisoners of war.[300] Indeed, the Rules of Service of the Security Organs in the Armed Forces of the SFRY in force at the time material to the Indictment make no reference to prisoners of war[301] while the Instructions on the Methods and Means of Work of the JNA Security Organs only refer to prisoners of war with respect to them being possible sources of information for counterintelligence for the security organ.[302]

86. The control that the security organ could exercise over the military police was limited to areas within the security organ's specialisation and competence (in other words, the area of counterintelligence).[303] Absent any special delegation by the commander, the security organ could only exercise control over the military police with respect to its areas of competence and specialisation. Therefore, absent a specific delegation by the commander, Šljivančanin had no specific responsibility for prisoners of war, by virtue of his position as security organ of the OG South. The Appeals Chamber observes that this is no longer contested by the Parties.[304]

[296] Trial Judgement, para. 668.
[297] Trial Judgement, para. 669.
[298] Trial Judgement, para. 114.
[299] Trial Judgement, para. 115.
[300] Trial Judgement, para. 115.
[301] Exhibit P107, "Rules of Service of the Security Organs in the Armed Forces of SFRY, 1984". This is highlighted in Petar Vuga's Expert Report which states "Rules of Service of Security Organ in OS do not provide for other tasks and obligations of Security Organ OS in respect of the prisoners of war" (Exhibit D868, "Expert Report of Petar Vuga", Item 2.2, p. 12).
[302] Exhibit P582, "Instructions on the Methods and Means of Work of the JNA Security Organs, 1986". Similarly, the Regulations on the Responsibilities of the Land Army Corps Command in Peacetime makes no reference to prisoners of war in Article 29 which deals with the security organ: Exhibit P580, "Regulations on the Responsibilities of the Land Army Corps Command in Peacetime, SFRY, 1990", p. 30.
[303] Exhibit P107, "Rules of Service of the Security Organs in the Armed Forces of SFRY, 1984", Rule 23, *see* also Rule 7(d); Exhibit D435, "Service Regulations of the SFRY Armed Forces Military Police, 1985", Rule 13.
[304] AT. 101-102, 153, 200, 230.

87. In light of the foregoing, Šljivančanin's authority over the military police of 80 mtbr, was limited by reason of the mandate of the security organ of the OG South. This is further borne out by the Trial Chamber's finding that:

> [i]t is clear that the commander of the relevant military unit has command of the military police and ultimately the commander's orders, if he chooses to issue orders, are those which the military police must obey. Subject to any such orders of the commander, however, by rule 13 the security organ "controls the military police" and is responsible for both the combat readiness of the military police and the performance of their tasks.[305]

88. Moreover, as part of its findings concerning the subordination of security organs, the Trial Chamber accepted that while Šljivančanin could organise, direct, coordinate and supervise the work of the security organs of the units subordinated to OG South, including 80 mtbr, he had no actual powers of command over them as the security organ of OG South.[306] In this regard, the Appeals Chamber takes note of Article 16 of the Rules of Service of the Security Organs which states:

> The security organ is directly subordinated to the commanding officer of the command, unit, institution or staff of the armed forces in whose strength it is placed in the establishment, and it is responsible to that officer for its work[...].[307]

89. In his capacity as security organ, Šljivančanin "could issue orders to the military police within OG South but these were subject to any orders of the commanders of the unit to which the military police were subordinated".[308] However, this was considered to be immaterial when the Trial Chamber assessed Šljivančanin's role in the evacuation because at the relevant time he was not functioning as the security organ and thus was not limited by the powers of that office.[309] Hence the Trial Chamber further found that Šljivančanin was exercising the power and authority conferred on him by Mrkšić to conduct the evacuation of the hospital and as such he was exercising *de jure* authority with respect to the relevant JNA military police forces of OG South.[310] Accordingly, an order from Mrkšić terminating any specifically delegated duty for the security of the prisoners of war,[311] would also have removed the power and authority that Šljivančanin had over the military police of the 80 mtbr, in his capacity as security organ.

90. In light of the foregoing, it is clear that given the limitations on Šljivančanin's authority over the military police of the 80 mtbr of the JNA, his ability to act in order to fulfil his continuing duty

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[305] Trial Judgement, para. 122. *See* also Trial Judgement, para. 125.
[306] Trial Judgement, para. 129. The Appeals Chamber notes that Prosecution relied upon this finding in support of its argument that the actual securing and transport of the prisoners of war was subject to Mrkšić's command. *See* AT. 100-102.
[307] Exhibit P107, "Rules of Service of the Security Organs in the Armed Forces of SFRY, 1984".
[308] Trial Judgement, para. 397.
[309] Trial Judgement, para. 397.
[310] Trial Judgement, para. 397.
[311] The Prosecution acknowledged that Šljivančanin's specifically delegated duty "for the prisoners custody and control" was terminated upon the withdrawal of the JNA from Ovčara. AT. 231.

to protect the prisoners of war pursuant to the laws and customs of war might have been limited as well. The Appeals Chamber turns to assess whether ordering the military police not to withdraw, contrary to Mrkšić's instruction, was indeed a possibility open to Šljivančanin to fulfil his duty towards the prisoners of war, despite the above considerations regarding his power and authority over the troops in question.

(iii) Šljivančanin's *de jure* authority

91. The Appeals Chamber notes the Trial Chamber's finding that "Veselin Šljivančanin had from Mile Mrkšić temporary *de jure* authority to do what was necessary to fulfil the task [of the hospital evacuation, the triage and selection of war crime suspects removed from the hospital on 20 November 1991, their transport and security, and the evacuation of civilians], and *de jure* powers to give orders to the forces used for this task, including relevantly military police".[312] In reaching this finding, the Trial Chamber considered the testimony of Captain Vukosavljević to the effect that a commander could pass his authority to a security organ for a specific purpose under Article 6 of the Regulations on the Responsibility of the Land Army Corps Command in Peacetime.[313]

92. However, the Appeals Chamber further recalls that the Trial Chamber also found that the security organ's *de jure* authority over the military police did not encompass the power of ultimate command over them, but rather an authority which "in certain circumstances [could] take the form of a working arrangement by which the commander could legitimately leave the routine management and control of the military police to the security organ in connection with a specific task with which the security organ has been entrusted".[314] As a result, Mrkšić's order to withdraw the JNA troops which ended Šljivančanin's delegated responsibility[315] would also have removed Šljivančanin's *de jure* authority over the military police. Further, the Appeals Chamber recalls that even if that authority had not been terminated by Mrkšić's order, the Trial Chamber found that "the security organ [had] the *de jure* ability to issue orders to the military police, subject always to the overriding authority of the commander of the unit".[316] Thus, in accordance with the Rules of Service of the Security Organs, Mrkšić's order to withdraw the military police of 80 mtbr of the

[312] Trial Judgement, para. 400.
[313] Trial Judgement, para. 399. The Appeals Chamber notes that it is clear from Article 6 of the Regulations on the Responsibility of the Land Army Corps in Peacetime that Mrkšić could delegate the responsibility to Šljivančanin: "The commander may authorize certain officers from the command to command units and institutions of branches services, but the commander shall continue to bear responsibility for the situation in these units, and for the work of the officers to whom he transferred some of his rights" (Exhibit P580, "Regulations on the Responsibility of the Land Army Corps in Peacetime, SFRY, 1990").
[314] Trial Judgement, para. 122.
[315] Trial Judgement, para. 673.
[316] Trial Judgement, para. 125. *See* also Trial Judgement, para. 122.

JNA from Ovčara would have prevailed over an order by Šljivančanin instructing those same troops to remain in place, or for reinforcements to be brought.

93. Having said this, the Appeals Chamber considers that even though Šljivančanin no longer had *de jure* authority over the military police deployed at Ovčara, had he ordered the military police not to withdraw, these troops may well have, in effect, obeyed his order to remain there, considering he had been originally vested with the authority for the entire evacuation of the Vukovar Hospital and entrusted with responsibility for protecting the prisoners of war. In particular, Šljivančanin could have informed the military police deployed at Ovčara that Mrkšić's order was in breach of the overriding obligation under the laws and customs of war to protect the prisoners of war, and thus constituted an illegal order.

94. Indeed, issuing an order contrary to Mrkšić's to the military police of the 80 mtbr was a course of action that would have required Šljivančanin to go beyond the scope of his *de jure* authority, which had been effectively removed by virtue of Mrkšić withdrawal order.[317] Nonetheless, the illegality of Mrkšić's order required Šljivančanin to do so. To further support this conclusion, the Appeals Chamber recalls the analysis in the *Čelebići* Trial Judgement which implies that in the context of preventing the commission of a war crime, an officer may be expected to act beyond the strict confines of his *de jure* authority:

> Likewise, the finding in the *High Command* case that a commander may be held criminally liable for failing to prevent the execution of an illegal order issued by his superiors, which has been passed down to his subordinates independent of him, indicates that legal authority to direct the actions of subordinates is not seen as an absolute requirement for the imposition of command responsibility. Similarly, the finding in the *Toyoda* case, whereby the tribunal rejected the alleged importance of what it called the "theoretical" division between operational and administrative authority, may be seen as supporting the view that commanders are under an obligation to take action to prevent the commission of war crimes by troops under their control despite a lack of formal authority to do so. An officer with only operational and not administrative authority does not have formal authority to take administrative action to uphold discipline, yet in the view of the tribunal in the *Toyoda case*; "[t]he responsibility for discipline in the situation facing the battle commander cannot, in the view of practical military men, be placed in any hands other than his own."[318]

Although the Trial Chamber in *Čelebići* discussed this in the context of superior responsibility, the Appeals Chamber considers that the principle that an officer may be required, within the limits of his capacity to act, to go beyond his *de jure* authority to counteract an illegal order is equally applicable to the present case.

95. This principle is reflected in article 21 of the military regulations of the JNA, which states not only that a military officer shall be liable for violations of the laws of war by his subordinates

[317] *See supra* paras 90-92.
[318] *Čelebići* Trial Judgement, para. 373 (footnotes omitted). *See* also *Čelebići* Appeal Judgement, para. 195.

but also when "other units or individuals were planning the commission of such violations, and, at a time when it was still possible to prevent their commission, failed to take measures to prevent such violations".[319] In fact, when asked by the Prosecution at trial about the scope of this provision, Šljivančanin responded that it implied that "[a]n officer is duty bound to intervene right away, as soon as he gets wind of any sort of suspicion at all".[320]

96. Being aware through Šljivančanin of the illegality of Mrkšić's order, it is likely that the military police at Ovčara would have obeyed Šljivančanin's order to remain in place. After all, in contrast to TOs and paramilitary forces who generally lacked military discipline and strong leadership and who harboured feelings of extreme animosity towards their enemy, "the JNA was, in the main, a disciplined military force with a strong leadership which had an understanding of the legal responsibilities of the JNA towards the prisoners of war".[321] Thus, the Appeals Chamber considers that the possibility was open to Šljivančanin to inform the members of the military police of the 80 mtbr present at Ovčara of the illegal nature of Mrkšić's order and to try to compel them to stay.

97. To succeed, the Prosecution, "must show that [Šljivančanin's] omission had a substantial effect on the crime in the sense that the crimes would have been substantially less likely had [Šljivančanin] acted".[322] In this regard, the Appeals Chamber considers that had Šljivančanin compelled the military police of the 80 mtbr to stay at Ovčara, the murder of the prisoners of war would have been substantially less likely, as the withdrawal of these troops "had an immediate and direct effect on the commission of the murders".[323] This conclusion is further borne out by the following Trial Chamber's findings. First, the Trial Chamber held that the presence of the JNA guards at Ovčara that day had provided some restraint (albeit inconsistent and at times not effective) against the TOs' and paramilitary forces' hatred and desire for revenge against the prisoners of war, and established that "[t]he withdrawal of the JNA guards removed this one restraint".[324] Furthermore, the Trial Chamber concluded that it was only after the final withdrawal of the military police of 80 mtbr from Ovčara, which enabled the TOs and paramilitaries to have unrestrained access to the prisoners of war who had been left in their control, that murder became a likely

[319] Exhibit P396, "SFRY Regulations on the Application of the Rules of International Law of War in the Armed Forces, 1988", Article 21. *See* also AT. 235.
[320] Veselin Šljivančanin, T. 13758-13759: "Q. Let's look at the core section or the core of Article 21. It says, in relation to planning the commission of such violations: '... and at a time when it was still possible to prevent their commission.' What that means, I'd suggest, is if a criminal act has commenced, and there is the responsibility of stopping that criminal act continuing, Article 21 puts a duty upon such an officer to intervene. That's correct, isn't it? A. An officer is duty-bound to intervene right away, as soon as he gets wind of any sort of suspicion at all".
[321] Trial Judgement, para. 620.
[322] AT. 169.
[323] Trial Judgement, para. 620.
[324] Trial Judgement, para. 620.

occurrence.[325] It follows that as long as the JNA troops were present, that might have kept the TOs and paramilitaries at bay[326] and prevented the mistreatment of the prisoners of war from escalating into killing.[327]

98. Regarding other means available to Šljivančanin to fulfil his duty towards the prisoners of war, at the appeals hearing the Prosecution acknowledged that: "what measures, what powers may have been available to him, may have altered, may have changed somewhat, given that he was now no longer – at [the] moment that the [withdrawal] order was given, he was now no longer acting under Mrkšić's specific delegated authority with all of its additional powers and authorities that he was given".[328] However, the Prosecution further submitted that at the very least, Šljivančanin should have reported through his chain of command directly to General Vasiljević in the SSNO, the likelihood that murder would occur if the JNA were to withdraw and the prisoners left in the sole custody of this vengeful group, or could have persuaded Mrkšić to abort the order to withdraw the JNA troops.[329] The Appeals Chamber concurs with this submission. Had his attempts to persuade Mrkšić not been successful, when Šljivančanin telephoned Belgrade in order to speak to General Vasiljević,[330] he could have sought the General's assistance on the matter.

99. The Appeals Chamber has found that the possibility was open to Šljivančanin to inform the members of the military police of the 80 mtbr present at Ovčara of the illegal nature of Mrkšić's order and to request them to stay.[331] Accordingly, the Appeals Chamber finds that the requirement

[325] Trial Judgement, para. 672.
[326] *See* AT. 73, 87.
[327] The Appeals Chamber notes the Defence's submission to the effect that: "[t]he military police of the 80th Brigade was the buffer in whose presence the members of the TO could not jeopardize the lives of the prisoners on that afternoon". AT. 275.
[328] AT. 234.
[329] AT. 234-235.
[330] Trial Judgement, para. 389. In the Trial Chamber's account Šljivančanin: "spoke to General Vasiljević, or a colonel who was on duty in Belgrade, about documents collected from the [National Guards Corps] shelter".
[331] It is a principle of international humanitarian law that subordinates are bound not to obey manifestly illegal orders or orders that they knew were illegal. *See* Hostage Case (*United States v. Wilhelm List et al.*, *Trials of War Criminals*, Vol. XI, p. 1236): "[T]he general rule is that members of the armed forces are bound to obey only the lawful orders of their commanding officers and they cannot escape criminal liability by obeying a command which violates international law and outrages fundamental concepts of justice". *See* also *Erdemović* 1996 Sentencing Judgement, para. 18 ("Although the accused did not challenge the manifestly illegal order he was allegedly given, the Trial Chamber would point out that according to the case-law referred to, in such an instance, the duty was to disobey rather than to obey."), fn. 12 ("*Trial of Rear-Admiral Nisuke Masuda and four others of the Imperial Japanese Navy, Jaluit Atoll Case*, U.S. Military Commission, U.S. Naval Air Base, Kwajalein Island, Kwajalein Atoll, Marshall Islands, 7-13 December 1945, Case No. 6, *L.R.T.W.C.*, Vol. I, pp. 74-76, pp. 79-80. *See* also *Trial of Wilhelm List and Others*, U.S. Military Tribunal, Nuremberg, 8 July 1947-19 February 1948, *L.R.T.W.C.*, Case No. 47, Vol. VIII, pp. 50-52 […].); *Mrda* Sentencing Judgement, para. 67 ("As to the related issue of superior orders, Article 7(4) of the Statute states that '[t]he fact that an accused person acted pursuant to an order of a government or of a superior […] may be considered in mitigation of punishment if the Tribunal determines that justice so requires.' […] [T]he orders were so manifestly unlawful that Darko Mrda must have been well aware that they violated the most elementary laws of war and the basic dictates of humanity. The fact that he obeyed such orders, as opposed to acting on his own initiative, does not merit mitigation of punishment.").

that Šljivačanin had the ability to act but failed to do so, which is a component of the *actus reus* for aiding and abetting by omission, has been fulfilled.

100. It further finds that had Šljivančanin been successful in securing the return of the military police to Ovčara they would likely have been able to regain control of the hangar at Ovčara and of the prisoners of war held therein. With the prisoners of war once again under the protection of the military police, their killings would have been substantially less likely. The Appeals Chamber thus finds that Šljivančanin's failure to act pursuant to his duty under the laws and customs of war substantially contributed to the murder of the prisoners of war.

5. Conclusion

101. The Appeals Chamber recalls that it has found that the only reasonable inference available on the evidence is that Šljivančanin learned of the withdrawal order at his meeting with Mrkšić upon his return to Negoslavci on the night of 20 November 1991. Moreover, the Appeals Chamber concurs with the Prosecution's submission that Sljivančanin knew that TOs and paramilitaries were capable of killing, and that if no action was taken "there was a real likelihood that the violence would escalate just as it had at Velepromet the night before and that the TOs and the paramilitaries would succeed in fully satisfying their revenge and kill the prisoners [of war]".[332] Accordingly, Šljivančanin knew that following the withdrawal of the military police the killing of the prisoners of war was probable and that his inaction assisted the TOs and paramilitaries.

102. The Appeals Chamber further found that the Trial Chamber erred in finding that Šljivančanin's duty to protect the prisoners of war came to an end upon Mrkšić's order to withdraw the military police of the 80 mtbr from Ovčara. Finally, it found that Šljivančanin's failure to act pursuant to his duty substantially contributed to the killing of the prisoners of war.

103. For the foregoing reasons, the Appeals Chamber finds, Judge Pocar and Judge Vaz dissenting, that all the requirements for a conviction for aiding and abetting murder by omission have been met, and is satisfied beyond reasonable doubt that the Prosecution has shown that, when account is taken of the errors committed by the Trial Chamber, all reasonable doubt concerning Šljivančanin's guilt has been eliminated. As a result, the Appeals Chamber, Judge Vaz dissenting, quashes the Trial Chamber's acquittal and finds, pursuant to Articles 3 and 7(1) of the Statute, Judge Pocar and Judge Vaz dissenting, Šljivančanin guilty under Count 4 of the Indictment for aiding and abetting the murder of 194 individuals identified in the Schedule to the Trial Judgement.

[332] *See* AT. 218-219.

IV. SLJIVANČANIN'S APPEAL

104. On 28 August 2008, Šljivančanin filed an amended notice of appeal setting forth six grounds of appeal against the Trial Judgement and requesting the Appeals Chamber to reverse the Trial Judgement and find him not guilty under Count 7 of the Indictment (torture as a violation of the laws and customs of war under Article 3 of the Statute),[333] or in the alternative reduce the sentence of five years' imprisonment imposed by the Trial Chamber.[334] Under his first ground of appeal, Šljivančanin argues that the Trial Chamber erred in finding that he was present at Ovčara on 20 November 1991.[335] His second ground of appeal alleges that the Trial Chamber erred in law and in fact in its reliance on aiding and abetting by omission.[336] Šljivančanin's third ground of appeal posits that the Trial Chamber erred by finding that he was in charge of the evacuation of the Vukovar hospital and thus that he owed a legal duty to the prisoners of war at Ovčara.[337] In his fourth ground of appeal, Šljivančanin argues that the Trial Chamber erred in finding that he must have witnessed the mistreatment of the prisoners of war at Ovčara.[338] Šljivančanin's fifth ground of appeal posits that the Trial Chamber erred by finding that his omission substantially contributed to the commission of the crimes and that he must have been aware that through his omission he facilitated the commission of the crimes.[339] Finally, in his sixth ground of appeal, which will be discussed in the sentencing section,[340] he argues that the Trial Chamber erred by imposing an excessive sentence.[341]

A. First Ground of Appeal: Šljivančanin's Presence at Ovčara on 20 November 1991

105. Šljivančanin argues under his first ground of appeal that the Trial Chamber erred at paragraphs 377 to 386 of the Trial Judgement in finding that he was present in Ovčara on the afternoon of 20 November 1991.[342] He contends that the Trial Chamber erred in: (1) relying exclusively on the testimony of Witness P009 which is "vitiated in many respects";[343] (2) failing to consider the evidence that he was elsewhere that afternoon;[344] (3) failing to properly consider the testimony of Witnesses P014, Vojnović and Panić;[345] and (4) failing to consider evidence to the

[333] Šljivančanin Notice of Appeal, para. 36.
[334] Šljivančanin Notice of Appeal, para. 38.
[335] Šljivančanin Notice of Appeal, paras 7-12.
[336] Šljivančanin Notice of Appeal, paras 13-16.
[337] Šljivančanin Notice of Appeal, paras 17-22.
[338] Šljivančanin Notice of Appeal, paras 23-27.
[339] Šljivančanin Notice of Appeal, paras 28-30.
[340] *See infra* Section VI: "Appeals Against Sentence".
[341] Šljivančanin Notice of Appeal, paras 31-35.
[342] Šljivančanin Notice of Appeal, para. 7; Šljivančanin's Appeal Brief, paras 7, 19.
[343] Šljivančanin Notice of Appeal, para. 7 (A).
[344] Šljivančanin Notice of Appeal, para. 7 (B).
[345] Šljivančanin Notice of Appeal, para. 7 (C).

contrary by other witnesses.[346] He submits that the Trial Chamber convicted him under Count 7 of the Indictment based solely on his presence in Ovčara on the afternoon of 20 November 1991 and thus, should the Appeals Chamber accept that he was elsewhere, he cannot be found responsible for having aided and abetted the torture of prisoners of war at the hangar at Ovčara that day.[347]

106. The Prosecution responds that the Trial Chamber properly assessed the evidence before it, provided a reasoned opinion in support of its analysis, and that "Šljivančanin's attempt to have the Appeals Chamber [weigh] this evidence anew should be rejected".[348] It contends that Šljivančanin has not shown that no reasonable trier of fact could have found that he was present in Ovčara on 20 November 1991, and that the Trial Chamber addressed not only Witness P009's credibility and reliability in substance but also weighed his testimony against the totality of the evidence.[349] Further, the Prosecution avers that Šljivančanin partly repeats arguments already made at trial,[350] substitutes its own interpretation of the evidence,[351] or merely asserts that the Trial Chamber ignored relevant evidence.[352]

1. The Trial Chamber's reliance on Witness P009's testimony

107. Šljivančanin argues that the Trial Chamber solely relied on the evidence provided by Witness P009[353] whereas this evidence was "vitiated".[354] He contends that the Trial Chamber: (a) failed to consider the testimony of Witness Hajdar Dodaj; (b) erred in finding that Witness P009's identification of Šljivančanin is strengthened by his "previous sightings"; and (c) failed to consider Witness P009's credibility and his motivations to testify which impaired the reliability of his evidence.[355]

(a) The Trial Chamber's alleged failure to consider the evidence of Witness Hajdar Dodaj

108. Šljivančanin argues that the Trial Chamber failed to weigh the testimony of Witness P009 against that of Witness Hajdar Dodaj,[356] who was present in Ovčara at the same time and place as Witness P009 and testified that Šljivančanin was not present.[357] He contends that, had the Trial

[346] Šljivančanin Notice of Appeal, para. 7 (D). *See* also AT. 126-127.
[347] Šljivančanin Notice of Appeal, paras 8-12.
[348] Prosecution Respondent's Brief, para. 9. *See* also Prosecution Respondent's Brief, paras 12, 16.
[349] Prosecution Respondent's Brief, para. 11.
[350] Prosecution Respondent's Brief, para. 14, citing Šljivančanin Appeal Brief, paras 58-59, 139-151.
[351] Prosecution Respondent's Brief, para. 14, citing Šljivančanin Appeal Brief, paras 112-120, 160-165.
[352] Prosecution Respondent's Brief, para. 15, citing Šljivančanin Appeal Brief, paras 55-56, 69, 75-86, 99-110, 152-156, 158, 160-164, 175, 180-181.
[353] Šljivančanin Appeal Brief, paras 42, 50.
[354] Šljivančanin Appeal Brief, paras 50, 62.
[355] Šljivančanin Appeal Brief, para. 62.
[356] Šljivančanin Appeal Brief, paras 64, 127, 129-130. *See* also Šljivančanin Brief in Reply, para. 3; AT. 132-133, 207-209.
[357] Šljivančanin Appeal Brief, para. 65. *See* also Šljivančanin Appeal Brief, paras 77, 79.

Chamber carefully considered Witness Hajdar Dodaj's testimony, it would have been left with a reasonable doubt as to Šljivančanin's presence in Ovčara in the afternoon of 20 November 1991.[358] The Prosecution responds that the Trial Chamber considered Witness Hajdar Dodaj's testimony in relation to Šljivančanin's presence, albeit not *vis-à-vis* Witness P009's testimony, and thus Šljivančanin's argument lacks merit.[359]

109. The Appeals Chamber finds that the Trial Chamber properly considered the evidence proffered by Witness Hajdar Dodaj in reaching its finding that Šljivančanin was present in Ovčara on the afternoon of 20 November 1991.[360] In particular, it took into account that he testified that he did not see Šljivančanin in Ovčara that day.[361] Šljivančanin's argument that the Trial Chamber found Witness Hajdar Dodaj's testimony "persuasive", and hence should have relied on it not only in relation to Witness Zlatko Zlogdleja's testimony but also in relation to Witness P009's testimony, is misplaced.[362] The Trial Chamber was aware that a number of witnesses who were brought to the barracks on the buses from the hospital, amongst them Hajdar Dodaj, had testified that they did not see Šljivančanin at the barracks on 20 November 1991.[363] However, the Trial Chamber concluded that given that the prisoners on the buses had been threatened, verbally abused and mistreated by TO members and paramilitaries milling around the buses, these "prisoners kept on the buses were not in a good position to notice all persons that at some time appeared near the buses".[364] The foregoing illustrates that the Trial Chamber properly considered Witness Hajdar Dodaj's evidence in relation to Šljivančanin's presence in Ovčara. However, it was perfectly within the Trial Chamber's discretion to rely on Witness P009's testimony rather than on the testimony of Witness Hajdar Dodaj. Further, Šljivančanin's assertion that Witness Hajdar Dodaj was in a better position than Witness P009 to observe the situation in Ovčara[365] is unsubstantiated and contradicts the evidence before the Trial Chamber. The only argument Šljivančanin makes in this respect is that Witness Hajdar Dodaj "stood right beside the buses".[366] Yet, as the Prosecution correctly notes,[367] Witness P009 came close enough to Šljivančanin to greet him.[368] For these reasons, Šljivančanin's arguments are dismissed.

[358] Šljivančanin Appeal Brief, para. 80.
[359] Prosecution Respondent's Brief, paras 18-19. *See* also AT. 188-190.
[360] *See* Trial Judgement, paras 384, 386.
[361] Trial Judgement, para. 384, fn. 1537, citing Hajdar Dodaj, T. 5664.
[362] Šljivančanin Appeal Brief, para. 74, citing Trial Judgement, para. 386, fn. 1537. *See* also Šljivančanin Brief in Reply, paras 2-4.
[363] Trial Judgement, para. 369.
[364] Trial Judgement, para. 369.
[365] Šljivančanin Appeal Brief, para. 78.
[366] Šljivančanin Appeal Brief, para. 78.
[367] Prosecution Respondent's Brief, paras 21-22.
[368] Trial Judgement, para. 377, fn. 1517, citing P009, T. 6165, 6284.

(b) The Trial Chamber's finding that Witness P009's identification is strengthened by his "previous sightings"

110. Šljivančanin argues that the Trial Chamber erred in finding that Witness P009's identification of Šljivančanin at Ovčara in the afternoon of 20 November 1991 is strengthened by his "previous sightings".[369] This is so, he contends, because Witness P009 did not see Šljivančanin at the Vukovar hospital on 19 November 1991[370] or at the JNA barracks on 20 November 1991.[371] The Prosecution responds that the Trial Chamber's findings were not unreasonable and hence that Šljivančanin's arguments should be dismissed.[372]

111. The Appeals Chamber finds that Šljivančanin's arguments do not show that "the Trial Chamber failed to appropriately consider and weigh Witness P009's testimony".[373] Witness P009 testified that, on 20 November 1991, he saw a JNA officer at the JNA barracks, whom he later identified as Šljivančanin. Witness P009 testified that he recognised Šljivančanin because even though he had seen him in front of the hospital on the preceding day for just about a couple of minutes, Šljivančanin "made a 'huge impression' on him".[374] Witness P009 realised that the officer he had seen in front of the hospital and at other locations was Šljivančanin, a few days later when he watched a news programme.[375] The Trial Chamber noted that Šljivančanin's testimony confirmed that he was present in front of the hospital in the afternoon of 19 November 1991.[376] Šljivančanin asserts that despite having accepted this testimony regarding the time of his presence at the Vukovar hospital, the Trial Chamber "failed to draw the proper inference that [Witness P009] could *not* therefore have seen him [there] on that day".[377] This argument must fail since "there is no general rule of evidence which precludes acceptance in part of the statement of a witness if good cause exists for this distinction".[378] Concerning Witness P009's "sighting" of Šljivančanin at the JNA barracks on 20 November 1991, Witness P009 testified that he saw Šljivančanin standing about 15 metres from the buses containing prisoners removed from the hospital, talking to at least two other JNA officers. After Witness P009 noticed that someone he knew was on one of the buses, he approached the JNA officers (including Šljivančanin) to ask for permission to get on that same bus. He boarded the bus, talked to his acquaintance, then disembarked and approached the officers again, to enquire whether something could be done to release that person; on both occasions he

[369] Šljivančanin Appeal Brief, paras 62, 82. *See* also AT. 126.
[370] Šljivančanin Appeal Brief, paras 83-91.
[371] Šljivančanin Appeal Brief, paras 92-115.
[372] Prosecution Respondent's Brief, para. 23.
[373] Šljivančanin Appeal Brief, para. 88.
[374] Trial Judgement, para. 367.
[375] Trial Judgement, para. 367.
[376] Trial Judgement, para. 367 citing Šljivančanin, T. 13585-13587.
[377] Šljivančanin Appeal Brief, para. 89.

came very close to Šljivančanin.[379] In this context, the Trial Chamber relied on the huge impression Šljivančanin made on Witness P009 and Šljivančanin's distinctiveness (which allowed Witness P009 to remember a number of details regarding Šljivančanin's appearance).[380] The Trial Chamber found that:

> [t]he reliability of the identification of Veselin Šljivančanin is strengthened by his previous sightings of the Accused and the big impression he had made on P009, which in the Chamber's assessment is entirely consistent with the manifestly distinctive physical build, bearing and manner of the Accused.[381]

It follows that it was within the Trial Chamber's discretion to evaluate Witness P009's "previous sightings" of Šljivančanin as it did, and to consider whether the witness, when his testimony was taken as a whole, was reliable.[382] The Trial Judgement illustrates that the Trial Chamber carefully considered the evidence provided by Witnesses Hadjar Dodaj, P030, P031, LtCol Panić, Major Vukašinović, Captain Šušić, P014, Dragutin Berghofer, and LtCol Vojnović in accepting Witness P009's evidence that he saw Šljivančanin at Ovčara on 20 November 1991.[383] The Appeals Chamber thus finds that Šljivančanin fails to demonstrate that the Trial Chamber committed any error of fact which occasioned a miscarriage of justice at paragraph 383 of the Trial Judgement. Accordingly, Šljivančanin's arguments are dismissed.

(c) The Trial Chamber's alleged failure to consider Witness P009's credibility and motivations which impaired the reliability of his evidence

(i) Reliability of Witness P009's description of Šljivančanin

112. Šljivančanin challenges the reliability of his description by Witness P009 as a "tall officer, in camouflage uniform, wearing a Tito cap and moustaches"[384] since such description corresponds exactly to his appearance on 20 November 1991 in video recordings broadcasted widely in the media for years, seen by Witness P009 and other witnesses,[385] and therefore "[a]ny average viewer could, on the basis of this video footage, give a 'precise and a clear' description of [his] appearance" as Witness P009 did.[386] He submits that identification evidence should leave no doubt

[378] *Kunarac et al.* Appeal Judgement, para. 228.
[379] Trial Judgement, para. 368.
[380] Trial Judgement, para. 367.
[381] Trial Judgement, para. 383.
[382] *Cf. Čelebići* Appeal Judgement, para. 498.
[383] *See* Trial Judgement, paras 369-383.
[384] Šljivančanin Appeal Brief, para. 119, citing P009, T. 6141.
[385] Šljivančanin Appeal Brief, para. 123.
[386] Šljivančanin Appeal Brief, para. 124.

as to its reliability and that in order to exclude any doubt Witness P009 should have been able to give additional details in support of his description, which he did not.[387]

113. The Prosecution responds that Witness P009's description of Šljivančanin is reliable: the Trial Chamber reasonably found that the huge impression Šljivančanin made on him enhanced his ability to remember a number of details about his appearance,[388] and that his description is consistent with the equivalent description, provided by other witnesses, which Šljivančanin himself finds reliable.[389] Further, it responds that such argument, if accepted, would imply that "any accused with sufficient notoriety to appear in the media could never be identified by any witness exposed to the media".[390]

114. The Trial Chamber found that "[t]he distinctiveness of [Šljivančanin] apparently enhanced P009's ability to remember a number of details of his appearance, such as his camouflage uniform, Tito hat and a moustache, which tally with the description of Veselin Šljivančanin given by other witnesses and films recording him at that time".[391] Witness P009's description of Šljivančanin was also corroborated by other witnesses as Šljivančanin himself admits.[392] The fact that Witness P009 and other witnesses had seen Šljivančanin on video footage cannot in itself undermine the Trial Chamber's assessment of the reliability of their description of Šljivančanin's appearance or the credibility of their testimony. Accordingly, Šljivančanin's arguments are dismissed.

(ii) Witness P009's credibility

115. Šljivančanin argues that the Trial Chamber "erred by failing to consider the motivations [W]itness P009 could have had in testifying".[393] He submits that Witness P009 had "strong reasons to contend that Veselin Šljivančanin was an active participant in the events which took place at Ovčara in the afternoon of 20 November 1991",[394] including that Witness P009 "personally and directly participated in some of the events which occurred before and during the time covered by the Indictment".[395] Šljivančanin further submits that Witness P009's contention that he was in Ovčara that day to help those in the buses cannot be verified as those who could testify to that effect are dead,[396] and his account of what happened in Ovčara that day differs completely from other

[387] Šljivančanin Appeal Brief, para. 125.
[388] Prosecution Respondent's Brief, para. 45.
[389] Prosecution Respondent's Brief, paras 46-47.
[390] Prosecution Respondent's Brief, para. 48.
[391] Trial Judgement, para. 367, citing P009, T. 6122-6123.
[392] Šljivančanin Appeal Brief, para. 119.
[393] Šljivančanin Appeal Brief, para. 145.
[394] Šljivančanin Appeal Brief, para. 144. *See* also Šljivančanin Brief in Reply, para. 32.
[395] Šljivančanin Appeal Brief, para. 135. *See* also Šljivančanin Appeal Brief, para. 141, in which Šljivančanin argues that Witness P009 was "deeply involved in events covered by the Indictment".
[396] Šljivančanin Appeal Brief, para. 136. *See* also Šljivančanin Brief in Reply, para. 32(d).

Prosecution's witnesses testimony and some of the Trial Chamber's findings.[397] The Prosecution responds that "there is no evidence that [Witness P009] was a perpetrator of any of the crimes described in the Indictment".[398]

116. The Appeals Chamber finds that Šljivančanin only reiterates arguments made in his Final Trial Brief.[399] Among those arguments previously advanced are the following: that Witness P009's testimony amounts to a "very suitable story both for himself and for his status",[400] that "those who could confirm his story about forcible recruitment [and his] accidental appearance at all the places where he was present on 19 and 20.11.1991 are all dead",[401] and that it "completely differs from the testimony of all the other witnesses who are testifying about that same period".[402] The Appeals Chamber recalls that an appellant cannot hope to see his appeal succeed by simply repeating or referring to arguments that did not succeed at trial,[403] unless he can demonstrate that the Trial Chamber's rejection of them constituted such an error as to warrant the intervention of the Appeals Chamber.[404] Šljivančanin fails to do so in the present case. Accordingly, Šljivančanin's arguments are dismissed.

2. The Trial Chamber's alleged failure to consider evidence that he was not in Ovčara

117. Šljivančanin argues that the Trial Chamber failed to consider evidence that he was in a location other than Ovčara on 20 November 1991.[405] He argues that the Trial Chamber failed to compare the following evidence when it weighed his testimony:[406] (i) that he was interviewed by Sky News at around 13:00-14:00 hours;[407] (ii) that his testimony,[408] that of Prosecution's witnesses[409] and the fact that he was in charge of the evacuation[410] demonstrate that he was at the Vukovar hospital when the convoy with the wounded, sick and medical staff departed to Sremska

[397] Šljivančanin Appeal Brief, para. 137.
[398] Prosecution Respondent's Brief, para. 54.
[399] Šljivančanin Final Trial Brief, paras 690-707.
[400] Šljivančanin Final Trial Brief, para. 700.
[401] Šljivančanin Final Trial Brief, para. 697.
[402] Šljivančanin Final Trial Brief, para. 693.
[403] *See Nahimana et al.* Appeal Judgment, para. 395; *Kajelijeli* Appeal Judgement, para. 6.
[404] *Kajelijeli* Appeal Judgement, para. 6, referring to *Niyitegeka* Appeal Judgement, para. 9. *See* also *Blaškić* Appeal Judgement, para. 13; *Rutaganda* Appeal Judgement, para. 18.
[405] Šljivančanin Appeal Brief, paras 56, 148. *See* also AT. 127.
[406] Šljivančanin Appeal Brief, paras 148, 153.
[407] Šljivančanin Appeal Brief, para. 151, citing Trial Judgement, para. 214.
[408] Šljivančanin Appeal Brief, para. 149, citing T.13568.
[409] Šljivančanin Appeal Brief, para. 151, citing Irinej Bućko, T. 2932-2933; Mara Bućko, T. 2797-2798; P012, T. 3663. *See* also AT. 137-138.
[410] Šljivančanin Appeal Brief, para. 152.

Mitrovica; and (iii) that the Trial Chamber found that the convoy left the hospital at around 14:00-14:30 hours.[411]

118. The Prosecution responds that Šljivančanin's arguments lack merit and should be dismissed.[412] It further responds that the Trial Judgement considered the evidence relied upon by Šljivančanin and adds that, considering the proximity of the two locations, Šljivančanin could well have been at the Vukovar hospital when the convoy left at about 14:00-14:30 hours and then at Ovčara at about 14:30-15:00 hours.[413]

119. The Appeals Chamber finds that the fact that Šljivančanin was interviewed by Sky News prior to the convoy leaving the hospital is irrelevant. The Appeals Chamber further finds that Šljivančanin's arguments that the evidence before the Trial Chamber demonstrates that he was at the hospital when the convoy left do not show that the Trial Chamber erred in accepting the testimony of Witness P009 that he saw Šljivančanin at Ovčara on 20 November 1991, or that the Trial Chamber erred in finding that Šljivančanin "was at Ovčara at about 1430 or 1500 hours".[414] First, Šljivančanin's arguments do not demonstrate that the Trial Chamber failed to consider other relevant evidence when it weighed his testimony.[415] Indeed, as Šljivančanin submits, the Trial Chamber had found that the convoy left the hospital at around 14:00-14:30 hours.[416] It further found that: (i) Šljivančanin was directing the process of the evacuation of other people from the hospital, that is, the women and children, elderly and hospital staff and their families; (ii) Šljivančanin talked to an ICRC representative, following which both were interviewed by the Sky News team; (iii) he organised a press conference at which he spoke to journalists about the ongoing events; and (iv) "[h]e was present at the hospital when the convoy with civilians left, that is at about 1400 or 1430 hours".[417] Second, as part of the evidence he purports to rely upon in his Appeal Brief, Šljivančanin refers to Exhibit P341, an ECMM report on the evacuation of the Vukovar hospital covering from 19 to 22 November, which he alleges states, regarding the departure of the convoy on 20 November 1991: "16:00: lived [*sic*] hospital".[418] However, the reference "16:00: [left] hospital" does not concern the convoy but the ECMM monitors.[419] Šljivančanin's argument is thus misleading. Further, Šljivančanin's arguments do not demonstrate that he could not have left the Vukovar hospital at 14:00-14:30 hours and arrived at Ovčara at about 14:30-15:00 hours. In light of

[411] Šljivančanin Appeal Brief, para. 150, citing Trial Judgement, para. 213.
[412] Prosecution Respondent's Brief, para. 58.
[413] Prosecution Respondent's Brief, paras 59-60. *See* also AT. 183-184.
[414] Trial Judgement, para. 383.
[415] *See* Šljivančanin Appeal Brief, para. 148.
[416] *See* Šljivančanin Appeal Brief, para. 150; Trial Judgement, para. 213.
[417] Trial Judgement, para. 376.
[418] Šljivančanin Appeal Brief, para. 150.

the foregoing, the Appeals Chamber finds that Šljivančanin fails to show that the Trial Chamber committed any error of fact which occasioned a miscarriage of justice at paragraph 383 of the Trial Judgement. Accordingly, Šljivančanin's arguments are dismissed.

3. The Trial Chamber's alleged failure to properly consider the testimony of Witnesses P014, Vojnović and Panić

120. Šljivančanin argues that the Trial Chamber failed to properly consider the testimony of Witnesses P014, Vojnović and Panić,[420] who testified they did not see him at Ovčara in the afternoon of 20 November 1991.[421] Specifically, he argues that the Trial Chamber's finding that Witness P014 saw Witnesses Panić and Vojnović discussing with each other contradicts its finding that Witness P014 was not present when Witness P009 said he saw Šljivančanin that afternoon.[422] He therefore submits that the Trial Chamber erred in finding that Witness P014's testimony did not call into question that of Witness P009.[423]

121. The Prosecution responds that Šljivančanin merely repeats arguments he made at trial,[424] that the Trial Chamber properly evaluated the testimony of Witnesses P014, Vojnović and Panić,[425] and that their testimony did not undermine Witness P009's sighting of Šljivančanin at Ovčara.[426]

122. The Appeals Chamber notes that Šljivančanin argued at trial that Witnesses P014, Vojnović and Panić, who were all present in Ovčara when Witness P009 saw Šljivančanin, testified they did not see him, and thus that the Trial Chamber could not conclude otherwise.[427] Hence, he already argued at trial that the Trial Chamber should assess their testimony against that of Witness P009. However, he does not use the same arguments he raised at trial but rather attempts to show some contradiction in the Trial Chamber's findings, and in particular that the Trial Chamber could not reasonably find that Witness P014 was not present when Witness P009 saw Šljivančanin. In this respect, the Appeals Chamber recalls the following findings by the Trial Chamber concerning the chronology of events up until the time when Witness P009 testified he saw Šljivančanin:

- The buses arrived in Ovčara between 13:30 and 14:30 hours;[428]

[419] Exhibit P341, "Report on the Evacuation of the Vukovar Hospital, 19 to 22 November 1991, by Dr. Schou, ECMM", p. 1. *See* Trial Judgement, para. 212.
[420] Šljivančanin Appeal Brief, paras 58, 155. *See* also Šljivančanin Brief in Reply, paras 36-37.
[421] Šljivančanin Appeal Brief, paras 156-158. *See* also AT. 130-131.
[422] Šljivančanin Appeal Brief, para. 159, citing Trial Judgement, para. 381.
[423] Šljivančanin Appeal Brief, para. 160.
[424] Prosecution Respondent's Brief, para. 14, fn. 27.
[425] Prosecution Respondent's Brief, para. 62, citing Trial Judgement, paras 254, 256-262, 378, 380-381, 383.
[426] Prosecution Respondent's Brief, paras 65-66.
[427] Šljivančanin Final Trial Brief, paras 702-707.
[428] Trial Judgement, para. 234.

- Šljivančanin was seen at Ovčara around 14:30-15:00 hours when the buses were still being unloaded;[429]

- Witness Vojnović testified that he arrived in Ovčara at around 14:00-14:30 hours when the prisoners were passing through the gauntlet in front of the hangar, and remained there until at least 17:00 hours;[430]

- Witness Panić testified that he arrived in Ovčara at about 15:00 hours after the buses were unloaded, stayed for 15 to 20 minutes in front of the hangar, and talked to Witness Vojnović;[431] Witness Panić testified that he did not see Šljivančanin at Ovčara;[432] and

- Witness P014 testified he was in Ovčara when the prisoners were passing through the gauntlet in front of the hangar, stayed there for 15-20 minutes until the buses were unloaded, only came back at around 17:00 hours, and testified he did not see Šljivančanin.[433]

123. It follows that the buses were completely unloaded around 15:00 hours. Accordingly, Witness P014 must have been in Ovčara from about 14:40 until 15:00 hours. Witness P009 testified that he saw the buses being unloaded and the prisoners of war being placed in the hangar (on this basis the Trial Chamber then inferred that he must have arrived at Ovčara towards the end of the process of placing the prisoners of war in the hangar), then went behind the hangar for about 15 minutes, after which he saw Šljivančanin.[434] As a result, Witness P009 must have seen Šljivančanin around 15:00-15:30 hours, at which time Witness P014 had left or was leaving Ovčara. Hence, a reasonable trier of fact could have concluded, as the Trial Chamber did, that Witness P014 was absent when Witness P009 saw Šljivančanin.[435]

124. Šljivančanin, however, argues that Witness P014 was actually in Ovčara "even after" the buses were unloaded,[436] which would contradict the Trial Chamber's finding. In support of his argument, he relies on Witness's P014's accepted testimony that he saw Witnesses Vojnović and Panić discuss,[437] which could only imply, considering Witness Panić's testimony that he arrived after the buses were unloaded, that this discussion occurred after 15:00 hours, and hence that Witness P014 was still in Ovčara after 15:00 hours when Witness P009 saw Šljivančanin. While

[429] Trial Judgement, paras 257, 383.
[430] Trial Judgement, para. 378.
[431] Trial Judgement, para. 258.
[432] Trial Judgement, para. 380.
[433] Trial Judgement, paras 254, 268, 381.
[434] Trial Judgement, para. 377.
[435] Trial Judgement, para. 381.
[436] Šljivančanin Appeal Brief, para. 159. The relevant portions of paragraph 159 are redacted in the public version of Šljivančanin's Appeal Brief. However, the Appeals Chamber considers that these portions do not reveal the identity of the witness in question and do not disclose any sensitive information.

such an argument could indeed undermine the Trial Chamber's conclusion that Witness P014 was "absent from the place at the time when P009 says he saw Šljivančanin",[438] it ignores the fact that the Trial Chamber did not accept this part of Witness Panić's testimony. Rather, the Trial Chamber found that, regarding the time at which Witness Panić arrived at Ovčara, "[s]ome evidence would suggest […] that LtCol Panić's visit was earlier than he indicated in his evidence",[439] and that he "may have seen more of the mistreatment of the prisoners of war outside the hangar than he acknowledged in his evidence in which event his evidence in this respect would not have been entirely frank, no doubt out of self interest".[440] The Trial Chamber thus considered that Witness Panić could have been in Ovčara before 15:00 hours and did not exclude the possibility that he had a discussion with Witness Vojnović on the right hand side of the gauntlet, while the buses were still being unloaded.[441] Accordingly, Šljivančanin fails to demonstrate that the Trial Chamber's finding that Witness P014 was not present when Witness P009 saw Šljivančanin is unreasonable, and also fails to demonstrate that the Trial Chamber erred in finding that Witness P014's testimony did not call into question that of Witness P009.

125. The Appeals Chamber further underlines that while there may indeed be inconsistencies within or amongst witnesses' testimonies before a Trial Chamber, such inconsistencies do not *per se* require a reasonable Trial Chamber to reject the evidence as being unreasonable.[442] In the present case, the Trial Chamber noted that the "[f]actual differences in this evidence are obvious" and that "[n]ot all of them can be resolved".[443] The Trial Chamber did not ignore the inconsistencies before it; rather its conclusion that Witness P009 saw Šljivančanin in Ovčara was based on the totality of the evidence before it, including the testimony of Witnesses Vojnović,[444] Panić,[445] and P014.[446] In light of the foregoing, Šljivančanin's arguments are dismissed**.**

4. The Trial Chamber's failure to consider contrary evidence

126. Šljivančanin contends that the Trial Chamber did not consider the testimonies of several witnesses present at Ovčara at the relevant time.[447] He argues that: (i) several prisoners of war testified that he was not in Ovčara but the Trial Chamber only considered the testimony of two of

[437] Trial Judgement, para. 254.
[438] Trial Judgement, para. 381.
[439] Trial Judgement, para. 261.
[440] Trial Judgement, para. 262.
[441] Trial Judgement, para. 254.
[442] *Niyitegeka* Appeal Judgement, para. 95, citing *Kupreškić et al.* Appeal Judgement, para. 31.
[443] Trial Judgement, para. 259.
[444] Trial Judgement, para. 378.
[445] Trial Judgement, para. 380.
[446] Trial Judgement, para. 381.
[447] Šljivančanin Appeal Brief, paras 60, 161.

them, whereas the others (Witnesses P031, P011, Čakalić, Karlović) were also present at the relevant time and provided detailed and reliable testimony;[448] (ii) the Trial Chamber ignored the evidence of Witness P022, a JNA soldier who participated in the beatings, and who knew Šljivančanin but did not mention seeing him when indicating which JNA officers were in front of the hangar;[449] and (iii) the Trial Chamber ignored the testimony of Witness P017 who was in front of the hangar when the buses were unloaded but did not see Šljivančanin.[450]

127. The Prosecution responds that a Trial Chamber does not have to refer to the testimony of every witness on the record, and that Šljivančanin fails to demonstrate why no reasonable trier of fact could have reached the conclusion that he was in Ovčara based on the totality of the evidence.[451] It argues that the fact that the witnesses Šljivančanin refers to testified that they did not see him at Ovčara does not undermine the Trial Chamber's reliance on Witness P009's sightings.[452]

128. With regard to the testimony of prisoners of war present at Ovčara on 20 November 1991, it is correct, as Šljivančanin argues, that the Trial Judgement only expressly mentions the testimony of Witnesses P030 and Berghofer as not necessarily contradicting that of Witness P009, after considering that, "in the circumstances, they were in no position to notice the presence of all the JNA officers outside the hangar".[453] However, the Appeals Chamber recalls that while a Trial Chamber is required to consider inconsistencies and any explanations offered in respect of them when weighing the probative value of evidence,[454] it does not need to individually address them in the Trial Judgement.[455] Thus, the fact that the Trial Chamber did not expressly mention at paragraph 382 of the Trial Judgement the evidence proffered by Witnesses P031, P011, Čakalić and Karlović that they did not see Šljivančanin while in Ovčara, does not in and of itself demonstrate that the Trial Chamber ignored their testimony. The same reasoning applies to the evidence proffered by Witnesses P017 and P022. Moreover, with respect to Witness P022, the Appeals Chamber notes that the Trial Chamber expressly stated that it had reservations about his testimony and was not persuaded to rely on it alone[456] "in so far as he identifies others as participants in relation to the events at Ovčara, unless this identification is confirmed by independent evidence which the Chamber accepts",[457] and further concluded after close scrutiny that it would treat other aspects of

[448] Šljivančanin Appeal Brief, paras 162-165. *See* also AT. 126, 128-130, 134-136.
[449] Šljivančanin Appeal Brief, para. 166, citing Trial Judgement, para. 353. *See* also AT. 210.
[450] Šljivančanin Appeal Brief, para. 167. The Appeals Chamber notes that paragraph 167 is redacted in the public version of Šljivančanin's Appeal Brief. However, the Appeals Chamber considers that this paragraph does not reveal the identity of the witness in question and does not disclose any sensitive information.
[451] Prosecution Respondent's Brief, para. 68.
[452] Prosecution Respondent's Brief, para. 73.
[453] Trial Judgement, para. 382.
[454] *Niyitegeka* Appeal Judgement, para. 96.
[455] *Muhimana* Appeal Judgement, para. 58.
[456] Trial Judgement, para. 102.
[457] Trial Judgement, para. 348.

the evidence of Witness P022 with great care.[458] In any case, the fact that the Trial Chamber did mention in the body of the Trial Judgement the evidence proffered by the prisoners of war[459] and by Witnesses P017 and P022[460] in relation to the events at Ovčara that day, demonstrates that it did not ignore their testimony. Accordingly, Šljivančanin's arguments that the Trial Chamber failed to consider evidence that he was not in Ovčara in the afternoon of 20 November 1991 are dismissed**.**

5. Conclusion

129. In light of the foregoing, the Appeals Chamber finds that Šljivančanin has not demonstrated that the Trial Chamber committed any error of law or fact at paragraphs 377 to 386 of the Trial Judgement. Therefore, Šljivančanin has not shown that it was unreasonable for the Trial Chamber to conclude that he was present in Ovčara in the afternoon of 20 November 1991. Accordingly, Šljivančanin's first ground of appeal is dismissed in its entirety**.**

B. Second Ground of Appeal: Šljivančanin's Conviction under Aiding and Abetting

130. Šljivančanin argues that the Trial Chamber erred in law and in fact in convicting him under Count 7 of the Indictment for aiding and abetting by omission the torture of the prisoners of war at Ovčara. He contends that: (1) aiding and abetting by omission is not a mode of liability included in the International Tribunal's jurisdiction;[461] (2) the Trial Chamber erred in finding that he was put on notice that the Prosecution was relying on this mode of liability;[462] and (3) the Trial Chamber erred in defining the essential elements of this mode of liability, and failed to consider certain elements.[463] Should the Appeals Chamber find that aiding and abetting by omission does not fall under the International Tribunal's jurisdiction, Šljivančanin requests the Appeals Chamber to reverse his conviction.[464] In the alternative, Šljivančanin requests the Appeals Chamber to either quash the conviction[465] or order a re-trial based on his lack of notice that the Prosecution relied on this mode of liability.[466] Should it find that he was put on notice that the Prosecution's case relied on aiding and abetting by omission, he requests the Appeals Chamber to identify the correct elements of aiding and abetting by omission and apply them to the facts of his case.[467]

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[458] Trial Judgement, para. 348. *See* also Trial Judgement, paras 346-347, 349.
[459] *See inter alia* Trial Judgement, paras 186, 232, 237, 242-244, 297, 597.
[460] *See*, respectively, Trial Judgement, paras 240-241, 600; paras 287-288, 294, 342-364, 529.
[461] Šljivančanin Notice of Appeal, para. 13(A); Šljivančanin Appeal Brief, paras 176-177. *See* also AT. 139.
[462] Šljivančanin Notice of Appeal, para. 13(B); Šljivančanin Appeal Brief, paras 222-238.
[463] Šljivančanin Notice of Appeal, para. 13(C); Šljivančanin Appeal Brief, paras 239-249.
[464] Šljivančanin Notice of Appeal, paras 14, 36; Šljivančanin Appeal Brief, paras 250, 509.
[465] Šljivančanin Appeal Brief, paras 221, 510; Šljivančanin Supplemental Brief in Reply, para. 57.
[466] Šljivančanin Notice of Appeal, paras 15, 37; Šljivančanin Appeal Brief, paras 251, 510.
[467] Šljivančanin Notice of Appeal, para. 16; Šljivančanin Appeal Brief, para. 252.

131. The Prosecution responds that the Trial Chamber correctly convicted Šljivančanin for aiding and abetting by omission the torture of the prisoners of war at Ovčara.[468] It submits that the jurisprudence of both this International Tribunal and the ICTR supports the Trial Chamber's finding that aiding and abetting by omission is a recognised mode of liability under Article 7(1) of the Statute.[469] It also contends that the Trial Chamber was correct in finding that Šljivančanin was on notice of this mode of liability[470] and that Šljivančanin fails to establish any prejudice in this regard.[471] The Prosecution further submits that the Trial Chamber correctly identified the requisite elements of this mode of liability and properly applied them to the facts.[472]

1. Aiding and abetting by omission under the International Tribunal's jurisdiction

132. Šljivančanin submits that the Trial Chamber erred in convicting him pursuant to Article 7(1) of the Statute under the mode of liability of aiding and abetting by omission, and that his conviction should therefore be quashed.[473] He contends that his conviction for aiding and abetting by omission is "a first" before the International Tribunal[474] and that the Appeals Chamber has never enumerated in detail the requirements for conviction by omission,[475] nor has it indicated whether omission may form the basis for individual criminal responsibility under this mode of liability.[476] In his view, aiding and abetting by omission is not included in the Statute of the International Tribunal and was not recognised as a norm of customary international law in November 1991, and hence his conviction under this mode of liability is in breach of the principle of legality.[477]

133. The Prosecution responds that the Trial Chamber was correct in finding that aiding and abetting by omission falls within the jurisdiction of the International Tribunal.[478] It argues that the jurisprudence of the International Tribunal and the ICTR supports the Trial Chamber's finding that aiding and abetting by omission is encompassed under Article 7(1) of the Statute.[479]

[468] Prosecution Supplemental Respondent's Brief, paras 2, 4.
[469] Prosecution Supplemental Respondent's Brief, paras 6, 15, 22.
[470] Prosecution Respondent's Brief, paras 77-79.
[471] Prosecution Respondent's Brief, paras 80-82.
[472] Prosecution Supplemental Respondent's Brief, para. 23. *See* also AT. 168.
[473] Šljivančanin Appeal Brief, paras 177-178, 221; Šljivančanin Supplemental Brief in Reply, para. 57.
[474] Šljivančanin Appeal Brief, paras 176, 198; Šljivančanin Supplemental Brief in Reply, paras 12, 19.
[475] Šljivančanin Appeal Brief, paras 176, 192.
[476] Šljivančanin Appeal Brief, paras 176, 192-196; Šljivančanin Supplemental Brief in Reply, paras 12-19.
[477] Šljivančanin Appeal Brief, paras 199-221. *See* also AT. 139-145, 203-207. At the appeals hearing, Šljivančanin highlighted the distinction between omission by a principal perpetrator, omission by a superior under Article 7(3) of the Statute and aiding and abetting by encouragement and moral support which he submits do fall within the jurisdiction of the International Tribunal but are different from aiding and abetting by omission.
[478] Prosecution Supplemental Respondent's Brief, paras 6, 10.
[479] Prosecution Supplemental Respondent's Brief, paras 4-10, 15-17.

134. The Appeals Chamber recalls that while individual criminal responsibility generally requires the commission of a positive act, this is not an absolute requirement.[480] In particular, the Appeals Chamber has previously found that "the omission to act where there is a legal duty to act can lead to individual criminal responsibility under Article 7(1) of the Statute".[481] Moreover, the Appeals Chamber has consistently found that, in the circumstances of a given case, the *actus reus* of aiding and abetting may be perpetrated through an omission.[482]

135. Accordingly, the Appeals Chamber finds that the Trial Chamber properly considered aiding and abetting by omission as a recognised mode of liability under the International Tribunal's jurisdiction.[483]

2. Whether Šljivančanin was put on notice that the Prosecution relied on aiding and abetting by omission

136. Šljivančanin submits that he was not put on notice that the Prosecution sought to rely on aiding and abetting by omission, contrary to his right to be informed of the case against him under Article 21(4)(a) of the Statute.[484] He argues that this mode of liability was not mentioned in the Indictment, and was first raised by the Prosecution in its Final Trial Brief.[485] He contends that, to the extent that "omission" is mentioned in the Indictment, it is generalised[486] and relates to either culpable omission under Article 7(1) of the Statute which, in any event, was not alleged,[487] or to his alleged superior responsibility under Article 7(3) of the Statute.[488] Šljivančanin further submits that the Trial Chamber erred by analysing this mode of liability[489] instead of declining to consider it on the basis of insufficient notice to the defence, as the Appeals Chamber did in the *Brđanin* case.[490] He argues that he was prejudiced by this lack of notice, since, had he known that the Prosecution intended to rely on this mode of liability, he would have challenged the jurisdiction of this International Tribunal to apply it, and engaged Prosecution witnesses differently.[491]

[480] *Blaškić* Appeal Judgement, para. 663.
[481] *Orić* Appeal Judgement, para. 43. *See* also *Brđanin* Appeal Judgement, para. 274; *Galić* Appeal Judgement, para. 175; *Simić* Appeal Judgement, fn. 259; *Blaškić* Appeal Judgement, paras 47-48, 663, fn. 1385; *Tadić* Appeal Judgement, para. 188; *Ntagerura et al.* Appeal Judgement, paras 334, 370.
[482] *Blaskić* Appeal Judgement, para. 47. *See* also *Nahimana et al.* Appeal Judgement, para. 482; *Ntagerura et al.* Appeal Judgement, para. 370.
[483] Trial Judgement, paras 553, 662.
[484] Šljivančanin Appeal Brief, paras 222-223.
[485] Šljivančanin Appeal Brief, paras 226, 235.
[486] Šljivančanin Brief in Reply, para. 40.
[487] Šljivančanin Appeal Brief, paras 232-233.
[488] Šljivančanin Brief in Reply, para. 39.
[489] Šljivančanin Brief in Reply, paras 41-42.
[490] Šljivančanin Appeal Brief, paras 228-231, citing *Brđanin* Appeal Judgement, paras 274-275; Šljivančanin Brief in Reply, paras 41-42.
[491] Šljivančanin Appeal Brief, paras 234-236; Šljivančanin Brief in Reply, paras 45-46.

137. The Prosecution contends that, although aiding and abetting by omission was not a principal theory of liability in its case,[492] Šljivančanin was sufficiently put on notice of it since the Indictment contained all relevant particulars, including the material facts underpinning the charges, the duty applicable to Šljivančanin, the material facts concerning the breach of that duty, and the legal consequences of this breach.[493] It also argues that Šljivančanin was on further notice throughout the trial by virtue of its related filings.[494] The Prosecution submits that Šljivančanin's reliance on the *Brđanin* case is misplaced, since in the present case, and unlike in *Brđanin,* the Trial Chamber identified the mode of liability under which Šljivančanin was convicted, and its elements, and found that he had notice of it.[495] Finally, the Prosecution contends that Šljivančanin fails to demonstrate the prejudice accrued to him, since he did not object to the alleged lack of notice until this late stage of the proceedings[496] and has not shown how he would have actually engaged witnesses differently at trial.[497]

138. The Appeals Chamber recalls that, in considering whether an appellant received clear and timely notice, the indictment must be considered as a whole.[498] Although it is preferable that each individual count precisely and expressly indicates the particular nature of the responsibility alleged,[499] even if this is not the case, an accused might have received clear and timely notice of the form of responsibility pleaded by virtue of other paragraphs of the indictment.[500] In the *Gacumbitsi* case, when seized of the question of whether the indictment gave the appellant sufficiently clear and timely notice that he was being charged with aiding and abetting murder, the Appeals Chamber found that reference to aiding and abetting in the preamble to the relevant count – namely a quote of Article 6(1) of the ICTR Statute stating that by his acts the accussed had planned, instigated, ordered, committed, or otherwise aided and abetted the planning, preparation or execution of the crime charged – taken in combination with the allegations of material facts sufficient to support a

[492] Prosecution Respondent's Brief, para. 79.
[493] Prosecution Respondent's Brief, paras 77, 79.
[494] Prosecution Respondent's Brief, para. 77, fns 246-248, referring to its Pre Trial Brief, Opening Statement and Final Trial Brief.
[495] Prosecution Respondent's Brief, para. 78.
[496] Prosecution Respondent's Brief, para. 80.
[497] Prosecution Respondent's Brief, para. 81.
[498] *Gacumbitsi* Appeal Judgement, para. 123.
[499] The Appeals Chamber recalls that the Prosecution has repeatedly been discouraged from the practice of simply restating Article 7(1) of the Statute in its indictments unless it intends to rely on all of the modes of liability contained therein; when the Prosecution is intending to rely on all modes of responsibility in Article 7(1) of the Statute, then the material facts relevant to each of those modes must be pleaded in the indictment (*Simić* Appeal Judgement, para. 21, citing *Semanza* Appeal Judgement, para. 357; *Ntakirutimana* Appeal Judgement, para. 473; *Blaškić* Appeal Judgement, para. 228; *Krnojelac* Appeal Judgement, para. 138; *Kvočka et al.* Appeal Judgement, para. 29).
[500] *Gacumbitsi* Appeal Judgement, para. 122, citing *Semanza* Appeal Judgement, para. 259; *Ntakirutimana* Appeal Judgement, para. 473; *Aleksovski* Appeal Judgement, fn. 319.

conviction under that mode of liability, was sufficient to put the appellant on notice that he was charged with aiding and abetting murder.[501]

139. In the present case, the Appeals Chamber notes that, according to paragraph 4 of the Indictment, Šljivančanin was charged under Article 7(1) of the Statute with "otherwise aiding and abetting" the crimes charged thereof. The Indictment alleges, *inter alia,* that Šljivančanin "permitted" the JNA soldiers under his command to deliver the detainees to other Serb forces who physically committed the crimes charged[502] and that, while still in charge of the evacuation operation, he was "personally present at the Ovčara farm on 20 November 1991 when the criminal acts charged in this indictment were being committed".[503] The Indictment further states that "at all times relevant to this indictment […] Šljivančanin was required to abide by the laws and customs governing the conduct of armed conflicts".[504] It is also alleged that Šljivančanin was subject to specific laws and regulations which set out the chain of command and obliged JNA officers and their subordinates to observe the laws of war.[505]

140. In addition, under the general paragraph setting out the charges under Counts 5 to 8 of the Indictment, it is alleged that Šljivančanin "otherwise aided and abetted" the imprisonment at the Ovčara farm of approximately 300 detainees, who were subjected to various forms of abuse, including beatings at the front of the farm building[506] and that "by these acts *and omissions*" Šljivančanin committed, *inter alia,* torture as a violation of the laws and customs of war under Article 3 and Articles 7(1) and 7(3) of the Statute.[507]

141. The Appeals Chamber finds that the paragraphs of the Indictment referenced above plead with sufficient particularity the nature of the charges against Šljivančanin with regard to aiding and abetting by omission the mistreatment of prisoners of war at Ovčara, and that accordingly Šljivančanin had sufficient notice that this was one of the modes of liability that the Prosecution intended to rely on.

142. In addition, with regard to the issue of prejudice, the Appeals Chamber notes that where an appellant raises a defect in his indictment for the first time on appeal, he bears the burden of

[501] *Gacumbitsi* Appeal Judgement, para. 123.
[502] Indictment, para. 11(g).
[503] Indictment, para. 11(h).
[504] Indictment, para. 22. The Indictment also alleges that, in his capacity as a superior in the JNA, Šljivančanin had *de facto* and *de jure* control over Serb forces, members of the TO and paramilitary units that were directly involved in, *inter alia,* the transfer of detainees to Ovčara farm, where they were mistreated (*see* Indictment, paras 17, 18).
[505] Indictment, para. 20.
[506] Indictment, para. 46.
[507] Indictment, para. 48, Count 7 (emphasis added).

showing that his ability to prepare his defence was materially impaired[508] and that generalised allegations of prejudice will not suffice.[509] This principle is of course subject to the inherent jurisdiction of the Appeals Chamber to do justice in the case.[510]

143. In the present case, Šljivančanin provides little detail as to how his defence was materially impaired, with the exception of a general submission that, had he known the Prosecution intended to rely on this mode of liability, he would have applied a different approach to his case, as he would have: (i) filed a motion challenging the jurisdiction of this International Tribunal to consider this mode of liability on the basis that it does not form part of customary international law; and (ii) engaged Prosecution witnesses differently, by questioning certain witnesses about the roles and duties of Mrkšić as the Commander of OG South, and asking those witnesses who were present at Ovčara at the relevant time about their own roles and responsibilities.[511]

144. The Appeals Chamber finds that Šljivančanin fails to provide specific information to show that his defence was materially impaired by the alleged lacked of notice. For example, he raised the challenge to the International Tribunal's jurisdiction over this mode of liability in his appeal and as such has still had the benefit of a determination on the issue. Furthermore, he has not indicated the particular witnesses he would have engaged differently, the specific questions which he could have asked them, or precisely how his approach to the case would have differed from the approach which he in fact adopted. In light of the foregoing, Šljivančanin's arguments are dismissed.

3. Whether the Trial Chamber erred in defining the elements of aiding and abetting by omission

145. Šljivančanin contends that the Trial Chamber erred in law in identifying the basic elements of aiding and abetting by omission.[512] He argues that the elements of aiding and abetting which were identified by the Trial Chamber in this case are not appropriate for this "unique" form of omission liability.[513] In particular, he submits that the Trial Chamber failed to take into consideration that: (i) the duty to act must be mandated by a rule of criminal law;[514] (ii) there must be a "capacity to act";[515] (iii) there must be at a minimum an elevated degree of "concrete

[508] *Nahimana et al.* Appeal Judgement, paras 327, 368. *See* also *Muvunyi* Appeal Judgement, para. 123; *Gacumbitsi* Appeal Judgement, para. 51; *Niyitegeka* Appeal Judgement, para. 200.
[509] *Nahimana et al.* Appeal Judgement, para. 368.
[510] *Nahimana et al.* Appeal Judgement, para. 327, citing *Ntagerura et al.* Appeal Judgement, para. 31; *Niyitegeka* Appeal Judgement, para. 200.
[511] Šljivančanin Appeal Brief, paras 234-236; Šljivančanin Brief in Reply, paras 45-46.
[512] Šljivančanin Appeal Brief, paras 242-243, 252.
[513] Šljivančanin Appeal Brief, paras 244, 247.
[514] Šljivančanin Appeal Brief, paras 245, 247(a); Šljivančanin Supplemental Brief in Reply, paras 41, 42.
[515] Šljivančanin Appeal Brief, paras 245, 247(b). *See* also Šljivančanin Supplemental Brief in Reply, para. 43.

influence";[516] and (iv) the knowledge that the conduct will facilitate the commission of a crime cannot be "mere knowledge".[517] The Prosecution responds that the Trial Chamber correctly set out the elements of aiding and abetting by omission and that they comport with the elements previously identified by the Appeals Chamber for aiding and abetting.[518]

(a) Preliminary issue

146. As Šljivančanin argues,[519] the Appeals Chamber has never set out the elements for a conviction for omission in detail.[520] In the *Orić* case, the Appeals Chamber considered the Trial

[516] Šljivančanin Appeal Brief, para. 245, citing *Orić* Appeal Judgement, para. 41; *Blaškić* Appeal Judgement, para. 664. *See* also Šljivančanin Appeal Brief, para. 247(d); Šljivančanin Supplemental Brief in Reply, paras 46-50.

[517] Šljivančanin Appeal Brief, paras 245, 247(e); Šljivančanin Supplemental Brief in Reply, paras 34-39. Šljivančanin also contends under his second ground of appeal that, should the Appeals Chamber find that the Trial Chamber correctly identified the elements of aiding and abetting by omission, it erred in applying them to the facts of the case (Šljivančanin Appeal Brief, para. 249). However, he does not attempt to support this argument under his second ground of appeal. The only specific arguments he makes in this respect are found under his fifth ground of appeal: *see infra* Section IV(E): "Whether the Elements of Aiding and Abetting the Torture of the Prisoners of War in Ovčara were Fulfilled". *See* Šljivančanin Appeal Brief, paras 211-212, 214.

[518] Prosecution Supplemental Respondent's Brief, para. 23.

[519] Šljivančanin Appeal Brief, para. 192.

[520] *Orić* Appeal Judgement, para. 43, citing *Simić* Appeal Judgement, para. 85, fn. 259; *Blaškić* Appeal Judgement, para. 47. The Appeals Chamber notes that paragraph 554 of the Trial Judgement in the case at hand states that, in the *Blaškić* Appeal Judgement, the Appeals Chamber found that although not expressly stated, Tihomir Blaškić was apparently convicted for having aided and abetted by omission the inhuman treatment of detainees occasioned by their use as human shields. The Trial Chamber in the present case reached this conclusion by reasoning that given that the indictment against Tihomir Blaškić charged him with all the forms of responsibility under Article 7(1) of the Statute, and that all of these, save for aiding and abetting, were specifically rejected or clearly not considered, the Appeals Chamber must have entered a conviction for aiding and abetting as it was the only remaining mode of liability. This understanding of the *Blaškić* Appeal Judgement is incorrect. The Appeals Chamber would like to emphasize for the sake of clarity that the *Blaškić* Appeals Chamber did not convict Tihomir Blaškić for aiding and abetting by omission the inhuman treatment of detainees. The *Blaškić* Appeals Chamber affirmed Tihomir Blaškić's conviction under Count 19 of the indictment pursuant to Article 7(1) of the Statute for the inhuman treatment of detainees occasioned by their use as human shields (a grave breach as recognised by Article 2(b) of the Statute). In reaching this decision the *Blaškić* Appeals Chamber: recalled that the indictment against him pleaded that by his acts and omissions, he had committed a grave breach as recognized by Articles 2(b), 7(1) and 7(3) (inhuman treatment) of the Statute of the International Tribunal; set out the legal definition of inhuman treatment under Article 2 of the Statute; found that the Trial Chamber's finding that he knew of the use of the detainees as human shields was one that a reasonable trier of fact could have made; and found that his failure to prevent the continued use of the detainees as human shields, leaving the protected persons exposed to danger of which he was aware, constituted an intentional omission on his part. The *Blaškić* Appeals Chamber found that the elements constituting the crime of inhuman treatment had been met as there was an omission to care for protected persons which was deliberate and not accidental, which caused serious mental harm, and constituted a serious attack on human dignity. In the absence of proof that Tihomir Blaskić positively ordered the use of human shields, the Appeals Chamber concluded that his criminal responsibility was properly expressed as an omission pursuant to Article 7(1) as charged in the indictment and found him guilty under Article 7(1) of the Statute for the inhuman treatment of detainees occasioned by their use as human shields. Indeed, as the Trial Chamber in the present case noted, the *Blaškić* Appeals Chamber left open the possibility that in the circumstances of a given case, an omission may constitute the *actus reus* of aiding and abetting. This statement has to be read in context with the facts of that case. In his appeal, Tihomir Blaškić had argued that the Trial Chamber erroneously applied a strict liability standard to find him guilty as an aider and abettor. After concluding that the Trial Chamber had correctly set out the *mens rea* and *actus reus* requirements, the *Blaškić* Appeals Chamber found that the Trial Chamber was correct in part and erred in part in setting out the legal requirements of aiding and abetting. It was in the context of analyzing the Trial Chamber's articulation of the *actus reus* of aiding and abetting (which the Trial Chamber considered might be perpetrated through an omission, provided this failure to act had a decisive effect on the commission of the crime and that it was coupled with the requisite *mens rea*) that the *Blaškić* Appeals Chamber stated that in the circumstances of a given case, an omission may constitute the *actus reus* of aiding and abetting. Furthermore, the *Blaškić* Appeals Chamber noted that the Trial Chamber did not hold Tihomir Blaškić responsible for aiding and abetting the crimes at issue; considered that this form of participation had been insufficiently litigated on appeal; concluded that this form of participation was not fairly

Chamber's findings in order to determine whether Atif Krdžić, Naser Orić's subordinate, had been found responsible for aiding and abetting by omission.[521] It concluded that no such finding had been entered as the issue of whether Naser Orić's subordinate had incurred criminal responsibility had not been resolved by the Trial Chamber.[522] In this context, with regard to the mode of liability of aiding and abetting by omission, the Appeals Chamber held that:

> at a minimum, the offender's conduct would have to meet the basic elements of aiding and abetting. Thus, his omission must be directed to assist, encourage or lend moral support to the perpetration of a crime and have a substantial effect upon the perpetration of the crime (*actus reus*). The aider and abettor must know that his omission assists in the commission of the crime of the principal perpetrator and must be aware of the essential elements of the crime which was ultimately committed by the principal (*mens rea*).[523]

Accordingly, the Appeals Chamber in *Orić* acknowledged that the basic elements of aiding and abetting apply notwithstanding whether this form of liability is charged as "omission". The *mens rea* and *actus reus* requirements for aiding and abetting by omission are the same as for aiding and abetting by a positive act.[524] The critical issue to be determined is whether, on the particular facts of a given case, it is established that the failure to discharge a legal duty assisted, encouraged or lent moral support to the perpetration of the crime, and had a substantial effect on it. In particular, the question as to whether an omission constitutes "substantial assistance" to the perpetration of a crime requires a fact based enquiry.[525]

147. The Appeals Chamber now turns to Šljivančanin's submissions that the Trial Chamber did not properly identify certain elements of aiding and abetting by omission in the present case.

(b) The nature of the legal duty

148. Šljivančanin submits that the duty to act, which forms the basis of omission liability, must stem from a rule of criminal law and cannot be a general duty.[526] He contends that this issue is of particular significance to his case, in light of his submission that he was under no specific duty mandated by criminal law to protect the prisoners of war at Ovčara on 20 November 1991.[527]

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encompassed by the indictment; and declined to consider this form of participation any further. *See Blaškić* Appeal Judgement, paras 43-52, 660, 665, 666, 668, 670, Disposition, p. 258.

[521] *See Orić* Appeal Judgement, paras 43-46.

[522] *See Orić* Appeal Judgement, para. 47.

[523] *Orić* Appeal Judgement, para. 43, citing *Nahimana et al.* Appeal Judgement, para. 482; *Simić* Appeal Judgement, paras 85, 86; *Seromba* Appeal Judgement, para. 56; *Blagojević and Jokić* Appeal Judgement, para. 127*; Aleksovski* Appeal Judgement, para. 162.

[524] *Orić* Appeal Judgement, para. 43; *Blaškić* Appeal Judgement, para. 47 ("The Appeals Chamber leaves open the possibility that in the circumstances of a given case, an omission may constitute the *actus reus* of aiding and abetting").

[525] *See Blagojević and Jokić* Appeal Judgement, para. 134 ("The Appeals Chamber observes that the question of whether a given act constitutes substantial assistance to a crime requires a fact-based inquiry"). *See* also *Muvunyi* Appeal Judgement, para. 80.

[526] Šljivančanin Appeal Brief, paras 245, 247(a); Šljivančanin Supplemental Brief in Reply, para. 41.

[527] Šljivančanin Supplemental Brief in Reply, para. 42.

149. The Prosecution responds that the question remains open as to whether the duty to act must be based on criminal law, or may be based on a general duty.[528] However, it argues that in the context of the present case it is not necessary for the Appeals Chamber to decide on this issue, since the Trial Chamber's findings make clear that Šljivančanin's duty to act stemmed from criminal law, in the sense that a breach of that duty gave rise to individual criminal responsibility under Article 7(1) of the Statute.[529] It submits that the Trial Chamber's finding is consistent with the jurisprudence of the International Tribunal, which has recognised that the breach of a duty to act imposed by the laws and customs of war is criminalised under international and domestic law.[530]

150. The Appeals Chamber notes that the Trial Chamber was satisfied that the duty to protect the prisoners of war was imposed on Šljivančanin by the laws and customs of war.[531] In particular, the Trial Chamber referred to Article 13 of Geneva Convention III which provides, *inter alia,* that any unlawful omission by the Detaining Power which causes death or seriously endangers the health of a prisoner of war is prohibited,[532] and to the JNA's own regulations on the application of the laws of war, pursuant to which each individual was responsible for applying the regulations, including the humane treatment of prisoners of war.[533] In addition, the Trial Chamber considered that Šljivančanin's duty to protect prisoners of war was part of his remit as security organ of OG South, and by virtue of the authority delegated to him by Mrkšić with regard to the removal of war crime suspects from the hospital.[534] According to the Trial Chamber:

> [i]t follows that his omission, when visiting Ovčara, or immediately after, to take necessary measures to prevent the continuing commission of crimes against the prisoners of war protected by the laws and customs of war, amounts to a breach of his legal duty. As discussed earlier, a failure to discharge a legal duty of this kind may incur criminal responsibility pursuant to Article 7(1) of the Statute.[535]

151. The Appeals Chamber recalls that it has previously recognised that the breach of a duty to act imposed by the laws and customs of war gives rise to individual criminal responsibility.[536] The Appeals Chamber further recalls that Šljivančanin's duty to protect the prisoners of war was imposed by the laws and customs of war.[537] Thus, the Appeals Chamber considers that Šljivančanin's breach of such duty gives rise to his individual criminal responsibility. Therefore, it

[528] Prosecution Supplemental Respondent's Brief, paras 25-26.
[529] Prosecution Supplemental Respondent's Brief, para. 27. *See* also AT. 168.
[530] Prosecution Supplemental Respondent's Brief, para. 27, citing *Blaškić* Appeal Judgement, fn. 1384.
[531] Trial Judgement, paras 668-669.
[532] *See* Trial Judgement, para. 668, fn. 2157, citing Article 13 of Geneva Convention III; *Blaškić* Appeal Judgement, para. 663, fn. 1384.
[533] *See* Trial Judgement, para. 668 fn. 2157, citing Exhibit P396, "Regulations on the Application of International Laws of War in the Armed Forces of the SFRY, 1988".
[534] Trial Judgement, para. 668.
[535] Trial Judgement, para. 669.
[536] *Blaškić* Appeal Judgement, para. 663, fn. 1384.
[537] *See supra* Section III.(B)(3).

is not necessary for the Appeals Chamber to further address whether the duty to act, which forms part of the basis of aiding and abetting by omission, must stem from a rule of criminal law.

152. In light of the foregoing, Šljivančanin's argument is dismissed.

(c) The capacity to act

153. Šljivančanin submits that the Trial Chamber failed to consider his material ability to take the necessary and reasonable measures to fulfil his duty to protect the prisoners of war at Ovčara.[538] He argues that regardless of any authority allegedly conferred on him by Mrkšić, and even if he was present at Ovčara, he could not issue orders directly to the Chief of Staff of OG South, or particular commanders of the 80 mtbr, which would have been necessary to protect the prisoners.[539] The Prosecution responds that the Trial Chamber was correct in finding that Šljivančanin had the material ability to act,[540] and that this conclusion is supported by the Trial Chamber's other findings that the JNA had the capacity to control the TOs and paramilitaries, and that Šljivančanin in particular was authorised to use as many military police as necessary to secure the prisoners and ensure their safe passage.[541]

154. The Appeals Chamber considers that aiding and abetting by omission necessarily requires that the accused had the ability to act, or in other words, that there were means available to the accused to fulfil this duty.[542] In the present case, the Appeals Chamber notes that the Trial Chamber addressed in detail the possibilities which were open to Šljivančanin to discharge his duty.[543] Consequently, Šljivančanin's argument that he could not issue orders to the Chief of Staff of OG South, or the commander of the 80 mtbr without first addressing their Brigade Commander, who was present,[544] does not support his contention that the Trial Chamber failed to take into consideration his material ability to take the necessary and reasonable measures to fulfil his duty to protect the prisoners of war at Ovčara. Accordingly, Šljivančanin's argument is dismissed.

(d) The requirement of "concrete influence"

155. Relying on the Appeals Chamber Judgements in *Orić* and *Blaškić*, Šljivančanin submits that, at a minimum, aiding and abetting by omission requires an elevated degree of "concrete

[538] Šljivančanin Appeal Brief, para. 245, 247(b); Šljivančanin Supplemental Brief in Reply, para. 43.
[539] Šljivančanin Supplemental Brief in Reply, para. 45.
[540] Prosecution Supplemental Respondent's Brief, para. 28, citing Trial Judgement, paras 667, 670. *See* also AT. 168.
[541] Prosecution Supplemental Respondent's Brief, para. 28, citing Trial Judgement, paras 396, 400. *See* also AT. 168.
[542] *Cf. Ntagerura et al.* Appeal Judgement, para. 335.
[543] Trial Judgement, paras 667, 670.
[544] Šljivančanin Supplemental Brief in Reply, para. 45. *See infra* para. 201.

influence".[545] He argues that this provides an objective standard for establishing whether his omission had a "substantial effect" on the mistreatment of prisoners[546] and that the contribution must be considered from the perspective of the perpetrators of the crime, not the omission itself.[547] Šljivančanin also appears to propose that the failure to act must have a "decisive effect" on the commission of the crime,[548] but fails to elaborate this point. The Prosecution responds that there is no indication that the "concrete influence" standard is in fact any higher than "substantial effect" which is the correct standard,[549] and that Šljivančanin's reliance on the *Orić* case is misplaced, since in that case the Appeals Chamber used the term "concrete influence" in the context of its finding that aiding and abetting by omission requires more than a simple correlation between the omission and the crimes.[550] The Prosecution submits that to prove that an omission had a substantial effect on the crime, it must be shown that the crime would have been substantially less likely to have occurred had the accused acted.[551]

156. The Appeals Chamber recalls that, in the *Orić* case, it found that the *actus reus* for "commission by omission requires an elevated degree of 'concrete influence'",[552] as distinct from the *actus reus* for aiding and abetting by omission, the latter requiring that the omission had a "substantial effect" upon the perpetration of the crime.[553] The Appeals Chamber finds no merit in Šljivančanin's attempt to conflate the substantial contribution requirement with the notion of an elevated degree of influence,[554] and notes that Šljivančanin himself does not provide any further support for his submission on this issue, beyond the vague statement that an "objective criteria" for assessing "substantial contribution" is warranted on the particular facts of his case.[555] Accordingly, Šljivančanin's argument is dismissed.

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[545] Šljivančanin Appeal Brief, para. 245, citing *Orić* Appeal Judgement, para. 41, *Blaškić* Appeal Judgement, para. 664. *See* also Šljivančanin Supplemental Brief in Reply, paras 46-50; AT. 145-146.
[546] Šljivančanin Supplemental Brief in Reply, paras 46-47.
[547] AT. 147.
[548] Šljivančanin Appeal Brief, para. 247(d).
[549] Prosecution Supplemental Respondent's Brief, para. 29.
[550] *Ibid.*
[551] AT. 169.
[552] *Orić* Appeal Judgement, para. 41, citing *Blaškić* Appeal Judgement, para. 664.
[553] *Orić* Appeal Judgement, para. 43, citing *Nahimana et al.* Appeal Judgement, para. 482; *Simić* Appeal Judgement, para. 85.
[554] The Appeals Chamber emphasizes that the reference to the term "concrete influence" in the *Orić* case (*Orić* Appeal Judgement, para. 41) must be read in the context of the *Blaškić* Appeals Chamber's qualification to the effect that the degree of "concrete influence" of a superior over the crime in which his subordinates participate (namely, the time when the superior's omission takes place *vis-à-vis* the occurrence of the crime), is a possible "distinguishing factor between the modes of responsibility expressed in Articles 7(1) and 7(3) of the Statute" since if the superior's omission to prevent a crime occurs when "the crime has already become more concrete or currently occurs, his responsibility would also fall under Article 7(1) of the Statute" (*Blaškić* Appeal Judgement, para. 664).
[555] Šljivančanin Supplemental Brief in Reply, paras 47, 48.

(e) The *mens rea* of aiding and abetting by omission

157. Šljivančanin submits that "aiding and abetting requires an intentional act on the part of the [a]ccused, which can only be matched by a culpable omission, a concept that goes beyond the basic elements of aiding and abetting as defined by the Appeals Chamber".[556] He argues that since the omission would have to be "specifically directed to assist, encourage or lend moral support"[557] to the perpetration of the crime, "only the wilful failure to discharge a duty, which implies the culpable intent of the accused, can lead to individual criminal responsibility, pursuant to Article 7(1) of the Statute".[558] In this regard, Šljivančanin submits that "mere knowledge" that the conduct facilitates the commission of the crime is insufficient to establish aiding and abetting by omission[559] and that the applicable *mens rea* standard must include, at a minimum, proof beyond reasonable doubt that he consciously decided not to act, which amounts to consent.[560] He argues that failure on the part of the Trial Chamber to establish that his omission was intentional and deliberate amounts to a finding of strict liability.[561]

158. The Prosecution responds that Šljivančanin attempts to elevate the mental element of aiding and abetting to a kind of special intent, which has already been specifically rejected by the Appeals Chamber.[562] It submits that the correct test is knowledge in the sense of "awareness of a probability" that the crime will be committed and that the acts or omissions will assist or facilitate in the commission of the crime,[563] and that, in any event, the facts as found by the Trial Chamber would fulfil his proposed criteria.[564]

159. The Appeals Chamber considers that Šljivančanin misapprehends the *mens rea* standard applicable to aiding and abetting. The fact that an "omission must be directed to assist, encourage or lend moral support to the perpetration of a crime" forms part of the *actus reus* not the *mens rea* of aiding and abetting.[565] In addition, the Appeals Chamber has confirmed that "specific direction" is

[556] Šljivančanin Appeal Brief, para. 212.
[557] Šljivančanin Appeal Brief, para. 211, citing *Orić* Appeal Judgement, para. 43. *See* also *Nahimana et al.* Appeal Judgement, para. 482.
[558] Šljivančanin Appeal Brief, para. 214.
[559] Šljivančanin Appeal Brief, para. 245.
[560] *See* Šljivančanin Supplemental Brief in Reply, para. 53. Šljivančanin further contends that the Trial Chamber should have applied the following additional criteria: (i) that he had knowledge of his ability to act; (ii) that he was aware of the essential elements of the crime ultimately committed by the principal; and (iii) that he had knowledge that taking action would obstruct the commission of the crime (*see* Šljivančanin Appeal Brief, para. 247(e)).
[561] Šljivančanin Supplemental Brief in Reply, para. 52.
[562] Prosecution Supplemental Respondent's Brief, para. 13, citing *Blaškić* Appeal Judgement, para. 49. *See* also Prosecution Supplemental Respondent's Brief, paras 12, 14.
[563] Prosecution Supplemental Respondent's Brief, para. 31. *See* also AT. 169, citing *Ndindabahizi* Appeal Judgement, para. 122.
[564] Prosecution Supplemental Respondent's Brief, para. 33. *See* also AT. 172.
[565] *Orić* Appeal Judgement, para. 43.

not an essential ingredient of the *actus reus* of aiding and abetting.[566] It reiterates its finding that the required *mens rea* for aiding and abetting by omission is that: (1) the aider and abettor must know that his omission assists in the commission of the crime of the principal perpetrator; and (2) he must be aware of the essential elements of the crime which was ultimately committed by the principal.[567] While it is not necessary that the aider and abettor know the precise crime that was intended and was in fact committed, if he is aware that one of a number of crimes will probably be committed, and one of those crimes is committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abetter.[568] The Appeals Chamber further recalls that it has previously rejected an elevated *mens rea* requirement for aiding and abetting, namely, the proposition that the aider and abettor needs to have intended to provide assistance, or as a minimum, accepted that such assistance would be a possible and foreseeable consequence of his conduct.[569] Accordingly, Šljivančanin's arguments are dismissed.

4. Conclusion

160. In light of the foregoing, Šljivančanin's second ground of appeal is dismissed in its entirety.

C. Third Ground of Appeal: Šljivančanin's Legal Duty to Protect the Prisoners of War at Ovčara by Virtue of his Responsibility for the Evacuation of the Vukovar Hospital

161. The Trial Chamber convicted Šljivančanin for aiding and abetting the torture of over 200 prisoners of war held at Ovčara on 20 November 1991.[570] In reaching this conclusion, the Trial Chamber found that Šljivančanin was under a duty to protect the prisoners of war by reason of his responsibility for the evacuation of the Vukovar hospital, and his failure to prevent the commission of crimes against the prisoners of war amounted to a breach of that duty.[571]

162. Šljivančanin argues that the Trial Chamber erred in finding that Mrkšić put him in charge of the evacuation of the Vukovar hospital and thereby entrusted him with a legal duty to protect the prisoners of war at Ovčara.[572] He avers that the Trial Chamber committed the following errors: (1) the Trial Chamber erred in finding that he testified that Mrkšić ordered him to ensure the

[566] *Blagojević and Jokić* Appeal Judgement, para. 189; *see* also *Blagojević and Jokić* Appeal Judgement para. 188.
[567] *See supra* para. 146.
[568] *Simić* Appeal Judgement, para. 86, citing *Blaškić* Appeal Judgement, para. 50. *See* also *Nahimana et al.* Appeal Judgement, para. 482; *Ndindabahizi* Appeal Judgement, para. 122; *Furundžija* Trial Judgement, para. 246.
[569] *Blaškić* Appeal Judgement, para. 49, citing *Vasiljević* Appeal Judgement, para. 102. *See* also *Blagojević and Jokić* Appeal Judgement, para. 222.
[570] Trial Judgement, paras 674, 689, 715.
[571] Trial Judgement, para. 669. *See* also Trial Judgement, paras 391, 668, 670.
[572] Šljivančanin Notice of Appeal, para. 17; Šljivančanin Appeal Brief, paras 257-259, citing Trial Judgement, para. 400. *See* also AT. 148-150, 200-201.

transport of the prisoners of war from the hospital to the prison in Sremska Mitrovica;[573] (2) the Trial Chamber erred in finding that, on 19 November 1991, Mrkšić announced that he had entrusted him with the evacuation of the hospital and authorised him to use the military police for that purpose;[574] (3) the Trial Chamber erred in finding that he was in charge of the evacuation of the Vukovar hospital whereas it was Colonel Pavković's responsibility;[575] (4) the Trial Chamber erred by inferring that he was involved in the transfer of the prisoners of war from the JNA barracks to Ovčara;[576] and (5) the Trial Chamber erred, by mischaracterising the testimony of Witness Vujić and relying on the testimony of other eye-witnesses not familiar with the JNA structure, in finding that he was in charge of the evacuation of the Vukovar hospital.[577] He posits that if he was not in charge of the evacuation of the Vukovar hospital and did not have a legal duty to protect the prisoners of war at Ovčara, there can be no culpable omission on his part, and thus requests that the Appeals Chamber enter a verdict of not guilty under Count 7 of the Indictment.[578]

163. The Prosecution responds that the Trial Chamber's finding that Šljivančanin was entrusted by Mrkšić with evacuating the Vukovar hospital and securing the prisoners of war during their transfer was the only reasonable conclusion which could have been drawn from the evidence.[579] It avers that Šljivančanin artificially deconstructs the evidence, misstates some of it, and fails to show how the alleged errors invalidate the Trial Judgement.[580]

1. Whether Šljivančanin testified that Mrkšić told him to ensure the transport of the prisoners of war to Sremska Mitrovica

164. Šljivančanin challenges the Trial Chamber's finding that he testified that "Mile Mrkšić told him to ensure the transport of war crime suspects from the hospital to the prison in Sremska Mitrovica".[581] He submits that: (a) he did not testify that he had been tasked with the transport of prisoners of war to Sremska Mitrovica and thus that the Trial Chamber incorrectly characterised his role in the evacuation;[582] and (b) his security officers corroborated his description of the scope of his tasks in relation to the evacuation.[583]

[573] Šljivančanin Notice of Appeal, para. 17(a).
[574] Šljivančanin Notice of Appeal, para. 17(b).
[575] Šljivančanin Notice of Appeal, para. 17(c).
[576] Šljivančanin Notice of Appeal, para. 17(d).
[577] Šljivančanin Notice of Appeal, para. 17(e).
[578] Šljivančanin Notice of Appeal, paras 21-22.
[579] Prosecution Respondent's Brief, para. 86, citing Trial Judgement, paras 390-396, 400-401, 659. *See* also AT. 175-181.
[580] Prosecution Respondent's Brief, para. 87.
[581] Šljivančanin Appeal Brief, para. 284, citing Trial Judgement, para. 391.
[582] Šljivančanin Appeal Brief, paras 261-263, 285-287.
[583] Šljivančanin Appeal Brief, para. 288(a), citing Mladen Karan, T. 15554-15556; Borče Karanfilov, T. 15423-15424; Ljubiša Vukašinović, T. 15007. Šljivančanin also argues under the present sub-ground of appeal that the Trial Chamber

(a) The Trial Chamber's characterisation of Šljivančanin's testimony

165. In his testimony, Šljivančanin testified twice about the tasks with regard to the Vukovar hospital that Mrkšić delegated to him:

> [Mrkšić] gave me the following task: that I must ensure full security to have all of those who are suspected of having committed war crimes taken out of the hospital first so that they would be transported to the prison in Sremska Mitrovica. As for the transport of these persons, I should report to the assistant for logistics; that he had already been ordered to assign buses for that.[584]

> As soon as the 18th of November, at that meeting, Mrkšić said that all crime suspects, or all those who had surrendered as crime suspects, were to be taken to Sremska Mitrovica, to the prison in Sremska Mitrovica, whereas the civilians could be taken to two different places - either to the Red Cross headquarters in Sid or to a place along the Croatian border where it was agreed that they would be received. There were also those who wanted to remain in Vukovar and it was said that those people should be allowed to do so undisturbed and unharassed.[585]

It is correct, as noted by the Prosecution,[586] that Šljivančanin mentioned the transport of the prisoners to Sremska Mitrovica in both of these instances. However, as Šljivančanin counters,[587] mere knowledge of the destination does not necessarily imply that he was in charge of their transport. Thus, Šljivančanin's testimony on its own is ambiguous: while his statements do not foreclose that possibility, in neither case did he explicitly say that he was responsible for the transportation of the prisoners of war.

166. Accordingly, the Appeals Chamber accepts Šljivančanin's argument that the Trial Chamber erred in finding that he testified that "Mrkšić told him to ensure the transport of war crime suspects from the hospital to the prison in Sremska Mitrovica".[588] However, while the Trial Chamber could not rely on Šljivančanin's testimony on its own to conclude that Mrkšić delegated to him the authority for the evacuation of the Vukovar hospital, the Appeals Chamber notes that the Trial Chamber also relied on other evidence. Thus, the Appeals Chamber will assess the impact of the Trial Chamber's error after it has addressed Šljivančanin's challenges to this evidence under his other sub-grounds of appeal.

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could not rely, in support of its finding that Mrkšić appointed him to evacuate the hospital, on his presence at the hospital (Šljivančanin Appeal Brief, para. 288(b)) and the fact that he held a meeting with the hospital staff whilst the prisoners were taken out of the hospital (Šljivančanin Appeal Brief, para. 288(c)). However, the Appeals Chamber notes that while these findings may not, on their own, have been sufficient to establish that Šljivančanin was in charge of the evacuation, the Trial Chamber did not rely on them alone but rather on a number of findings which are discussed in this ground of appeal. Accordingly, these arguments are dismissed.

[584] Veselin Šljivančanin, T. 13597.

[585] Veselin Šljivančanin, T. 13621.

[586] Prosecution Respondent's Brief, paras 88-91.

[587] Šljivančanin Brief in Reply, paras 51-52.

[588] Trial Judgement, para. 390.

(b) Whether Šljivančanin's security officers corroborated his description of the scope of his tasks in relation to the evacuation

167. In support of his contention that he was not appointed by Mrkšić to be in charge of the whole evacuation of the Vukovar hospital but was merely given discrete tasks, Šljivančanin submits that his security officers corroborated his description of the scope of his tasks in relation to the evacuation.[589] Contrary to his submissions, however, the testimonies of some of his officers support rather than contradict the finding that he was responsible for the evacuation and transport of the prisoners of war from the Vukovar hospital. As the Trial Chamber found,[590] on the evening of 19 November 1991, Šljivančanin held a briefing for his subordinates at which he delegated various tasks to them to effectuate the evacuation of the Vukovar hospital.[591] The delegation of tasks included putting Major Vukašinović in charge of the organisation of buses and the transport of the selected prisoners from the hospital to the JNA barracks and then on to Sremska Mitrovica.[592] As a result, it was not unreasonable for the Trial Chamber to conclude that Mrkšić conferred on Šljivančanin the authority not only to ensure the security and the triage of the prisoners of war at the Vukovar hospital, but also entrusted him with the evacuation of the prisoners of war more broadly understood, including their transportation. Accordingly, Šljivančanin's argument is dismissed.

2. Whether Mrkšić announced that Šljivančanin was in charge of the evacuation of the Vukovar hospital at the 18:00 hours regular briefing on 19 November 1991

168. Šljivančanin argues that the Trial Chamber erred in finding, at paragraphs 192 and 396 of the Trial Judgement, that Mrkšić announced at the 18:00 hours regular OG South briefing on 19 November 1991 that he had entrusted Šljivančanin with the evacuation of the hospital and authorised him to use the military police for that purpose.[593] In support of this contention, he submits that the Trial Chamber erred by: (a) failing to consider that Witnesses Paunović, Sušić, Trifunović, Lešanović and Gluščević, who were present at the briefing, did not confirm that Mrkšić made such a statement;[594] (b) finding that the statement given by Witness Panić to Prosecution investigators accurately reflected the tenor of Mrkšić's statement at the briefing;[595] and (c) finding

[589] Šljivančanin Appeal Brief, para. 288(a), citing Mladen Karan, T. 15554-15556; Borče Karanfilov, T. 15423-15424; Ljubiša Vukašinović, T. 15007.
[590] Trial Judgement, para. 192.
[591] *See* Mladen Karan, T. 15632-15633; Borče Karanfilov, T. 15453-15454.
[592] Trial Judgement, para. 192. *See* also Ljubiša Vukašinović, T. 15007-15008; Mladen Karan, T. 15555-15556, 15633.
[593] Šljivančanin Notice of Appeal, para. 17(b); Šljivančanin Appeal Brief, paras 264, 290-332.
[594] Šljivančanin Appeal Brief, paras 265, 290-300; Šljivančanin Brief in Reply, paras 56-57.
[595] Šljivančanin Appeal Brief, paras 266, 301-319, citing Trial Judgement, para. 396; Šljivančanin Brief in Reply, paras 58-61. Šljivančanin also argues that the fact that the Trial Chamber found that Witness Panić reported to Mrkšić rather than Šljivančanin on a number of issues related to the evacuation of the prisoners of war shows that Šljivančanin was not in charge of the evacuation (Šljivančanin Appeal Brief, paras 316-318). However, the fact that Panić reported to

that Mrkšić's direction during the briefing to Captain Paunović to provide his military police to secure the buses reinforced its conclusion that Mrkšić authorised Šljivančanin to use the military police for securing the prisoners.[596]

169. The Prosecution responds that the Trial Chamber properly considered the evidence of the participants in the 18:00 hours briefing on 19 November 1991 and that their testimonies do not support Šljivančanin's contention.[597] Regarding Witness Panić's account of the briefing, the Prosecution submits that: (i) the Trial Chamber did not err in relying on his testimony;[598] (ii) the Trial Chamber did not err in its reasoning for why it accepted his written statement and his reasons for qualifying it during his testimony;[599] (iii) his reports to Mrkšić on 20 November 1991 do not undermine that Šljivančanin was in charge of the evacuation of the hospital and the security of the prisoners;[600] and (iv) Mrkšić's overall commanding role of the evacuation does not negate Šljivančanin's responsibility.[601] Finally, the Prosecution avers that the Trial Chamber did not err in finding that Mrkšić's specific direction to Captain Paunović reinforced its finding that Mrkšić authorised Šljivančanin to use military police to secure the prisoners of war.[602]

(a) The Trial Chamber's alleged failure to consider testimonies which do not support its finding

170. With regard to Šljivančanin's argument that the Trial Chamber failed to consider the relevant testimony of witnesses who were present at the 18:00 hours briefing on 19 November 1991 in determining that Mrkšić delegated responsibility for the evacuation to Šljivančanin,[603] the Appeals Chamber notes that while the Trial Chamber chose to rely on the evidence of Witness Panić in reaching its conclusion, it did state that it also took into account that "no other JNA witness who was at the briefing gave evidence about Mile Mrkšić making such a statement at the briefing".[604] Further, the Appeals Chamber notes that while Witnesses Gluščević, Vojnović, Trifunović and Šušić did not testify that Mrkšić assigned responsibility for the evacuation of the Vukovar hospital to Šljivančanin, they did not foreclose the possibility. For example, Witness Trifunović testified:

Mrkšić on certain issues does not preclude Šljivančanin from having been delegated responsibility for the evacuation and transport of the prisoners of war. His argument is thus dismissed.

[596] Šljivančanin Appeal Brief, paras 267, 320-331, citing Trial Judgement, paras 192, 396, 401, fns 1563, 1581.

[597] Prosecution Respondent's Brief, paras 98-101, citing Trial Judgement, paras 127, 153, 192-193, 260, 263, 314, 317, 396, 401.

[598] Prosecution Respondent's Brief, para. 104.

[599] Prosecution Respondent's Brief, paras 104-110.

[600] Prosecution Respondent's Brief, paras 111-112.

[601] Prosecution Respondent's Brief, paras 113-114.

[602] Prosecution Respondent's Brief, paras 116-120.

[603] Šljivančanin Appeal Brief, paras 265, 290-300; Šljivančanin Brief in Reply, paras 56-57.

[604] Trial Judgement, para. 396.

> I don't know whether [Šljivančanin] received any kind of duties or assignments in relation to the evacuation. I think that it is clear that those organs and – are actually supposed to be used in this manner. That is all.
>
> He did not have the right, as I said, to command units of the military police. If there was any command and carrying out of orders, this was probably with the approval or agreement of the commander, and it was probably a result of the authority that he enjoyed.[605]

The Trial Chamber thus did not fail to consider their testimonies, including the fact that they did not testify that Mrkšić announced that Šljivančanin was in charge of the evacuation of the Vukovar hospital; rather, it chose to rely upon Witness Panić's account of the briefing. Šljivančanin thus fails to demonstrate that the Trial Chamber ignored relevant evidence, nor does he show why no reasonable trier of fact, based on the evidence, could have reached the same conclusion as the Trial Chamber did.[606] Accordingly, Šljivančanin's argument is dismissed.

(b) Witness Panić's change of position in his evidence

171. The Appeals Chamber now turns to Šljivančanin's argument that the Trial Chamber erred in relying on Witness Panić's written statement to the Prosecution over his *viva voce* evidence.[607] In his written statement, Witness Panić' stated that Mrkšić ordered Šljivančanin to be in charge of the evacuation of the Vukovar hospital and authorised him to use military police to ensure the safe passage of the prisoners of war. However, in his *viva voce* evidence, he stated that Colonel Pavković was in charge of the overall evacuation of the Vukovar hospital and that Šljivančanin was in charge of the separation of prisoners of war from civilians at the hospital.[608] The Trial Chamber accepted the change in Witness Panić's evidence as an attempt to "accommodate what he described as documents, with which he had been familiarised, and which he said helped him realise that in his statement he ascribed to Veselin Šljivančanin certain powers which he did not have at the relevant time".[609] Šljivančanin alleges that the Trial Chamber erred by finding that Witness Panić changed his position based on his review of military regulations when in fact Panić qualified his prior statement on the basis of "documents and written statements […] which relate to the events of 20 November 1991".[610]

172. The Appeals Chamber notes that it is not altogether clear from Witness Panić's testimony which documents he was referring to as the basis for changing his evidence. He made reference to

[605] Radoje Trifunović, T. 8187-8188.
[606] *Cf. Brdanin* Appeal Judgement, para. 24. *See* also *Strugar* Appeal Judgement, paras 24, 74.
[607] Šljivančanin Appeal Brief, paras 266, 301-319, citing Trial Judgement, para. 396; Šljivančanin Brief in Reply, paras 58-61.
[608] Šljivančanin Appeal Brief, paras 266, 303.
[609] Trial Judgement, para. 396.
[610] Šljivančanin Appeal Brief, para. 309. *See* also Šljivančanin Appeal Brief, para. 308.

the regulations,[611] but also referred to a document produced by the command of the 1st Military District and the Cabinet of the Federal Secretary for All People's Defence which discussed the involvement of Colonel Pavković.[612] When cross-examined by the Prosecution concerning this document, Witness Panić testified as follows:

> Q. And you're saying this document appoints Colonel Pavković to command the evacuation? I'm aware of the document where he is sent to the Guards Motorised Brigade, but again, do you possess any document from the JNA command tasking or ordering Colonel Pavković to be in charge or in command of that evacuation? No one in this Court has ever seen such a document. Do you have one in your possession?
>
> A. I don't have one in my possession, but I did see the document talking about the involvement of Pavković, who would [be] negotiating, receiving, and taking those people away. After all, he's right there in those recordings, but that's a bit of a special topic, isn't it? The answer is I don't have the document on me right now.
>
> Q. The issue of his command, sir. You've already indicated that the paragraph in your statement is correct, that you were present when Colonel Mrksić appointed Major Šljivančanin to be in charge of that evacuation. You don't have any document in your possession from Colonel Mrksić indicating that Colonel Pavković was in charge of the evacuation; isn't that correct?
>
> A. No, no such document.[613]

The Appeals Chamber takes into consideration Šljivančanin's argument that "[r]efreshing one's memory on events that took place in a distant past with the presentation relevant authentic documents […] can improve the credibility of a witness".[614] However, the Appeals Chamber notes that, if Šljivančanin considered that the nature of the documents which Witness Panić reviewed in preparing his testimony was essential to the Trial Chamber's acceptance of Witness Panić's *viva voce* evidence over his written statement, Šljivančanin should have made clear at trial which exhibits he was relying upon. He did not. In his Brief in Reply, Šljivančanin stresses that "the Prosecution is wrong when it claims that [his Defence] did not state the documents that were shown to Panić during the preparation of his testimony"[615] and submits that "[i]n his testimony, Panić confirmed that around ten documents (including ECMM reports) were shown to him by the Defence during his preparation".[616] Nevertheless, the Appeals Chamber observes that it is apparent from the trial transcripts that neither the Prosecution nor the Trial Chamber was informed exactly which documents were relied upon by the Defence when proofing this witness.[617] When asked by

[611] Miodrag Panić, T. 14297.
[612] Miodrag Panić, T. 14495-14496.
[613] Miodrag Panić, T. 14495-14496.
[614] Šljivančanin Appeal Brief, para. 312.
[615] Šljivančanin Brief in Reply, para. 58.
[616] Šljivančanin Brief in Reply, para. 59, citing Exhibits 320-333, 335.
[617] After Witness Panić responded that Colonel Pavković conducted all the negotiations, agreements and discussions concerning the evacuation when examined by the Defence, Counsel for the Prosecution raised an objection as there was no reference to Colonel Pavković's involvement in the evacuation in the summary of proofing notes provided to the Prosecution by the Defence (Miodrag Panić, T. 14297-14299). The Defence replied that it was not their duty to provide

the Defence who was in charge of the evacuation of the Vukovar hospital, Witness Panić responded "[l]et us start from the regulations. Colonel Pavković conducted all the negotiations, agreements, discussions".[618] Moreover, having reviewed the evidence[619] on the basis of which Šljivančanin claims that Witness Panić "concluded that Col. Pavković was in charge of the evacuation",[620] the Appeals Chamber considers that this evidence does not support the contention that "it was in fact Colonel Pavković who was in charge of the evacuation" as opposed to Šljivančanin.[621] Further, the Appeals Chamber finds that Šljivančanin fails to demonstrate how, if at all, the nature of the documents that Witness Panić reviewed before he testified would have affected the Trial Chamber's preference for Witness Panić's written statement over his *viva voce* evidence. Accordingly, Šljivančanin's argument is dismissed.

(c) Mrkšić's direction to Captain Paunović to make the military police available to Šljivančanin

173. The Trial Chamber stated that its finding that Šljivančanin was authorised to use the military police was "further reinforced at the meeting by Mile Mrkšić's specific direction to Captain Paunović who was present, to provide his military police to secure the buses".[622] In reaching this conclusion, the Trial Chamber relied solely on Witness Panić's evidence.[623] Šljivančanin challenges this finding, arguing that the Trial Chamber erred in relying exclusively on Witness Panić's prior written statement,[624] particularly given that, according to Šljivančanin, Witness Paunović, who was commander of the military police, testified that he was not re-subordinated to anyone in ensuring the security of the buses.[625] The Appeals Chamber recalls that it has already found that it was reasonable for the Trial Chamber to rely on Witness Panić's prior statement. Further, the Appeals Chamber notes that the Trial Chamber considered Captain Paunović's evidence that Šljivančanin

such kind of information (Miodrag Panić, T. 14298). *See* also Miodrag Panić T. 14298-14303 (exchange between Counsel and the Presiding Judge of the Trial Chamber on this issue).
[618] Miodrag Panić, T. 14297.
[619] *See* Exhibit P320, "ECMM Report of Humanitarian Convoy from Vukovar Hospital, 22 November 1991"; Exhibit P321, "ECMM Report of Vukovar Relief Mission, 20-22 November 1991"; Exhibit P322, "ECMM Report, Ky-V-10, Daily Summary, 20 November 1991"; Exhibit P323, "ECMM Report, Ky-V-5, EC Team talks to Dr. Bosanac"; Exhibit D324,"ECMM Report, Ky-I-16, Report on Referendum, 13 October 1991"; Exhibit D325, "Activities of the European Monitoring Mission in the Area of ILOK, 19 October 1991"; Exhibit D326, "ECMM Report, Ky-I-14, Report on visit to ILOK, 19 October 1991"; Exhibit D327, "Report 832-85/115 from the 1st Military District Command, 19 October 1991"; Exhibit D328, "Report 832-85/95 from the 1st Military District Command, 30 September 1991"; Exhibit D329, "Report 832-85/114 from 1st Military District Command, 18 October 1991"; Exhibit D332, "Report 832-86/145 from 1st Military District Command, 23 November 1991"; Exhibit D333, "ECMM Report of Evacuation of Vukovar, 19 November 1991"; Exhibit D335, "Video of Borsinger and Pavković".
[620] Šljivančanin Brief in Reply, para. 59.
[621] Šljivančanin Appeal Brief, para. 266.
[622] Trial Judgement, para. 396.
[623] *See* Trial Judgement, fn. 1563.
[624] Šljivančanin Appeal Brief, para. 320, citing Trial Judgement, para. 396, fn. 1563.
[625] Šljivančanin Appeal Brief, para. 324, citing Radoje Paunović, T. 14167.

never issued an order to him, but did not accept the reliability of his evidence because it contradicted that of Šljivančanin.[626] Accordingly, Šljivančanin's argument is dismissed.

3. Whether the Trial Chamber erred in finding that Šljivančanin rather than Colonel Pavković was in charge of the evacuation of the Vukovar hospital

174. Šljivančanin submits that if the Trial Chamber had not failed to consider certain JNA and ECMM documents, it could not have concluded beyond reasonable doubt that he was responsible for the evacuation of the Vukovar hospital but rather would have concluded that it was Colonel Pavković's responsibility.[627] The Prosecution responds that Šljivančanin has failed to show a discernible error and that the Trial Chamber properly considered the JNA and ECMM exhibits in its discussion of both Šljivančanin and Colonel Pavković's roles during the operation.[628]

175. The Appeals Chamber notes that, in the course of its discussion and findings on the events of 18 to 20 November 1991 and the roles and responsibilities of both Šljivančanin and Colonel Pavković, the Trial Chamber referred to and considered all of the JNA[629] and ECMM[630] exhibits listed by Šljivančanin in this sub-ground of appeal with the exception of Exhibit D125. Exhibit D125 is an excerpt of a video of the negotiations at Mitnica, used at trial to show Colonel Pavković's involvement in the negotiations.[631] While the Trial Chamber did not specifically refer to this exhibit, it did note Colonel Pavković's participation in the Mitnica surrender negotiations[632] and discussed his role in the operations throughout the Trial Judgement.[633] Šljivančanin thus fails to

[626] Trial Judgement, para. 401.
[627] Šljivančanin Appeal Brief, paras 270-272, 333-343, citing JNA documents (Exhibits P401, "War Diary of the Guards of the Motorized Brigade"; P404, "Order on engagement of officers from SSNO from Guards Motorized Brigade, 29 September 1991"; P419, "Order 439-1 from Mrkšić, 20 November 1991"; P421, "Regular combat report no. 457-1, signed by Mrkšić, 20 November 1991") and ECMM documents (Exhibits D125, "Excerpt of video of negotiations at Mitnica"; P316, "ECMM Report of talks with Cunningham"; P320, "ECMM Report of Humanitarian Convoy from Vukovar Hospital"; P321, "ECMM Report of Vukovar Relief Mission"; D333, "ECMM Report of Evacuation of Vukovar"; D335, "Video of Borsinger and Pavković"; D336, "Transcript of Exhibit D335"; P344, "Notebook of Witness Kypr November-December 1991"). *See* also Šljivančanin Brief in Reply, paras 66-70.
[628] Prosecution Respondent's Brief, paras 122-128.
[629] Exhibit P401, "War Diary of the Guards of the Motorized Brigade" (*see* Trial Judgement, fns 138-139, 239, 241, 248, 264, 364, 486, 493, 521, 576, 1291); Exhibit P419, "Order 439-1 from Mrkšić, 20 November 1991" (*see* Trial Judgement, paras 197, 295, fns 260, 290); Exhibit P421, "Regular combat report no. 457-1, signed by Mrkšić, 20 November 1991" (*see* Trial Judgement, fns 290-291, 712, 1625).
[630] Exhibit P316, "ECMM Report of talks with Cunningham" (*see* Trial Judgement, fns 453, 455, 459, 460, 1987, 1988); Exhibit P320, "ECMM Report of Humanitarian Convoy from Vukovar Hospital" (*see* Trial Judgement, fns 164, 797, 807, 829); Exhibit P321, "ECMM Report of Vukovar Relief Mission" (*see* Trial Judgement, fn. 817); Exhibit D333, "ECMM Report of Evacuation of Vukovar" (*see* Trial Judgement, fns 458, 462, 479, 803, 1988, 2010); Exhibit D335, "Video of Borsinger and Pavković" (*see* Trial Judgement, fn. 804); Exhibit D336, "Transcript of Exhibit D335" (*see* Trial Judgement, fns 803, 804); Exhibit P344, "Notebook of Witness Kypr November-December 1991" (*see* Trial Judgement, fns 432, 434, 435, 437, 439, 440, 453, 454, 457, 459, 464-466, 570, 576, 1987); Exhibit P401, "War Diary of the Guards of the Motorized Brigade" (*see* Trial Judgement, fns 138-139, 239, 241, 248, 264, 364, 486, 493, 521, 576, 1291); Exhibit P404, "Order on engagement of officers from SSNO from Guards Motorized Brigade, 29 September 1991" (*see* Trial Judgement, fns 192, 225).
[631] Van Lynden, T. 3215.
[632] Trial Judgement, para. 146.
[633] *See* Trial Judgement, paras 62, 139, 146, 151, 209, 366, 476, 575, 578, 582, 586, 602.

demonstrate that the Trial Chamber failed to consider the above-mentioned exhibits, nor does he show why no reasonable trier of fact, based on the evidence, could have reached the same conclusion as the Trial Chamber did concerning Colonel Pavković's role.[634] Accordingly, Šljivančanin's argument is dismissed.

4. Whether Šljivančanin was involved in the transfer of the prisoners of war from the JNA barracks to Ovčara

176. Šljivančanin submits that the Trial Chamber erred by inferring at paragraph 659 of the Trial Judgement that he was involved in the transfer of the prisoners of war from the JNA barracks to Ovčara.[635] He submits he was not involved in the transfer, which demonstrates that he was not responsible for the entire evacuation of Ovčara.[636] He further argues that the fact that he was not involved in the transfer demonstrates that, even if he was in charge of the evacuation of Ovčara, his responsibility came to an end when he was "kept out of the loop" of plans regarding the destination of the prisoners of war.[637] The Prosecution responds that the Trial Chamber's findings were sound.[638]

177. The Trial Chamber's inference that Šljivančanin was involved in the transfer of the prisoners of war from the JNA barracks to Ovčara was based on: (i) Šljivančanin's visit to the JNA barracks while the buses with the prisoners were there;[639] (ii) his continuing control of the prisoners at the barracks, in that prisoners listed by him were removed from the buses and returned to the hospital;[640] (iii) the responsibility and authority conferred on him by Mrkšić to direct the process of the selection and transport of the prisoners of war from the hospital;[641] (iv) the authority expressly given to him by Mrkšić to use such military police of OG South as he required;[642] (v) the fact that military police of 2 MP/gmtbr guarded the prisoners until they reached Ovčara where military police of 80 mtbr, who had been ordered urgently to Ovčara, were ready to secure the prisoners on their arrival;[643] (vi) the personal involvement of Šljivančanin's deputy Major Vukašinović in the transportation of the prisoners to Ovčara;[644] and (vii) Šljivančanin's presence at Ovčara within about an hour of the arrival there of the prisoners of war.[645] The Appeals Chamber considers that

[634] *Brdanin* Appeal Judgement, para. 24. *See* also *Strugar* Appeal Judgement, paras 24, 74.
[635] Šljivančanin Appeal Brief, paras 276-278, 344-365; Šljivančanin Brief in Reply, paras 71-80. *See* also AT. 149-150.
[636] Šljivančanin Appeal Brief, para. 278.
[637] Šljivančanin Appeal Brief, para. 363. *See* also AT. 201.
[638] Prosecution Respondent's Brief, paras 129-144.
[639] Trial Judgement, para. 659. *See* also Trial Judgement, paras 219, 223.
[640] Trial Judgement, para. 659. *See* also Trial Judgement, paras 221, 224.
[641] Trial Judgement, para. 659. *See* also Trial Judgement, paras 217, 221, 224, 400.
[642] Trial Judgement, para. 659. *See* also Trial Judgement, paras 125, 397, 400.
[643] Trial Judgement, para. 659.
[644] Trial Judgement, para. 659. *See* also Trial Judgement, paras 192, 198, 208, 255.
[645] Trial Judgement, paras 659. S*ee* also Trial Judgement, para. 372.

Šljivančanin's arguments[646] fail to show that, in reaching its conclusion, the Trial Chamber failed to consider the totality of the evidence, or that it failed to properly assess this evidence.[647]

178. Moreover, even though the Trial Chamber found that "[t]he order to send the buses with the prisoners of war from the JNA barracks in Vukovar to Ovčara […] also facilitated the commission of the crimes committed at Ovčara that day",[648] the Appeals Chamber notes that the Trial Chamber's finding that Šljivančanin was responsible for the evacuation and transport of the prisoners of war from the Vukovar hospital to Sremska Mitrovica is not based solely on the finding that he was involved in the transfer of the prisoners of war from the JNA barracks to Ovčara.[649] Additionally, the Appeals Chamber rejects Šljivančanin's submission that his not being informed of the change of destination for the prisoners of war would have terminated his duty to protect the prisoners of war. Accordingly, Šljivančanin fails to show that had the Trial Chamber not drawn the inference that Šljivančanin was involved in the transfer of the prisoners of war from the JNA barracks to Ovčara, it would not have found that Šljivančanin had an ongoing responsibility for the entire evacuation of the prisoners of war from Vukovar hospital.[650] Accordingly, Šljivančanin's argument is dismissed.

5. Whether Šljivančanin directed the evacuation operation at the Vukovar hospital

179. Šljivančanin challenges the Trial Chamber's findings at paragraph 401 of the Trial Judgement that a number of witnesses observed him directing the evacuation operation at the Vukovar hospital on 20 November 1991. He posits that a number of the eye-witnesses lack reliability because they were "ignorant of the JNA organization",[651] and points to Witness Trifunović's testimony that Šljivančanin appearing before the media with ICRC representatives may have created the impression that he had more responsibility than he actually did.[652] Šljivančanin further argues that the Trial Chamber mischaracterised the testimony of Witness Vujić.[653] Šljivančanin avers that instead of relying on these witnesses, the Trial Chamber should have relied on the testimony of Witnesses Paunović and Šušić who testified that they did not receive orders from him.[654]

[646] Šljivančanin Appeal Brief, paras 347-365.
[647] Šljivančanin Appeal Brief, paras 276-277.
[648] Trial Judgement, para. 659.
[649] *See* Trial Judgement, paras 390-401.
[650] *Cf. Martić* Appeal Judgement, paras 16-17; *Strugar* Appeal Judgement, para. 19; *Brdanin* Appeal Judgement, paras 21-22; *Kordić and Čerkez* Appeal Judgement, para. 19; *Furundžija* Appeal Judgement, para. 37.
[651] Šljivančanin Appeal Brief, para. 367.
[652] Šljivančanin Appeal Brief, para. 367; Radoje Trifunović, T. 8349-8350. *See* also Šljivančanin Brief in Reply, para. 83.
[653] Šljivančanin Appeal Brief, paras 368-372. *See* also Šljivančanin Brief in Reply, para. 84.
[654] Šljivančanin Appeal Brief, paras 373-378. *See* also Šljivančanin Brief in Reply, paras 85-91.

180. The Prosecution responds that the Trial Chamber properly considered the testimonies of eye-witnesses which were consistent and corroborative of the Trial Chamber's conclusion.[655] It further submits that Witness Trifunović's testimony does not negate these accounts, given that he was not at the hospital on 20 November 1991,[656] and the fact that Mrkšić was in overall command does not preclude Šljivančanin from having been responsible for the evacuation.[657]

(a) The testimony of eye-witnesses present at the Vukovar hospital

181. While the Appeals Chamber recognises that civilians may not have a comprehensive understanding of the JNA hierarchy and organisation, it considers that this would not necessarily negate their ability to generally observe who appeared to be in charge and directing the evacuation of the hospital. Further, the Appeals Chamber notes that the Trial Chamber did not rely exclusively on these witnesses to reach its conclusion that Šljivančanin was in charge of the evacuation of Vukovar hospital. As discussed above,[658] it also relied on testimony regarding JNA briefings and meetings at which the operation and responsibilities were discussed. As such, the testimonies of eye-witnesses from the Vukovar hospital serve as corroborative evidence rather than the sole foundation for the finding of the Trial Chamber that Šljivančanin was in charge of the evacuation and security of the Vukovar hospital. Additionally, the Appeals Chamber does not consider that Witness Trifunović's affirmation that Šljivančanin's appearance before the media gave the impression that Šljivančanin had greater importance than he actually had negates the testimony of the eye-witnesses who observed him giving instructions at the hospital. The Appeals Chamber thus finds that Šljivančanin fails to show a discernible error in the Trial Chamber's reliance on eye-witnesses from the Vukovar hospital. Accordingly, Šljivančanin's argument is dismissed.

(b) The Trial Chamber's assessment of Witness Vujić's testimony

182. With regard to Šljivančanin's submissions that the Trial Chamber mischaracterised Colonel Vujić's testimony, the Appeals Chamber considers that the Trial Chamber's discussion of Witness Vujić's evidence[659] clearly and accurately reflected his testimony.[660] Contrary to Šljivančanin's submission, the Trial Chamber did not find that Witness Vujić had testified that Šljivančanin had ordered two military police officers to accompany Witness Vujić, but rather inferred it from Witness Vujić's testimony. The Trial Chamber summarised Witness Vujić's testimony as follows:

[655] Prosecution Respondent's Brief, paras 145-153.
[656] Prosecution Respondent's Brief, para. 149.
[657] Prosecution Respondent's Brief, paras 154-155.
[658] *See supra* paras 167, 170.
[659] Trial Judgement, para. 401.
[660] Bogdan Vujić, T. 4534-4535, 4799.

> Colonel Vujić stated that the military police guarding the hospital in the morning of 20 November 1991 were under Veselin Šljivančanin's command. He insisted in cross-examination that Veselin Šljivančanin was both the security organ present at the hospital and the commander of the military police unit. Colonel Vujić stated that he asked Veselin Šljivančanin to assign two soldiers to accompany Vujić when touring the hospital. Subsequently, a military police commander brought two military police officers. It appears that Veselin Šljivančanin issued an order for two officers of the military police to accompany Colonel Vujić.[661]

Further, while Witness Vujić was not part of OG South, he was a member of the JNA[662] and would have had some insight when observing who appeared to be directing the operation even though he may not have known the details of the operation. As a result, it was not unreasonable for the Trial Chamber to accept Witness Vujić's testimony that his impression was that Šljivančanin was both commander of the military police and security organ.[663] Accordingly, Šljivančanin's argument is dismissed.

(c) The testimony of Witnesses Paunović and Šušić that they received orders from Mrkšić

183. With regard to Šljivančanin's argument that the Trial Chamber should have relied on Witnesses Paunović and Šušić's testimonies that they never received orders from Šljivančanin, but rather received them from Mrkšić,[664] the Appeals Chamber notes that the Trial Chamber considered Witness Paunović's evidence but did not accept it because it contradicted Šljivančanin's own testimony[665] and finds that Šljivančanin does not demonstrate why this reasoning should be overturned. Further, the Appeals Chamber recalls that the Trial Chamber discussed Witness Šušić's testimony thoroughly, including the reasons why Witness Šušić reported to Mrkšić.[666] However, the Appeals Chamber does not consider that the fact that Witness Sušić received orders exclusively from Mrkšić shows that Šljivančanin was not in charge of the evacuation of the hospital.[667] Accordingly, Šljivančanin's argument is dismissed.

6. Conclusion

184. The Appeals Chamber recalls that while it found that the Trial Chamber mischaracterised Šljivančanin's testimony as to whether Mrkšić told him to ensure the transport of the prisoners of war to Sremska Mitrovica,[668] the Trial Chamber did not rely on his testimony alone for its

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[661] Trial Judgement, para. 401 (footnotes omitted).
[662] Bogdan Vujić, T. 4478-4480.
[663] Šljivančanin Appeal Brief, para. 372.
[664] Šljivančanin Appeal Brief, paras 289, 373-377.
[665] Trial Judgement, para. 401.
[666] Trial Judgement, paras 298-300.
[667] Similarly, the Appeals Chamber does not consider that the fact that Witnesses Vujić and Gluščević did not testify that they received orders from Šljivančanin shows that Šljivančanin was not in charge of the evacuation (*see* Šljivančanin Appeal Brief, para. 289).
[668] *See supra* para. 166.

conclusion that Mrkšić delegated to him the authority for the evacuation of the Vukovar hospital.[669] In particular, the Appeals Chamber dismissed Šljivančanin's arguments that: (i) it was unreasonable for the Trial Chamber to have concluded that Mrkšić announced at the 18:00 hours regular OG South briefing on 19 November 1991 that he had entrusted Šljivančanin with the evacuation of the Vukovar hospital and authorised him to use the military police for that purpose;[670] (ii) the Trial Chamber ignored the JNA and ECMM exhibits which Šljivančanin alleged demonstrated that Colonel Pavković not Šljivačanin was in charge of the evacuation;[671] (iii) the Trial Chamber erred by inferring that Šljivančanin was involved in the transfer of the prisoners of war from the JNA barracks to Ovčara;[672] and (iv) the Trial Chamber erred in relying on the testimonies of eye-witnesses and Witness Vujić who were present at the Vukovar hospital on 20 November 1991, in reaching the conclusion that Šljivančanin's behaviour at the Vukovar hospital supported its finding that he was responsible for the evacuation of the prisoners of war.[673]

185. In light of the foregoing, the Appeals Chamber finds that it was reasonably open to the Trial Chamber to conclude, on the basis of the totality of the evidence before it, that Šljivančanin was under a duty to protect the prisoners of war from the Vukovar hospital by reason of the responsibility delegated to him by Mrkšić. Accordingly, Šljivančanin's third ground of appeal is dismissed in its entirety.

D. Fourth Ground of Appeal: Whether Šljivančanin Witnessed the Mistreatment of the Prisoners of War at Ovčara

186. Šljivančanin relies on the evidence of Witness P009 and that of other witnesses to challenge the Trial Chamber's finding that he must have witnessed the mistreatment of the prisoners of war in Ovčara.[674] He further contends that the Trial Chamber erred in concluding that he failed to take necessary measures to stop the mistreatment of the prisoners of war[675] and requests the Appeals Chamber to reverse the Trial Chamber's finding and enter a verdict of not guilty for Count 7 of the Indictment.[676]

187. The Prosecution responds that the evidence before the Trial Chamber demonstrates that the finding challenged by Šljivančanin was not unreasonable.[677] It further contends that even if he did

[669] *See supra* para. 167.
[670] *See supra* paras 170-173.
[671] *See supra* para. 175.
[672] *See supra* para. 177.
[673] *See supra* paras 181-182.
[674] Šljivančanin Notice of Appeal, para. 23; Šljivančanin Appeal Brief, paras 394-402.
[675] Šljivančanin Notice of Appeal, paras 24-25; Šljivančanin Appeal Brief, paras 389-390, 406-407.
[676] Šljivančanin Notice of Appeal, paras 26-27; Šljivančanin Appeal Brief, paras 406-409.
[677] Prosecution Respondent's Brief, paras 158, 177. *See* also AT. 182-194.

not actually witness the mistreatment, the situation in Ovčara as well as Šljivančanin's knowledge of the serious threat posed by the TOs and paramilitaries who had free access to the prisoners, can only lead to the conclusion that he knew that the prisoners would probably be mistreated.[678]

1. Witness P009's testimony

188. Šljivančanin submits that the only evidence of his presence at Ovčara was the testimony of Witness P009, and that this testimony supports his assertion that he only arrived after the buses had left and all the prisoners had already entered the hangar.[679] He contends that, had the Trial Chamber considered the entire testimony of Witness P009 and its own findings regarding Witness P009's sequence of events, it could not have concluded beyond reasonable doubt that Šljivančanin witnessed the mistreatment in front of the hangar at Ovčara.[680] Šljivančanin also submits that the Trial Chamber should have considered that, in accordance with the testimony of Witness P009, Šljivančanin could only have arrived at Ovčara after the buses had left and the prisoners had already entered the hangar, and that Witness P009 could not confirm exactly how long Šljivančanin was present at Ovčara.[681]

189. The Prosecution responds that the Trial Chamber's findings as to the timeline of events were reasonable[682] and that the fact that the Trial Chamber made no findings as to the precise duration of Šljivančanin's presence at Ovčara does not render the Trial Chamber's findings unreasonable on this issue, since in any event Šljivančanin only needed to be there for a short time to witness the mistreatment.[683]

190. The Appeals Chamber recalls its finding concerning Šljivančanin's first ground of appeal that he failed to demonstrate that the Trial Chamber committed any error of fact which occasioned a miscarriage of justice at paragraph 383 of the Trial Judgement, where it found that he was at Ovčara at about 14:30 or 15:00 hours.[684] It also recalls its finding under that same ground of appeal that the buses were completely unloaded at around 15:00 hours and that Witness P009 must have seen Šljivančanin at about 15:00-15:30 hours.[685] In the present ground of appeal, Šljivančanin essentially contends that the fact that Witness P009 saw him only after the buses were unloaded implies that he only arrived in Ovčara after that period. The Appeals Chamber, however, fails to see how the fact that Witness P009 saw Šljivančanin only after the buses were unloaded undermines the Trial

[678] Prosecution Respondent's Brief, paras 159, 177. *See* also AT. 191.
[679] Šljivančanin Appeal Brief, paras 386-387, 394-399; Šljivančanin Brief in Reply, para. 92. *See* also AT. 155-156.
[680] Šljivančanin Appeal Brief, paras 397, 402; Šljivančanin Brief in Reply, paras 92-93, 96.
[681] Šljivančanin Appeal Brief, paras 386, 397-398, 401-402.
[682] Prosecution Respondent's Brief, paras 163-164, 167. *See* also AT. 183-185.
[683] Prosecution Respondent's Brief, para. 168.
[684] *See supra* para. 111.
[685] *See supra* para. 123.

Chamber's finding that Šljivančanin must have been in Ovčara at about 14:30-15:00 hours, at which time "in the Chamber's finding the unloading of prisoners of war and their having to pass through the gauntlet towards the hangar were still in progress".[686] The Appeals Chamber further notes that it is clear from the Trial Chamber's reasoning[687] that it did not conclude that Šljivančanin was present for the entire period in which this process of transferring the prisoners of war from the buses to the hangar occurred, but rather that it was satisfied that Šljivančanin was at Ovčara at some stage during this process. Therefore, the Appeals Chamber considers that the fact that Witness P009 was unable to confirm precisely how long Šljivančanin was at Ovčara does not invalidate the Trial Chamber's findings as to the timeline of events, nor its findings that Šljivančanin was present at Ovčara during the relevant period and witnessed the mistreatment of prisoners. Accordingly, Šljivančanin's argument is dismissed.

2. Other witnesses' testimony

191. In support of his argument that he was not at Ovčara when the prisoners passed through the gauntlet, Šljivančanin points to the testimony of Witnesses Dragutin Berghofer, Emil Čakalić, P030, P031 and Hajdar Dodaj that they did not see him in front of the hangar at Ovčara.[688] The Prosecution responds that the Trial Chamber properly considered the testimony of these witnesses.[689]

192. The Appeals Chamber recalls its earlier findings regarding Šljivančanin's first ground of appeal that the Trial Chamber properly considered the evidence of these witnesses when concluding that Šljivančanin was present at in Ovčara in the afternoon of 20 November 1991.[690] In particular, the Appeals Chamber found that the Trial Chamber: (i) properly exercised its discretion by relying on the testimony of Witness P009, rather than Witness Hajdar Dodaj, concerning Šljivančanin's presence at Ovčara;[691] (ii) carefully considered the evidence of Witnesses P030, P031, Hajdar Dodaj and Dragutin Berghofer prior to accepting Witness P009's testimony that he saw Šljivančanin at Ovčara;[692] and (iii) considered the testimony of Witnesses P031 and Emil Čakalić that they did not see Šljivančanin at Ovčara.[693] Under the present ground of appeal, Šljivančanin does not attempt to further substantiate his arguments under his first ground of appeal. Accordingly, Šljivančanin's argument is dismissed.

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[686] Trial Judgement, para. 663.
[687] Trial Judgement, para. 663.
[688] Šljivančanin Appeal Brief, paras 403-405.
[689] Prosecution Respondent's Brief, paras 172-176. *See* also AT. 186-191.
[690] *See supra* para. 129.
[691] *See supra* para. 109.
[692] *See supra* para. 111.
[693] *See supra* para. 128.

3. Conclusion

193. In light of the foregoing, the Appeals Chamber finds that Šljivančanin fails to demonstrate that the Trial Chamber's finding that he was present at Ovčara at the time when the prisoners of war were seriously mistreated by TOs and paramilitaries and must have witnessed the mistreatment was unreasonable. He fails to show that the Trial Chamber committed an error of fact which resulted in a miscarriage of justice at paragraph 663 of the Trial Judgement.[694] Accordingly, Šljivančanin's fourth ground of appeal is dismissed in its entirety.

E. Fifth Ground of Appeal: Whether the Elements of Aiding and Abetting the Torture of the Prisoners of War in Ovčara were Fulfilled

194. The Trial Chamber found that Šljivančanin's failure to act pursuant to his duty to ensure the security of the prisoners of war from the Vukovar hospital had a substantial effect on the commission of the crimes of cruel treatment and torture at Ovčara in the afternoon of 20 November 1991.[695] It further found that he knew that the TOs and paramilitaries were mistreating the prisoners of war and concluded that he must have been aware that his failure to give clear direction to the military police present or to reinforce them facilitated the commission of the crimes.[696] Accordingly, the Trial Chamber found Šljivančanin guilty of aiding and abetting the torture of the prisoners of war at the hangar at Ovčara in the afternoon of 20 November 1991.[697]

195. Šljivančanin submits that the elements of aiding and abetting were not fulfilled in that: (1) the Trial Chamber erred in finding that his omission had a substantial effect on the commission of the crimes at Ovčara; (2) the Trial Chamber erred in finding that he must have been aware that his failure to give clear direction to the military police or to reinforce them assisted the commission of the crimes; and (3) the Trial Chamber erred in finding that he was on notice of the occurrence of acts similar to those committed in Ovčara.[698] Accordingly, he requests the Appeals Chamber to enter a finding of not guilty under Count 7 of the Indictment.[699]

196. The Prosecution responds that the Trial Chamber properly found that the *actus reus* and *mens rea* of aiding and abetting by omission were fulfilled.[700] It submits that Šljivančanin misunderstands the applicable standard of substantial contribution[701] and misconstrues the pertinent

[694] Šlivančanin Notice of Appeal, para. 23.
[695] Trial Judgement, para. 670.
[696] Trial Judgement, para. 670.
[697] Trial Judgement, paras 674, 715.
[698] Šljivančanin Notice of Appeal, para. 28; Šljivančanin Appeal Brief, para. 466. *See* also AT. 157-160.
[699] Šljivančanin Notice of Appeal, para. 30; Šljivančanin Appeal Brief, para. 467.
[700] Prosecution Supplemental Respondent's Brief, paras 37-38. *See* also AT. 170-174.
[701] Prosecution Supplemental Respondent's Brief, para. 37.

factual findings of the Trial Chamber that he was aware of his contribution to the crimes.[702] It further posits that the Trial Chamber's findings regarding Šljivančanin's knowledge of earlier crimes and the perpetrators' propensity to harm the prisoners of war was relevant to his *mens rea*.[703] The Prosecution concludes that Šljivančanin has not shown that the Trial Chamber's findings on the elements of aiding and abetting by omission were unreasonable.[704]

1. Whether Šljivančanin's omission had a substantial effect on the commission of the crimes

197. Šljivančanin submits that no reasonable trier of fact could have concluded that his failure to take action to protect the prisoners of war held at Ovčara had a substantial effect on the commission of the crimes committed against them.[705] He submits that the Trial Chamber erred in reaching this conclusion because it failed to consider the presence at Ovčara of officers who had the material ability and were in a better position than him to take measures to stop the mistreatment of the prisoners of war, and had reason to take such action.[706] Šljivančanin particularly points to LtCol Milorad Vojnović,[707] but also refers to LtCol Miodrag Panić,[708] Captain Dragan Vezmarović[709] and Captain Dragi Vukosavljević,[710] as officers upon whom it was incumbent to take action to prevent the mistreatment of the prisoners of war held at Ovčara.

198. The Prosecution responds that Šljivančanin's submission that his failure to act did not have a substantial effect on the commission of the crimes at Ovčara because other JNA officers were in a better position to act misunderstands the law because a cause-effect relationship between the aider and abettor and the commission of the crime is not required.[711] Rather, it submits, the determination as to whether the aider and abettor's failure to act had a substantial effect on the commission of the crime is a fact-based inquiry.[712] The Prosecution further submits that whatever the responsibilities of the other officers may have been, they do not absolve Šljivančanin of his own legal duty toward the prisoners of war.[713] Based on the Appeals Chamber's finding in *Blagojević and Jokić*, it posits that an accused's conduct can have a substantial effect on the commission of crimes even if his contribution is more limited in scope than that of other individuals or entities.[714] The Prosecution

[702] Prosecution Supplemental Respondent's Brief, para. 38.
[703] Prosecution Respondent's Brief, para. 179.
[704] Prosecution Supplemental Respondent's Brief, para. 39.
[705] Šljivančanin Appeal Brief, paras 410, 413.
[706] Šljivančanin Appeal Brief, paras 411, 424.
[707] Šljivančanin Appeal Brief, paras 412, 425-426, 431-432, 435. *See* also Šljivančanin Supplemental Brief in Reply, paras 71-72.
[708] Šljivančanin Appeal Brief, paras 427, 435.
[709] Šljivančanin Appeal Brief, paras 428, 431, 435. *See* also Šljivančanin Supplemental Brief in Reply, para. 73.
[710] Šljivančanin Appeal Brief, paras 429, 435. *See* also Šljivančanin Supplemental Brief in Reply, para. 73.
[711] Prosecution Supplemental Respondent's Brief, para. 40, citing Trial Judgement, para. 552.
[712] Prosecution Supplemental Respondent's Brief, para. 40, citing Trial Judgement, paras 552-553.
[713] Prosecution Supplemental Respondent's Brief, paras 41, 49-51, 53. *See* also AT. 170-171.
[714] Prosecution Supplemental Respondent's Brief, para. 50, citing *Blagojević and Jokić* Appeal Judgement, para. 134.

argues that Šljivančanin had the obligation and the ability to take steps to secure the protection of the prisoners of war and that his failure to act had a substantial effect on the perpetration of the crimes at Ovčara.[715]

199. At the appeals hearing, Šljivančanin argued that substantial contribution must be assessed by looking at the effect on the perpetrators.[716] In this regard, Šljivančanin submits that his failure to act did not influence the perpetrators of the crimes, given that they did not see him at Ovčara and knew that other JNA officers present at Ovčara were in control of the situation.[717] He submits that he was not responsible for the security of the prisoners of war held at Ovčara and that, in any event, whether he had the authority and means to act is not relevant to whether his inaction had a substantial effect on the commission of the crimes.[718] Furthermore, he submits that there is no evidence that any actions he could have taken according to the Trial Chamber and the Prosecution would have prevented the mistreatment of prisoners of war.[719] Finally, Šljivančanin argues that the Prosecution's reliance on the *Blagojević and Jokić* Appeal Judgement, in support of the proposition that "his omission can have a substantial effect on the mistreatment of prisoners even where it is more limited in scope than that of other officers present" is erroneous as that case dealt with positive practical assistance rather than omission.[720]

200. The Appeals Chamber considers that the Trial Chamber correctly enunciated that the determination of whether an act or omission had a substantial effect on the commission of a crime is a fact-based inquiry.[721] It recalls its previous finding that "it is not required that the act of assistance serve as a condition precedent for the commission of the crime".[722] Furthermore, the Appeals Chamber recalls the finding in the *Blagojević and Jokić* Appeal Judgement that the fact that the accused provided more limited assistance to the commission of a crime than others does not preclude the accused's assistance from having had a substantial effect on the perpetration of the crime.[723] The Appeals Chamber rejects Šljivančanin's submission that this finding is inapplicable to the present case because *Blagojević and Jokić* was concerned with an act rather than an omission.[724] The Appeals Chamber recalls that it has acknowledged that the basic elements of aiding and abetting apply notwithstanding whether this form of liability is charged as "omission" and it has

[715] Prosecution Supplemental Respondent's Brief, paras 42-47. *See* also AT. 171-172.
[716] AT. 157-158.
[717] Šljivančanin Supplemental Brief in Reply, paras 62-63. *See* also AT. 157.
[718] Šljivančanin Supplemental Brief in Reply, para. 65.
[719] Šljivančanin Supplemental Brief in Reply, paras 68-69.
[720] Šljivančanin Supplemental Brief in Reply, para. 70, citing Prosecution Supplemental Respondent's Brief, para. 50.
[721] Trial Judgement, para. 552.
[722] *Blagojević and Jokić* Appeal Judgement, para. 134 citing *Simić* Appeal Judgement, para. 85 and *Blaškić* Appeal Judgement, para. 48.
[723] *Blagojević and Jokić* Appeal Judgement, para. 134.
[724] Šljivančanin Supplemental Brief in Reply, para. 70.

held that the *mens rea* and *actus reus* requirements for aiding and abetting by omission are the same as for aiding and abetting by a positive act.[725] Against this backdrop, the Appeals Chamber therefore finds that the fact that other officers better placed than Šljivančanin to ensure the protection of the prisoners of war at Ovčara also failed to act does not in and of itself negate the effect of Šljivančanin's failure to intervene to prevent the mistreatment. In addition, the Appeals Chamber notes that the Trial Chamber considered at length the roles of LtCol Vojnović, LtCol Panić, Captain Vezmarović and Captain Vukosavljević in securing the prisoners of war at Ovčara and took into account their efforts and failures to provide security to the prisoners of war in the hangar.[726]

201. Turning to Šljivančanin's contention that he was not responsible for the security of the prisoners of war held at Ovčara[727] and that it has not been proven that he could have prevented the mistreatment of prisoners of war,[728] the Appeals Chamber recalls that it has already found that Šljivančanin was bound by a legal duty to protect the prisoners of war.[729] Furthermore, the Appeals Chamber recalls that it has upheld the Trial Chamber's finding that Mrkšić ordered Šljivančanin to be in charge of the evacuation and authorised him to use as many military police as necessary to escort the prisoners of war and ensure their safe passage.[730] Therefore, Šljivančanin's contention that he could not have issued instructions to the military police without referring to the commander of the Military Police Company or the 80 mtbr, cannot succeed.[731] Similarly his argument that he would have had to refer to Mrkšić or other officers in order to take action[732] is neither correct, given findings of the Trial Chamber regarding Šljivančanin's authority and ability to issue orders which have not been challenged,[733] nor an excuse for failing to take those steps that were possible. In this regard, the Appeals Chamber recalls that LtCol Vojnović referred to the 80 mtbr command requesting additional soldiers and reported the situation at Ovčara to Mrkšić.[734] While the steps LtCol Vojnović took were not altogether successful, it demonstrates that Šljivančanin could also

[725] *See supra* para. 146. The Appeals Chamber recalls that aiding and abetting by omission also requires that the accused had the ability to act, or in other words, that there were means available to the accused to fulfil this duty. *Cf. Ntagerura et al.* Appeal Judgement, para. 335.
[726] Trial Judgement, paras 254-273.
[727] Šljivančanin Supplemental Brief in Reply, para. 64.
[728] Šljivančanin Supplemental Brief in Reply, paras 68-69.
[729] *See supra* para. 185.
[730] *See supra* paras 171-172.
[731] The Appeals Chamber recalls that as security organ, Šljivančanin could issue orders to the military police within OG South but that these were subject to any orders of the commanders of the unit to which the military police were subordinated. However, this was considered to be immaterial when the Trial Chamber assessed Šljivančanin's role in the evacuation because at the relevant time he was not functioning as the security organ and thus was not limited by the powers of that office. Hence, the Trial Chamber further found that Šljivančanin was exercising the power and authority conferred on him by Mrkšić to conduct the evacuation of the hospital and as such he was exercising *de jure* authority with respect to the relevant JNA military police forces of OG South. *See* Trial Judgement, para. 397. *See* also *supra* Section III.B.4(a)(ii): "Šljivančanin's authority as security organ of OG South".
[732] Šljivančanin Supplemental Brief in Reply, para. 69
[733] Trial Judgement, paras 122, 125, 127.

have undertaken steps to address the security situation; however, he failed to even attempt to take any steps to assist the prisoners of war.

202. Finally, the Appeals Chamber rejects Šljivančanin's submission that his failure to act could not have had a substantial effect on the commission of the crimes given that the perpetrators did not see him at Ovčara on 20 November 1991, or know he was there, and that from the perpetrator's perspective it was the JNA officers present at Ovčara who could have influenced their behaviour.[735] The Appeals Chamber recalls that the Trial Chamber took into account that none of the perpetrators saw Šljivančanin at Ovčara in finding that "it cannot be concluded that his presence was deemed by the perpetrators as tacit approval or encouragement".[736] Rather, the Trial Chamber found that Šljivančanin substantially contributed to the commission of the crimes against the prisoners of war by failing to take action to prevent them as discussed above.[737]

203. The Appeals Chamber finds that Šljivančanin failed to show any error in the Trial Chamber's consideration of whether his contribution had a substantial effect on the mistreatment of the prisoners of war at Ovčara. Accordingly, Šljivančanin's arguments are dismissed.

2. Whether Šljivančanin was aware that his failure to take additional measures to protect the prisoners of war had a substantial effect on the commission of the crimes

204. Šljivančanin submits that the Trial Chamber erred in finding that he must have been aware that by failing to give clear direction to the military police or to provide additional military police to assist with ensuring the security of the prisoners of war held at Ovčara, he facilitated the commission of the mistreatment of the prisoners of war.[738] In support of this contention, he submits that the military police at Ovčara was not subordinated to him and that he knew that LtCol Milorad Vojnović and other OG South officers were present at Ovčara and had the material ability to take measures to put an end to the mistreatment of the prisoners of war.[739] He submits that the Trial Chamber neglected to consider that he was aware that the same forces had successfully performed the same task at the same location two days earlier.[740] Therefore, he contends that even if he did go to Ovčara and see that the security was insufficient, he could only have assumed that the other officers present were capable of addressing the situation.[741]

[734] Trial Judgement, para. 263.
[735] Šljivančanin Supplemental Brief in Reply, paras 62-63.
[736] Trial Judgement, para. 671.
[737] Trial Judgement, para. 670.
[738] Šljivančanin Appeal Brief, paras 414, 416, 440. *See* also AT. 158-159, 211.
[739] Šljivančanin Appeal Brief, para. 415. *See* also AT. 211.
[740] Šljivančanin Appeal Brief, para. 436. *See* also AT. 211.
[741] Šljivančanin Appeal Brief, paras 437, 439. *See* also Šljivančanin Supplemental Brief in Reply, para. 87.

205. The Prosecution responds that, contrary to Šljivančanin's submissions, as a result of the earlier transfer to Sremska Mitrovica, Šljivančanin was aware of the risk of hostile acts directed against Croatian prisoners of war held at Ovčara.[742] Furthermore, the Prosecution posits that, based on the attacks at the JNA barracks and what he saw at Ovčara, Šljivančanin must have realised that the transfer of prisoners of war from the Vukovar hospital on 20 November 1991 was in serious jeopardy and that although LtCol Vojnović had the authority to issue orders to the military police, he was not doing so efficiently or effectively.[743] As a result, the Prosecution argues that Šljivančanin could not have thought that the other officers present at Ovčara had superior or more efficient authority, or that the authority of these officers absolved him of his own responsibility to act.[744]

206. Recalling its finding that Šljivančanin was present at Ovčara on the afternoon of 20 November 1991[745] and witnessed the mistreatment of the prisoners of war,[746] the Appeals Chamber considers that, in light of the fact that Šljivančanin saw the mistreatment of the prisoners of war at Ovčara occurring despite the presence of JNA troops, it must have been clear to him that the JNA officers and troops present were either unable or unwilling to prevent the beatings. The fact that a similar evacuation had been successfully completed two days earlier could not have assuaged his concerns in the face of the actual scene unfolding before him that afternoon at Ovčara. Regardless of what they had been able to achieve during the earlier evacuation, witnessing the beatings at Ovčara must have indicated to Šljivančanin that the officers did not have everything under control at this time. Given that the Appeals Chamber has already upheld the findings to the effect that Šljivančanin had been delegated with the responsibility for the evacuation of the prisoners of war from the Vukovar hospital, and that Mrkšić authorised him to use as many military police as necessary to escort the prisoners of war and ensure their safe passage,[747] Šljivančanin must have known that it was his responsibility to protect the prisoners of war and that he had the authority to take action. Knowing what he did, the only reasonable conclusion is that he knew that his failure to take any action to protect the prisoners of war assisted in the mistreatment of the prisoners of war by the TOs and paramilitaries.

207. The Appeals Chamber finds that Šljivančanin fails to show that it was not reasonably open to the Trial Chamber to find that Šljivančanin was aware that his inaction contributed to the

[742] Prosecution Supplemental Respondent's Brief, para. 55, citing Trial Judgement, para. 665, fn. 1118.
[743] Prosecution Supplemental Respondent's Brief, paras 56-57, 59.
[744] Prosecution Supplemental Respondent's Brief, para. 58.
[745] *See supra* para. 129.
[746] *See supra* para. 193.
[747] *See supra* paras 184-185.

mistreatment of the prisoners of war held at Ovčara.[748] As a result it was open to the Trial Chamber to conclude that Šljivančanin possessed the requisite *mens rea* for aiding and abetting torture. Accordingly, Šljivančanin's arguments are dismissed.

3. Whether Šljivančanin was on notice of the occurrence of previous acts similar to those committed at Ovčara

208. Šljivančanin submits that the Trial Chamber erred in finding that he was on notice of the occurrence of acts similar to those committed at Ovčara in the afternoon of 20 November 1991.[749] In support of this, Šljivančanin contends that prior knowledge of other incidents of mistreatment is not the applicable *mens rea* of aiding and abetting torture, but rather it must be proved that the accused knew that his omission assisted in the commission of the crime of the principal perpetrator.[750] However, in the event that the Appeals Chamber finds that prior knowledge is relevant, Šljivančanin submits that the Trial Chamber erred in finding that he was informed by Colonel Vujić of the mistreatment and killings committed at Velepromet by TOs and paramilitaries on 19 November 1991[751] and further that he was present at the JNA barracks on 20 November 1991 and observed or was informed of the mistreatment of the prisoners of war there.[752] Accordingly, Šljivančanin submits that no reasonable trier of fact could have concluded that he was aware that he facilitated the crimes committed at Ovčara.[753]

209. The Prosecution responds that the Trial Chamber properly found that the applicable *mens rea* is knowledge that "one of a number of crimes would probably be committed, and one of those crimes [was] in fact committed".[754] Moreover, it submits that Šljivančanin's prior knowledge was not limited to the incidents at Velepromet on 19 November 1991 and the JNA barracks on 20 November 1991.[755] With respect to his knowledge of the events at Velepromet and the JNA barracks, the Prosecution submits that the Trial Chamber reasonably concluded that he was aware of the prior mistreatment and it properly considered both Witnesses Colonel Vujić and Branko Korica's testimonies.[756]

210. The Appeals Chamber recalls that it has already found that Šljivančanin was aware that his failure to act assisted the mistreatment of the prisoners of war based on the mistreatment he

[748] Trial Judgement, para. 670.
[749] Šljivančanin Appeal Brief, paras 417, 419, 444.
[750] Šljivančanin Appeal Brief, para. 442. *See* also Šljivančanin Brief in Reply, paras 107-109.
[751] Šljivančanin Appeal Brief, paras 418, 443-444, 447-465. *See* also Šljivančanin Brief in Reply, paras 115-119.
[752] Šljivančanin Appeal Brief, paras 418, 445. *See* also Šljivančanin Appeal Brief, paras 92-117; Šljivančanin Brief in Reply, paras. 110-114.
[753] Šljivančanin Appeal Brief, para. 420.
[754] Prosecution Respondent's Brief, para. 180, quoting Trial Judgement, para. 556.
[755] Prosecution Respondent's Brief, para. 182.

witnessed at Ovčara on the afternoon of 20 November 1991.[757] It has therefore already found that Šljivančanin possessed the requisite knowledge to satisfy the *mens rea* of aiding and abetting torture. Accordingly, it is not necessary to consider whether Šljivančanin's awareness of previous similar acts contributed to his awareness that his inaction assisted the mistreatment of the prisoners of war held at Ovčara. Šljivančanin's arguments are dismissed.

4. Conclusion

211. The Appeals Chamber has found that it was reasonably open to the Trial Chamber to find that Šljivančanin's failure to take action to protect the prisoners of war held at Ovčara on 20 November 1991 substantially contributed to their mistreatment by the TOs and paramilitaries. It has further found that it was reasonable for the Trial Chamber to conclude that Šljivančanin was aware that his inaction assisted the perpetrators of the crimes. Accordingly the Appeals Chamber dismisses Šljivančanin's fifth ground of appeal in its entirety.

[756] Prosecution Respondent's Brief, paras 185-193.
[757] *See supra* para. 206.

V. MRKŠIĆ'S APPEAL

212. On 29 October 2007, Mrkšić filed a notice of appeal setting forth eleven grounds of appeal against the Trial Judgement and requesting the Appeals Chamber to acquit him of his convictions under Article 3 of the Statute for having aided and abetted the crimes of murder, torture and cruel treatment.[758] In his first eight grounds of appeal, Mrkšić challenges numerous findings which he claims were entered as a result of the Trial Chamber's failure to apply the standard of proof beyond reasonable doubt.[759] Under his ninth ground of appeal, he argues that as a result of the errors alleged in his preceding eight grounds of appeal, the Trial Chamber erred in law in convicting him pursuant to Article 7(1) of the Statute for having aided and abetted murder, torture and cruel treatment under Article 3 of the Statute.[760] Under his tenth ground of appeal, Mrkšić disputes certain facts which he asserts were not so important for the Trial Chamber in the course of reaching its decision but which are "important to the Defence and the position of the JNA".[761] Under his eleventh ground of appeal, he argues that the Trial Chamber erred in assessing the aggravating and mitigating circumstances when sentencing him to 20 years' imprisonment.[762] This ground of appeal is addressed in the sentencing section.[763]

A. Preliminary Issue

213. The Appeals Chamber observes that Mrkšić's submissions were often difficult to understand. While this may to some extent result from translation difficulties, it is also due to the way in which the arguments are presented and structured. Thus, for the sake of clarity the present Judgement quotes extensively from Mrkšić's relevant submissions when addressing his arguments. The Appeals Chamber has summarised the rest of the arguments to the best of its ability as it understands them.

214. The Appeals Chamber notes with concern that Mrkšić's Appeal Brief largely repeats arguments previously advanced in his Final Trial Brief without a clear explanation as to how these arguments support the allegation that the Trial Chamber misapplied the standard of proof beyond reasonable doubt thus resulting in an erroneous finding of fact. In many instances paragraphs from Mrkšić's Final Trial Brief are copied *verbatim* into his submissions on appeal. This practice is unacceptable; an appeal is not an opportunity for the parties to reargue their cases[764] or, "for the

[758] Mrkšić Notice of Appeal, para. 97.
[759] Mrkšić Notice of Appeal, paras 7, 14-23, 25-34, 39-40, 42, 44, 47, 51, 59, 66, 89.
[760] Mrkšić Notice of Appeal, Ground 9 (A), para. 84; Mrkšić Appeal Brief, paras 388-442.
[761] Mrkšić Notice of Appeal, para. 87; Mrkšić Appeal Brief, paras 466-492.
[762] Mrkšić Notice of Appeal, para. 96; Mrkšić Appeal Brief, paras 493-499.
[763] *See infra* Section VI: "Appeals Against Sentence".
[764] *Simić* Appeal Judgement, para. 238.

Appeals Chamber to reconsider the evidence and factors submitted before the Trial Chamber".[765] The Appeals Chamber emphasizes that an appellant cannot hope to see his appeal succeed by simply repeating or referring to arguments that did not succeed at trial,[766] unless he can demonstrate that the Trial Chamber's rejection of them constituted such an error as to warrant the intervention of the Appeals Chamber.[767] Therefore, the Appeals Chamber will dismiss all those arguments which simply duplicate the submissions already raised before the Trial Chamber without seeking to clarify how these arguments support an error of law invalidating the Trial Judgement[768] or an error of fact which occasioned a miscarriage of justice.[769]

B. Standard of Proof

215. Under his first, second, third, fourth, sixth and tenth grounds of appeal, Mrkšić contends that the Trial Chamber erred by misapplying the standard of proof beyond reasonable doubt.[770] Mrkšić submits that this error of law consists of two "sub-errors": (1) "[t]he Trial Chamber misapplied the standard of proof beyond reasonable doubt by applying it to [a] discrete [portion] of the evidence rather than to the complete body of evidence relevant to the ultimate issue";[771] and (2) "[t]he Trial Chamber, rather than applying the standard of proof beyond a reasonable doubt, entertained any doubt including doubt not based upon logic and common sense".[772]

216. Mrkšić further alleges throughout his appeal that the Trial Chamber misapplied the standard of proof beyond reasonable doubt[773] with respect to a vast number of findings.[774] In doing so, Mrkšić merely reiterates submissions made in his Final Trial Brief. The Appeals Chamber emphasizes that this is not sufficient to satisfy the requirements of the standard of review on appeal. In this respect, Mrkšić's arguments are vague and in effect amount to an attempt to turn the appeals proceedings into a trial *de novo*. Hence the Appeals Chamber will dismiss these allegations.

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[765] *Kupreškić et al.* Appeal Judgment, para. 430, citing *Čelebići* Appeal Judgement, para. 837.
[766] *See Nahimana et al.* Appeal Judgment, para. 395; *Kajelijeli* Appeal Judgement, para. 6.
[767] *Kajelijeli* Appeal Judgement, para. 6, referring to *Niyitegeka* Appeal Judgement, para. 9. *See* also *Blaškić* Appeal Judgement, para. 13; *Rutaganda* Appeal Judgement, para. 18.
[768] *Kupreškić et al.* Appeal Judgement, para. 27.
[769] *Rutaganda* Appeal Judgement, para. 18.
[770] *See* Mrkšić Notice of Appeal, paras 3-4, 7, 21, 29, 47, 66, 89. *See* also Mrkšić Appeal Brief, paras 1, 3, 103, 150, 188, 279, 478, 489. At the appeals hearing Mrkšić submitted that the Trial Chamber "deviate[d] from the principle of establishing facts beyond reasonable doubt and decide[d] to make conclusions that are based on a sentence referred to paragraph 321 of the [Trial] Judgement, and that is: Such an order only could have come from Mile Mrkšić". *See* AT. 39.
[771] Mrkšić Notice of Appeal, para. 4. *See* also Mrkšić Notice of Appeal, paras 3, 8, 9, 21, 29, 30, 36, 39, 42, 44, 47, 51, 59, 62, 66; Mrkšić Appeal Brief, Introduction, p. 6.
[772] Mrkšić Notice of Appeal, para. 4.
[773] *See* Mrkšić Appeal Brief, paras 1, 20, 25, 63, 93, 103, 150, 155, 162, 165, 174, 179, 191, 246, 253, 279, 478, 489.
[774] Mrkšić takes issue with the following paragraphs of the Trial Judgement: paras 79-82, 110-113, 139-146, 172-175, 191-197, 205, 225-233, 240-241, 245-305, 314-329, 390-393, 575, 582, 585, 586, 607-623, 625, 630, 632, 634.

1. Whether the Trial Chamber applied the standard of proof beyond reasonable doubt to a discrete portion of the evidence rather than to the complete body of evidence

217. According to the Statute and the Rules, a trier of fact should render a reasoned opinion on the basis of the entire body of evidence and without applying the standard of proof "beyond reasonable doubt" with a piecemeal approach.[775] The Trial Chamber's considerations regarding the evaluation of the evidence do not reveal an erroneous approach in this respect; on the contrary, they show that the Trial Chamber analysed the entire body of evidence without isolating any individual item.[776] The Trial Chamber determined in respect of each of the counts charged in the Indictment whether it was satisfied beyond reasonable doubt, on the basis of the *totality* of the evidence, that every element of the crime in question charged in the Indictment, including each form of liability, had been established.[777] To that effect, the Trial Chamber stated that:

> [I]n respect of some issues, it has been necessary for the Chamber to draw one or more inferences from facts established by the evidence. Where, in such cases, more than one inference was reasonably open from these facts, the Chamber has been careful to consider whether any inference reasonably open on those facts was inconsistent with the guilt of the Accused. If so, the onus and the standard of proof requires that an acquittal be entered in respect of that count.[778]

Mrkšić has not shown that the Trial Chamber erred in applying the requisite standard to "discrete" portions of the evidence or individual items of evidence in isolation from each other. The Appeals Chamber recalls that Mrkšić must identify the specific finding of the Trial Chamber where the error of law was allegedly committed, present arguments in support of his claim, and explain how the error invalidates the Trial Chamber's decision.[779] The Appeals Chamber finds that Mrkšić fails to do so. Accordingly, this allegation is dismissed.

2. Whether the Trial Chamber applied a standard amounting to proof beyond any doubt

218. Mrkšić's second allegation concerning the application of the standard of proof is that "[t]he Trial Chamber rather than applying the standard of proof beyond a reasonable doubt, entertained any doubt including doubt not based upon logic and common sense".[780] This allegation is raised under the first and second grounds of appeal in Mrkšić's Notice of Appeal[781] but is only referred to twice in his Appeal Brief; in his introductory remarks and under his first ground of appeal.[782]

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[775] *Halilović* Appeal Judgement, para. 128.
[776] Trial Judgement, paras 11-16.
[777] Trial Judgement, para. 11 (emphasis added).
[778] Trial Judgement, para. 11, citing *Čelebići* Appeal Judgement, para. 458.
[779] *See supra* para. 11.
[780] Mrkšić Notice of Appeal, para. 4; Mrkšić Appeal Brief, para. 3.
[781] Mrkšić Notice of Appeal, paras 4, 8, 23 (under his second ground of appeal Mrkšić submits that this allegation would be the subject of "detailed" explanation in his Appeal Brief).
[782] Mrkšić Appeal Brief, Introduction, p. 6 and para. 3.

219. The Appeals Chamber finds that Mrkšić's submissions on this issue are unclear and unsupported by any evidence. However, for the sake of clarity the Appeals Chamber makes the following observations.

220. In the Appeals Chamber's view, this allegation reveals a lack of understanding of the standard of proof beyond reasonable doubt. The application of this standard relates to the principle enshrined in Rule 87(A) of the Rules that guilt must be proven beyond reasonable doubt.[783] This standard of proof at trial requires that a Trial Chamber may only find an accused guilty of a crime if the Prosecution has proved each element of that crime and of the mode of liability, and any fact which is indispensable for the conviction, beyond reasonable doubt.[784] The term "beyond reasonable doubt" connotes that the evidence establishes a particular point and it is beyond dispute that any reasonable alternative is possible. It does not mean that no doubt exists as to the guilt of the accused. The test for establishing proof beyond reasonable doubt is that "the proof must be such as to exclude not every hypothesis or possibility of innocence, but every fair or rational hypothesis which may be derived from the evidence, except that of guilt".[785] The standard of proof beyond reasonable doubt requires a finder of fact to be satisfied that there is no reasonable explanation of the evidence other than the guilt of the accused.[786]

221. If the Trial Chamber in the instant case had entertained any *reasonable* doubt as to Mrkšić's guilt, it could not legitimately have entered a conviction against him. Clearly, that was not the case here. With respect to any doubts "not based upon logic and common sense" which the Trial Chamber may have had (and these are not identified by Mrkšić), these would not have prevented the Trial Chamber from reaching a finding of guilt as they would not have amounted to a fair or rational hypothesis of innocence. For the foregoing reasons, the Appeals Chamber finds that this allegation is unclear, obscure, contradictory and vague. Mrkšić's submission is accordingly dismissed as unfounded.[787]

222. In light of the foregoing, the Appeals Chamber finds that Mrkšić fails to show that the Trial Chamber erred in its application of the standard of proof beyond reasonable doubt. This allegation is accordingly dismissed**.**

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[783] *Halilović* Appeal Judgement, para. 111.
[784] *Blagojević and Jokić* Appeal Judgement, para. 226.
[785] *Tadić* Appeal Judgement, para. 174, citing Prosecution's Cross-Appellant's Brief, para. 3.12. *See* also *Tadić* Appeal Judgement, para. 183.
[786] *Martić* Appeal Judgement, para. 61.
[787] *See Naletilić and Martinović* Appeal Judgement, para. 14; *Kajelijeli* Appeal Judgement, para. 7; *Blaškić* Appeal Judgement, para. 13; *Niyitegeka* Appeal Judgement, para. 10; *Vasiljević* Appeal Judgement, para. 12; *Kunarac et al.* Appeal Judgement, paras 43, 48.

C. Assessment of the Evidence

223. In the introduction to his Notice of Appeal, Mrkšić raises a general allegation that the Trial Chamber erred in fact when it "failed to consider clearly relevant evidence, failed to consider or fully consider all the evidence that corroborated, erroneously evaluated evidence".[788] This allegation is made expressly under sub-ground (d) of his first ground of appeal,[789] his third ground of appeal[790] and his fourth ground of appeal,[791] and implicitly under sub-ground (a) of Mrkšić's sixth ground of appeal.[792]

224. At the outset, the Appeals Chamber recalls that a Trial Chamber need not refer to the testimony of every witness or every piece of evidence on the trial record. It is to be presumed that the Trial Chamber evaluated all the evidence presented to it, as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence. There may be an indication of disregard when evidence which is clearly relevant to the findings is not addressed by the Trial Chamber's reasoning, but not every inconsistency which the Trial Chamber failed to discuss renders its opinion defective.[793] Mere assertions that the Trial Chamber failed to consider relevant evidence, without showing why no reasonable trier of fact, based on the evidence, could reach the same conclusion as the Trial Chamber, will be summarily dismissed.[794] It is against this backdrop that the Appeals Chamber will consider the challenges to specific factual findings where the Trial Chamber allegedly failed to consider clearly relevant evidence.

D. First to Tenth Grounds of Appeal

1. First Ground of Appeal: Alleged error regarding the role and responsibility of the 80 mtbr command

225. Under his first ground of appeal, Mrkšić challenges paragraphs 79 to 82, 110 to 113, 251 to 294, 315 to 324, 623, 625 and 630 of the Trial Judgement.[795] He argues that, as a result of the erroneous application of the standard of proof beyond reasonable doubt, the Trial Chamber wrongly evaluated the role and responsibility of the 80 mtbr and its command structure and thus erred in finding that he was responsible for the events that occurred at Ovčara on 20 November 1991.[796] Mrkšić's first ground of appeal consists of five sub-grounds of appeal which concern: (i) the role

[788] Mrkšić Notice of Appeal, para. 5; Mrkšić Appeal Brief, Introduction, p. 6.
[789] Mrkšić Appeal Brief, paras 93, 97.
[790] Mrkšić Appeal Brief, paras 152, 161, 162, 165, 174, 179.
[791] Mrkšić Appeal Brief, paras 191, 201, 246, 253.
[792] Mrkšić Appeal Brief, para. 295.
[793] *Kvočka et al.* Appeal Judgement, para. 23.
[794] *Brdanin* Appeal Judgement, para. 24. *See* also *Strugar* Appeal Judgement, para. 24.
[795] *See* Mrkšić Appeal Brief, para. 1.

and responsibility of the 80 mtbr; (ii) the subordination and responsibility of local commanders; (iii) the re-subordination of a light artillery anti-aircraft battalion ("LAD PVO"); (iv) the reliability of 80 mtbr documents as to the timing of the withdrawal; and (v) the list of names of prisoners of war taken by the 80 mtbr.[797]

226. The Prosecution responds that Mrkšić's arguments: (i) repeat failed submissions made at trial; (ii) make general allegations that are vague and unsupported by specific references to the Trial Judgement; (iii) do not demonstrate how the Trial Chamber's alleged errors occasioned a miscarriage of justice; (iv) misrepresent the Trial Chamber's findings or the evidence; (v) challenge factual findings that are irrelevant or upon which the conviction does not rely; and (vi) constitute mere assertions that the Trial Chamber failed to give sufficient weight to certain evidence, mere assertions unsupported by evidence, or mere assertions that the Trial Chamber failed to consider relevant evidence. The Prosecution accordingly submits that the summary dismissal of these arguments is warranted.[798]

227. Mrkšić replies that the responsibility for local commanders is not a marginal issue since this fact shows that the 80 mtbr was in charge of guarding and securing the prisoners of war and that its officers were commanders of the area with sufficient forces to suppress any kind of threat against the life of the prisoners of war.[799]

228. At the outset, the Appeals Chamber observes that paragraphs 9 to 17, 26, 28 to 31, 35 to 54, 56 to 59, 65 to 70, 72, 73, 75, 77 to 79, 83 to 86, 88, 90, 91, 96, 99, and 101 of Mrkšić's Appeal Brief merely repeat arguments made at paragraphs 16, 99 to 106, 254, 256, 346, 353, 354, 361, 366, 410, 423, 424, 428, 432, 452, 453, 473 to 475, 480, 481, 484 to 487, 489 to 495, 497 to 500, 516 to 519, 523 and 533 of Mrkšić's Final Trial Brief.

229. As previously noted, an appeal is not a trial *de novo.*[800] Mrkšić's arguments simply repeat submissions previously made before the Trial Chamber and rejected, without providing a clear explanation as to how the arguments referred to above support the allegations raised under his first ground of appeal. He fails to show any need for intervention by the Appeals Chamber. For the foregoing reasons, the arguments brought under paragraphs 9 to 17, 26, 28 to 31, 35 to 54, 56 to 59, 65 to 70, 72, 73, 75, 77 to 79, 83 to 86, 88, 90, 91, 96, 99 and 101 of Mrkšić's Appeal Brief which are advanced in support of sub-grounds (a) to (d) of his first ground of appeal are dismissed. Accordingly, sub-grounds (a), (b) and (c) of Mrkšić's first ground of appeal are dismissed**.**

[796] *See* Mrkšić Notice of Appeal, paras 7-12.
[797] Mrkšić Notice of Appeal, paras 14-20; Mrkšić Appeal Brief, paras 25-102.
[798] *See* Prosecution Respondent's Brief, paras 211-224.

230. Under sub-ground (d) of his first ground of appeal, Mrkšić also submits that "[h]ad the Trial Chamber applied generally accepted standards for proof beyond reasonable doubt and *properly judged relevant evidence* as it should have been done by any reasonable Trial Chamber, then it would have found in [paragraphs 234 to 294 of the Trial Judgement], that these documents [80 mtbr documentation] were kept accurately by [officer] Premović and Major Janković".[801] The Appeals Chamber considers that as Mrkšić does not explain how the Trial Chamber's assessment of the evidence was erroneous, he fails to discharge the burden incumbent upon him.[802] Accordingly, sub-ground (d) of Mrkšić's first ground of appeal is dismissed**.**

231. Under sub-ground (e) of his first ground of appeal, Mrkšić submits that if the Trial Chamber had not erred at paragraphs 267 and 268 of the Trial Judgement, it would have found that: (1) the list of names of prisoners of war was put together pursuant to an order by Witness P014; and (2) that during the night of 20 November 1991, under Witness P014's order, the list was brought to LtCol Milorad Vojnović ("Vojnović"), commander of the 80 mtbr, whose unit was responsible for guarding the prisoners of war at Ovčara.[803]

232. As stated earlier in the present Judgement, an appealing party must limit its arguments to legal errors that invalidate the decision of the Trial Chamber and to factual errors that result in a miscarriage of justice within the scope of Article 25 of the Statute.[804] The Appeals Chamber recalls that as long as the factual findings supporting the conviction and sentence are sound, errors related to other factual conclusions do not have any impact on the Trial Judgement.[805] Bearing this in mind, the Appeals Chamber considers that under sub-ground (e) of his first ground of appeal, Mrkšić challenges an allegedly erroneous factual finding without adequately demonstrating that it is a finding on which the Trial Chamber relied for his conviction. Accordingly he fails to discharge the burden incumbent upon him.[806]

233. Moreover, the Appeals Chamber considers that even if the list of prisoners of war had indeed been put together pursuant to Witness P014's order and then sent to the command of the 80 mtbr, this fact would not render unsound any other findings upon which the Trial Chamber relied for Mrkšić's conviction. In particular, the finding that throughout the period relevant to the Indictment, Mrkšić had single command over all the forces in the zone of responsibility of OG

[799] Mrkšić Brief in Reply, para. 11; *see* also paras 8-10, 13.
[800] *Blaškić* Appeal Judgement, para. 13.
[801] Mrkšić Appeal Brief, para. 97 (emphasis added).
[802] *Vasiljević* Appeal Judgement, para. 12.
[803] Mrkšić Notice of Appeal, para. 20; Mrkšić Appeal Brief, paras 100-102.
[804] *See supra* Section II: "Standard of Review on Appeal".
[805] *Strugar* Appeal Judgement, para. 19; *Brdanin* Appeal Judgement, para. 21.
[806] *See Brdanin* Appeal Judgement, para. 22. *Cf. Strugar* Appeal Judgement, para. 69.

South, namely, JNA, TO, volunteer or paramilitary forces[807] and – as correctly pointed out by the Prosecution[808] – the 80 mtbr which was also subordinated to the OG South.[809] Mrkšić thus fails to elaborate on how the alleged error of fact had any impact on the findings of the Trial Chamber, so as to amount to a miscarriage of justice.[810] Accordingly, sub-ground (e) of Mrkšić's first ground of appeal is dismissed.

234. In light of the foregoing, the Appeals Chamber dismisses Mrkšić's first ground of appeal in its entirety.

2. Second Ground of Appeal: Alleged errors regarding Mrkšić's role in the evacuation of the Vukovar hospital

235. Under his second ground of appeal, Mrkšić submits that the Trial Chamber erred in law at paragraphs 139 to 146, 193 to 197, 575, 582 and 586 of the Trial Judgement "by misapplying the standard of proof beyond a reasonable doubt and erred of facts when [it] did not conclude that security organs were responsible for separating and [transporting the prisoners of war] and that [this] task [was] issued through their security lines from Security Administration and that [they] made decisions for [the] Vukovar hospital evacuation".[811] Mrkšić's second ground of appeal consists of two sub-grounds of appeal which concern: (a) the role of Colonel Nebojša Pavković in the negotiations to evacuate the Vukovar hospital; and (b) the role of the Federal Secretary of National Defence ("SSNO")[812] and Šljivančanin in the Vukovar hospital evacuation.[813]

236. The Prosecution responds that Mrkšić's arguments under his second ground of appeal should be summarily dismissed on the grounds that they: (i) ignore relevant findings of the Trial Chamber; (ii) constitute mere assertions that the Trial Chamber failed to properly consider the evidence; (iii) fail to show how the alleged error of fact in evaluating the evidence occasioned a miscarriage of justice; and (iv) seek to re-argue the evidence without showing how the Trial Chamber was unreasonable.[814] The Prosecution also refers to evidence relied upon by the Trial Chamber in order to determine Mrkšić's role in the evacuation, transportation and security of the

[807] Trial Judgement, para. 88.
[808] Prosecution Respondent's Brief, para. 224.
[809] *See* Trial Judgement, paras 77-82.
[810] *See Brdanin* Appeal Judgement, para. 31.
[811] Mrkšić Appeal Brief, para. 103; Mrkšić Notice of Appeal, paras 21-22.
[812] The long form of this acronym was not provided in Mrkšić's Appeal Brief or the attached Glossary. However, this acronym was used in his final trial submissions. Mrkšić Final Trial Brief, para. 47: "The Command and Control in the Armed Forces was activated by the Federal Secretary of National Defence (hereinafter SSNO)".
[813] Mrkšić Notice of Appeal, paras 25-28; Mrkšić Appeal Brief, paras 105-149.
[814] *See* Prosecution Respondent's Brief, paras 225, 227-234, 241.

prisoners of war and explains how the evidence relied upon by Mrkšić actually confirms the challenged findings.[815]

237. At the outset, the Appeals Chamber observes that paragraphs 103, 107, 109 to 114, 117, 122, 125, 129, 137 to 140 and 149 of Mrkšić's Appeal Brief merely repeat arguments made at paragraphs 123, 124, 134, 138 to 140, 171 to 175, 699, 808, 810, 812, 813, 815, 821 to 824, 862, and 875 of Mrkšić's Final Trial Brief.

238. The Appeals Chamber finds that Mrkšić fails to provide a clear explanation as to how the arguments referred to above, which repeat his submissions at trial and were rejected by the Trial Chamber, support the allegations raised under his second ground of appeal. Accordingly, Mrkšić fails to show any need for intervention by the Appeals Chamber. For the foregoing reasons, the arguments brought under paragraphs 103, 107, 109 to 114, 117, 122, 125, 129, 137 to 140 and 149 of Mrkšić's Appeal Brief are dismissed.

(a) Alleged errors regarding the role and responsibility of Colonel Nebojša Pavković in the negotiations to evacuate the Vukovar hospital

239. Under sub-ground (a) of his second ground of appeal, Mrkšić submits that: "had the Trial Chamber not erred in [paragraphs 139 to 146, 193, 575, 582 and 586 of the Trial Judgement] it would have found that Col. Pavković was detached to the command of the GMTBR as [a] supervisor from the SSNO. In that capacity on behalf of SSNO, he took role in implementation agreement which was [the goal] of the meetings between members of Supreme Command JNA and Croat government".[816]

240. The Appeals Chamber has found that the Trial Chamber did not err in its application of the standard of proof beyond reasonable doubt[817] and has dismissed a number of arguments advanced under Mrkšić's second ground of appeal.[818] Moreover, as the Prosecution correctly points out, Mrkšić's arguments under this sub-ground of appeal ignore the Trial Chamber's findings on his role in the negotiations and the evacuation of the Vukovar hospital.[819] Bearing this in mind, the Appeals Chamber finds that the remaining arguments advanced under sub-ground (a) of Mrkšić's second

[815] *See* Prosecution Respondent's Brief, paras 226, 228-229, 232-242.
[816] Mrkšić Appeal Brief, para. 105; Mrkšić Notice of Appeal, para. 25.
[817] *See supra* para. 222.
[818] *See supra* para. 238.
[819] Prosecution Respondent's Brief, paras 228-229, citing Trial Judgement, paras 138, 301-321.

ground of appeal[820] do not support the allegation that the Trial Chamber erred in assessing Mrkšić's role in the Vukovar hospital evacuation for the following reasons.

241. Mrkšić essentially submits that it was Colonel Pavković and the SSNO who were responsible for the evacuation of the Vukovar hospital and not him. He claims that the Trial Chamber erred in concluding that he was present at the meetings with ECMM, and that it wrongly evaluated the testimony of Witness Petr Kypr, ECMM monitor.[821] He further submits that the negotiations on the evacuation of the Vukovar hospital were conducted on behalf of the High Command in Vukovar by Colonel Pavković who was not subordinated to the OG South.[822]

242. Mrkšić avers that the Trial Chamber erred when it concluded that he was "present at the meetings with [ECMM]".[823] Mrkšić makes no specific reference to the paragraph in the Trial Judgement where this conclusion was reached. This is an obvious formal deficiency.[824] However, given that his Notice of Appeal and the introductory paragraph to sub-ground (a) of his second ground of appeal mention the challenged paragraphs of the Trial Judgement, the Appeals Chamber understands that this challenge concerns paragraph 139 of the Trial Judgement.[825] The Trial Chamber concluded that it was not able to accept the truth of Mrkšić's denial that he had any knowledge of the Zagreb Agreement, because of the nature of the Agreement, and the presence of ICRC and ECMM monitors, who were seeking to reach the hospital to implement the Agreement but who were prevented from doing so by JNA officers under Mrkšić's command.[826] It then further noted that on 19 November 1991, the ECMM monitors met with Mrkšić in Negoslavci to discuss the evacuation of the wounded from the hospital and referred to those ECMM monitors and officers from the JNA who were present at the meeting.[827]

243. Mrkšić fails to show how the Trial Chamber acted unreasonably in accepting the evidence relied upon at paragraph 139 of the Trial Judgement, including the testimony of Witness Petr Kypr. All his arguments advanced in support have been dismissed as they repeat submissions made at trial

[820] Mrkšić Appeal Brief, paras 105-106, 108, 115-116.
[821] Mrkšić Appeal Brief, para. 108.
[822] Mrkšić Appeal Brief, para. 115.
[823] Mrkšić Appeal Brief, para. 108.
[824] *See* Practice Direction on Formal Requirements for Appeals from Judgement, paras 1(c)(iii) and 4(b)(ii). *See* also *Blagojević and Jokić* Appeal Judgement, para. 11; *Brdanin* Appeal Judgement, para. 15; *Gacumbitsi* Appeal Judgement, para. 10.
[825] *See* Mrkšić Notice of Appeal, paras 21, 25.
[826] Trial Judgement, para. 138.
[827] Trial Judgement, para. 139, citing Petr Kypr, T. 6577, 6581, 6596-6597, 6709-6710; Exhibit P316, "ECMM Report of Talks with Cunningham"; Exhibit P344, "Notebook of Witness Kypr, November-December 1991".

and rejected by the Trial Chamber.[828] The Appeals Chamber thus finds that Mrkšić fails to show that the Trial Chamber erred in fact so as to occasion a miscarriage of justice.

244. In light of the foregoing, sub-ground (a) of Mrkšić's second ground of appeal is dismissed**.**

(b) Alleged errors regarding the role of and responsibility of the SSNO and Šljivančanin in the evacuation of the Vukovar hospital

245. Under sub-ground (b) of his second ground of appeal, Mrkšić avers that "he was not in charge of the triage and evacuation"[829] and submits that a reasonable Trial Chamber would have concluded that the evidence indicated that only a member of the security organ "could have given the order on triage of [prisoners of war], their transport and detention, as well as of their interrogation and of the withdrawal of [the Military Police] in charge of their security and guarding".[830]

246. The Appeals Chamber has found that the Trial Chamber did not err in its application of the standard of proof beyond reasonable doubt[831] and has dismissed a number of arguments advanced under Mrkšić's second ground of appeal.[832] Bearing this in mind, the Appeals Chamber finds that the rest of the arguments advanced under sub-ground (b) of Mrkšić's second ground of appeal[833] do not support the allegation that the Trial Chamber erred in assessing Mrkšić's role in the Vukovar hospital evacuation for the following reasons.

247. The Appeals Chamber recalls that mere assertions that the testimony of one witness is inconsistent with the conclusions of the Trial Chamber are insufficient[834] and call for summary dismissal.[835] Mrkšić's arguments simply repeat certain portions of the testimony of Šljivančanin, Bogdan Vujić, Radoje Trifunović and Ljubiša Vukašinović[836] and do not show how the Trial Chamber's findings on Mrkšić's role in the Vukovar hospital evacuation are contrary to the testimony of these witnesses.

248. When discussing the preparation for the evacuation of the Vukovar hospital and the events on 20 November 1991, the Trial Chamber relied, *inter alia*, on the testimony of witnesses Bogdan

[828] *See supra* para. 238.
[829] Mrkšić Appeal Brief, para. 144. *See* also Mrkšić Brief in Reply, paras 21-24, 27.
[830] Mrkšić Appeal Brief, para. 119.
[831] *See supra* para. 222.
[832] *See supra* para. 238.
[833] Mrkšić Appeal Brief, paras 118-119, 123-124, 126-127, 131-136, 141-148.
[834] *Brdanin* Appeal Judgement, para. 28.
[835] *See Strugar* Appeal Judgement, paras 23, 70, 243.
[836] Mrkšić Appeal Brief, paras 118-121, 123-124, 126-127,130-136, 141-147.

Vujić, Radoje Trifunović and Ljubiša Vukašinović.[837] Recounting evidence provided by Šljivančanin, the Trial Chamber concluded that Mrkšić instructed Šljivančanin to ensure the transport of war crime suspects from the Vukovar hospital to the prison in Sremska Mitrovica, and Mrkšić's instruction, as understood and implemented by Šljivančanin, was in fact to remove all members of the Croat forces at the hospital. The order to prepare and conduct the evacuation on 20 November 1991 was issued to Šljivančanin on 19 November 1991.[838] On the basis of these conclusions, the Trial Chamber found that Mrkšić ordered Šljivančanin to conduct the evacuation of the Vukovar hospital which involved the evacuation of civilians, the wounded and sick, and the transportation to prison of war crime suspects.[839] The Appeals Chamber finds that Mrkšić's arguments do not support the conclusion that he was not in charge of the triage and evacuation. Accordingly, sub-ground (b) of Mrkšić's second ground of appeal is dismissed.

249. In light of the foregoing, the Appeals Chamber dismisses Mrkšić's second ground of appeal in its entirety.

3. Third Ground of Appeal: Alleged errors regarding the role and responsibility of officers at the JNA barracks

250. Under his third ground of appeal, Mrkšić submits that the Trial Chamber erred in law and in fact at paragraphs 295, 305 and 607 to 610 of the Trial Judgement by misapplying the standard of proof beyond a reasonable doubt, and concluding that "[Mrkšić] ordered that [the] convoy with [prisoners of war] went from Vukovar hospital to the military barracks, and again that upon Mrkšić's order that convoy was waiting for the decision from the 'government' session".[840] He also submits that the Trial Chamber erred in fact "when [it] failed to consider clearly relevant evidence, failed to consider or fully consider all the evidence that corroborated that [Šljivančanin] ordered in consent with Col. Vujić that buses with [prisoners of war] change direction and went to the Vukovar JNA barracks".[841]

251. Mrkšić's third ground of appeal essentially consists of three sub-grounds of appeal[842] which concern: (a) the timing of the transfer and the SAO "government's" session;[843] (b) the Trial

[837] *See* Trial Judgement, paras 180-403.
[838] Trial Judgement, para. 191.
[839] Trial Judgement, para. 295.
[840] Mrkšić Appeal Brief, para. 150. *See* also Mrkšić Appeal Brief, para. 155; Mrkšić Brief in Reply, paras 31-32, 40.
[841] Mrkšić Appeal Brief, para. 152. *See* also Mrkšić Appeal Brief, paras 158, 161; Mrkšić Brief in Reply, para. 30.
[842] Mrkšić Notice of Appeal sets forth five sub-grounds of appeal (*see* Mrkšić Notice of Appeal, paras 34-46). However, the present Judgement divides the arguments into three sub-grounds of appeal for the following reasons. Sub-ground (a) of Mrkšić's third ground of appeal, as set out in his Notice of Appeal (*see* Mrkšić Notice of Appeal, paras 34-35) merely repeats the main allegation underlying the third ground of appeal. Sub-grounds (c) and (d) as set out in his

Chamber's reliance on the testimony of certain witnesses; and (c) the Trial Chamber's finding that Mrkšić ordered the transfer of prisoners of war to Ovčara.[844]

252. In response, the Prosecution submits that the arguments advanced under Mrkšić's third ground of appeal should be dismissed because they are irrelevant, misstate or ignore relevant findings of the Trial Chamber, and challenge the Trial Chamber's evaluation of the evidence without showing how it was unreasonable.[845] It adds that Šljivančanin's responsibility regarding the prisoners of war does not deny Mrkšić's responsibility as the ultimate commander of the relevant area.[846]

253. At the outset, the Appeals Chamber observes that paragraphs 152, 153, 161, 180 and 186 of Mrkšić's Appeal Brief repeat arguments made at paragraphs 188 to 191 and 914 to 916 of Mrkšić's Final Trial Brief. The Appeals Chamber finds that Mrkšić fails to provide a clear explanation as to how these arguments, which repeat submissions rejected at trial, support the allegations raised under his third ground of appeal. Mrkšić therefore fails to show any need for intervention by the Appeals Chamber. For the foregoing reasons, the arguments brought under paragraphs 152, 153, 161, 180 and 186 of Mrkšić's Appeal Brief are dismissed.

(a) Alleged errors regarding the timing of the transfer and the SAO "government's" session

254. Under sub-ground (a) of his third ground of appeal, Mrkšić submits that the Trial Chamber erred in law and in fact at paragraphs 225 to 233, 285, 293 to 305, 585, and 607 of the Trial Judgement, "by misapplying the standard of proof beyond a reasonable doubt and [by failing] to consider clearly relevant evidence […] consider or fully consider all the evidence that corroborated" that the SAO "government's" session in Velepromet could not have started before 14:00 hours on 20 November 1991, at which time the buses had already gone to the Ovčara farm.[847]

255. At the conclusion of his trial, Mrkšić contended that "[a]ccording to statements of all witnesses who were on the bus, the buses arrived at Ovčara between 13:00 and 14:00, and it was before the meeting [SAO "government's" session] was adjourned, as of the timing recorded on

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Notice of Appeal (*see* Mrkšić Notice of Appeal, paras 39-43) both concern the Trial Chamber's assessment of the credibility of witnesses so they are addressed jointly.

[843] In August 1991, local Serb communities made a declaration of their autonomy and purported to create the second of the new Serb-ruled "mini-states" in Croatia, *viz*, the Serb Autonomous District ("SAO"; *Srpska Autonomna Oblast*) of Slavonia, Baranja, and Western Srem. A "government" of the SAO was formed in September 1991 by the Serbian National Council of Slavonia, Baranja, and Western Srem. As in the Trial Judgement, the present Judgement uses the terms: "'government" or "SAO 'government'". *See* Trial Judgement, paras 32, 225.

[844] Mrkšić Notice of Appeal, paras 34-46; Mrkšić Appeal Brief, paras 155-187.

[845] *See* Prosecution Respondent's Brief, paras 243-257.

[846] Prosecution Respondent's Brief, para. 243.

[847] Mrkšić Appeal Brief, para. 162.

video film from Velepromet yard and statements of witnesses who attended the meeting".[848] Mrkšić reiterates this submission on appeal, relying on a still image of Slavko Dokmanović taken from a video clip dated 20 November 1991 at 15:25 hours.[849] No specific reference to any other evidence is made. This is not sufficient to substantiate the allegation that the Trial Chamber disregarded relevant evidence supporting Mrkšić's contention that the SAO "government's" session in Velepromet could not have started before 14:00 hours on 20 November 1991.

256. The Appeals Chamber notes, as correctly pointed out by the Prosecution,[850] that the Trial Chamber carefully considered all the conflicting evidence on this issue and concluded that the evidence in the *Dokmanović* case, which placed the session of the SAO "government" as commencing at 14:00 hours, could not be accepted.[851] Hence, it found that the SAO "government's" session "had concluded before 1300 hours, and in all probability started at about 1100 hours and concluded at about 1200 hours".[852] There is no indication that the Trial Chamber completely disregarded any particular piece of evidence. Mrkšić fails to explain why no reasonable trier of fact, based on the evidence, could reach the same conclusion as the Trial Chamber.[853] He does not articulate how this challenge implicates any specific finding by the Trial Chamber on his criminal responsibility.[854] Accordingly, sub-ground (a) of Mrkšić's third ground of appeal is dismissed.

(b) Alleged errors regarding the Trial Chamber's reliance on the testimony of certain witnesses

257. In its account of the role played by Mrkšić in the preparation for the evacuation of the Vukovar hospital and the events on 20 November 1991, the Trial Chamber relied, amongst other evidence, upon the testimonies of Captain Jovan Šušić ("Šušić"), commander of the 1MP/gmtbr, and LtCol Miodrag Panić ("Panić"), Chief of Staff of OG South and Mrkšić's deputy. Under sub-ground (b) of his third ground of appeal, Mrkšić challenges the Trial Chamber's reliance on this evidence.

(i) Alleged errors regarding the Trial Chamber's reliance on Witness Panić's testimony

258. Panić testified that on the morning of 20 November 1991, Mrkšić instructed him over the phone to attend, on his behalf, the SAO "government's" session and to convey to the participants that Mrkšić was prepared to accept and act in accordance with their decision as to what to do with

[848] Mrkšić Final Trial Brief, para. 201.
[849] Exhibit D268, "Still from video-clip showing Slavko Dokmanović". *See* AT.44.
[850] Prosecution Respondent's Brief, para. 249.
[851] *See* Trial Judgement, paras 225-232.
[852] Trial Judgement, para. 233.
[853] *See supra* para. 224.
[854] *Cf. Blagojević and Jokić* Appeal Judgement, para. 41.

the prisoners of war from the Vukovar hospital. Panić acted in accordance with this order.[855] During that same telephone conversation, Panić informed Mrkšić that a bus with prisoners from the Vukovar hospital was stationed in the barracks compound, and that members of the TO and other local men were trying to approach the bus in order to identify the men inside it.[856] After Panić returned from the "government" meeting to the barracks, he called Mrkšić, who, having heard from Panić that it had been said at the meeting of the "government" that the prisoners of war would be put on trial, and that there would be a prison at Ovčara, said: "[v]ery well, let it be as they decided".[857] On the basis of this testimony and all the other relevant evidence before it, the Trial Chamber concluded that after the telephone conversation with Panić, Mrkšić reached at least an interim decision about what should be done regarding the transport of the prisoners of war, who had been held on buses for some hours. Subsequently, an order was given for the prisoners of war to be taken to Ovčara.[858]

259. Mrkšić submits that the Trial Chamber, erred in law and in fact at paragraphs 225 to 233 and 295 to 305 of the Trial Judgement "by misapplying the standard of proof beyond a reasonable doubt and [failing] to consider clearly relevant evidence […] to consider or fully consider all the evidence that corroborated that [Panić] in his previous testimonies had never told anything regarding buses in the barracks [at the] time when he was talking with [Mrkšić]".[859] In particular, he challenges the Trial Chamber's reliance on Panić's testimony,[860] contends that his previous statements "did not claim what the Trial Chamber accepts",[861] and claims that the witness lied in order to transfer responsibility for the events at Ovčara to Mrkšić.[862]

(ii) Alleged errors regarding the Trial Chamber's reliance on Witness Šušić's testimony

260. Šušić testified that on the morning of 20 November 1991 Captain Mladen Predojević ("Predojević"), the commander of an armoured vehicles company of 1 MP/gmtbr, who was responsible for security in the JNA, informed him that he had problems securing some of the buses that had arrived at the JNA barracks from the Vukovar hospital. After seeing that TO members were verbally insulting and threatening the prisoners on the buses, Šušić called Mrkšić and told him that the safety and security of the prisoners was in danger. Mrkšić ordered him to ensure the security of

[855] Trial Judgement, para. 296.
[856] Trial Judgement, para. 297.
[857] Trial Judgement, para. 305.
[858] Trial Judgement, para. 305. *See* also Trial Judgement, para. 612.
[859] Mrkšić Appeal Brief, para. 165.
[860] *See* Mrkšić Appeal Brief, paras 167-172.
[861] Mrkšić Appeal Brief, para. 173, citing Miodrag Panić, T.14305.
[862] Mrkšić Appeal Brief, 172. *See* also AT. 40.

the people on the buses and told him that a meeting of the "government" of Krajina was underway at which the issue of the destination envisaged for these people would be discussed.[863]

261. Mrkšić submits that the Trial Chamber erred in law and in fact at paragraphs 298 to 305 of the Trial Judgement by misapplying the "standard of proof beyond a reasonable doubt and [failing] to consider clearly relevant evidence […] consider or fully consider all the evidence that corroborated that [Šušić] had no reason for intervention in situation that Chief of Staff was in the barracks, that Major Vukašinović ordered Captain Predojević to guard the [prisoners of war] and to members of TO to step out, when Major Lukić barracks commander ordered Captain Predojević who was under his command to secure the buses. In these circumstances there was no need [for Šušić to give] the call to [Mrkšić] as the Trial Chamber concluded".[864] Mrkšić contends that the challenged findings are at odds with the contradictions in Šušić's evidence regarding his recollection of the manner in which he got in touch with Mrkšić, and the Trial Chamber's finding that Šušić's reporting to Mrkšić was not in accordance with JNA formal chain of command procedures.[865]

(iii) Discussion

262. The Appeals Chamber finds that the arguments advanced by Mrkšić under sub-ground (b) of his third ground of appeal do not support the allegation that the Trial Chamber failed to consider relevant evidence for the following reasons.

263. First, the Appeals Chamber recalls that a Trial Chamber is not required to set out in detail why it accepted or rejected the testimony of a particular witness.[866] In this respect, Mrkšić's claim that the Trial Chamber "fails to explain how it puts trust in the witness Šušić" is misconceived.[867] While a Trial Chamber is required to consider inconsistencies and any explanations offered in respect to them when weighing the probative value of evidence,[868] it does not need to individually address them in the Trial Judgement.[869] Furthermore, the presence of inconsistencies within or amongst witnesses' testimonies does not *per se* require a reasonable Trial Chamber to reject the evidence as being unreasonable.[870]

[863] Trial Judgement, para. 298.
[864] Mrkšić Appeal Brief, para. 174.
[865] *See* Mrkšić Appeal Brief, paras 175-178.
[866] *Musema* Appeal Judgement, para. 20.
[867] Mrkšić Appeal Brief, para. 177.
[868] *Muhimana* Appeal Judgement, para. 58; *Niyitegeka* Appeal Judgement, para. 96.
[869] *Muhimana* Appeal Judgement, para. 58; *Niyitegeka* Appeal Judgement, para. 124. *See* also *Musema* Appeal Judgement, para. 20
[870] *Kupreškić et al.* Appeal Judgement, para. 31. *See* also *Niyitegeka* Appeal Judgement, para. 95.

264. Second, when assessing the reliability of evidence, corroboration is an element that a reasonable trier of fact may consider in assessing the evidence. However, corroboration is neither a condition nor a guarantee of reliability. The question of whether to consider the corroboration of evidence or not, forms part of a Trial Chamber's discretion.[871] The Appeals Chamber considers that Mrkšić does not show that the Trial Chamber's credibility assessment of Witnesses Panić and Šušić was in error. Mrkšic does not show that the Trial Chamber was unreasonable in its treatment of the testimonies of Witnesses Panić and Šušić as illustrated below.

265. As the Prosecution correctly points out, the Trial Chamber specifically considered that Panić avoided disclosing matters that might implicate him.[872] The Trial Chamber considered Panić to be generally, and in respect of most matters, an honest and reliable witness. Nonetheless, it expressly noted that it had reviewed the evidence of this witness with great care and considered it in light of the other evidence about these events.[873] In assessing the credibility of this witness, it took into account his demeanour, the events that were otherwise established to have occurred, and the demeanour of those who gave differing accounts about these events.[874] Hence, it found that:

> in his evidence LtCol Panić sought to present aspects of his own role in a more favourable light and to avoid disclosing matters which could be construed as implicating Panić himself in criminal conduct. Because of this, while the Chamber is entirely persuaded it should accept much of his evidence, it has and will identify its reservations about some issues.[875]

The Trial Chamber pointed out that Panić was not being frank when speaking of his own knowledge of mistreatment of the prisoners of war, in order to minimise the truth. Nonetheless, the Trial Chamber was entirely persuaded that in other respects his evidence was reliable and reflected what occurred that afternoon when Panić reported to Mrkšić,[876] and found that "at the time of his report as Chief of Staff to his commander, Panić would have reported reliably what he had seen and heard and his own concerns about the situation".[877] It was within the discretion of the Trial Chamber to evaluate the inconsistencies highlighted and to consider whether when taking his testimony as a whole, the witness was reliable and his evidence was credible.[878]

266. With respect to Šušić's testimony, as the Prosecution correctly points out, the Trial Chamber considered Mrkšić's challenges to the reliability of this witness and rejected them.[879] The Trial Chamber acknowledged that the credibility of Šušić's evidence had been strongly challenged during

[871] *See Limaj et al.* Appeal Judgement, para. 203.
[872] Prosecution Respondent's Brief, para. 251, citing Trial Judgement, para. 297.
[873] Trial Judgement, para. 297.
[874] Trial Judgement, para. 297. *See* also the Prosecution's submissions on this issue at the appeals hearing: AT. 80.
[875] Trial Judgement, para. 297.
[876] Trial Judgement, para. 308.
[877] Trial Judgement, para. 309.
[878] *Cf. Čelebići* Appeal Judgement, para. 498.
[879] Prosecution Respondent's Brief, para. 253. *See* also AT. 80.

the trial. However, after assessing the challenges it concluded that the discrepancy as to the manner in which Šušić got in touch with Mrkšić – either by using a radio microphone in one of the vehicles parked outside the barracks' building, or by using a telephone inside the building – was understandably a matter of little significance at the time and in any event was not an indication that the witness fabricated his account.[880] In the Trial Chamber's view, to conclude that Šušić could not have reported directly to Mrkšić on the basis that this was not in accordance with the formal procedures of the JNA chain of command would in fact over-emphasize formal procedures and fail to give adequate weight to other relevant considerations.[881] There is therefore no indication that the Trial Chamber completely disregarded any particular piece of evidence in reaching the challenged findings. Mrkšić's arguments fail to show why no reasonable trier of fact, based on the evidence, could reach the same conclusion as the Trial Chamber did.

267. In light of the foregoing, sub-ground (b) of Mrkšić's third ground of appeal is dismissed.

(c) Alleged errors regarding the Trial Chamber's finding that Mrkšić ordered the transfer of the prisoners of war to Ovčara

268. Under sub-ground (c) of his third ground of appeal, Mrkšić submits that the Trial Chamber erred in law and in fact at paragraphs 305 to 307, 612 and 623 of the Trial Judgement "by misapplying the standard of proof beyond a reasonable doubt and [failing] to consider clearly relevant evidence […] to consider or fully consider all the evidence that corroborated that according [to] the war log of the 80MTBR there was normal [route] for the [prisoners of war] that before Sremska Mitrovica they spent same time on Ovčara for triage and selection".[882]

269. Mrkšić's arguments under this sub-ground of appeal[883] are irrelevant and fail to support the allegation that the Trial Chamber erred by disregarding relevant evidence when finding that he ordered that the prisoners of war be transferred to Ovčara. As previously recalled, the Trial Chamber concluded that after the telephone conversation with Panić, Mrkšić reached at least an interim decision about what should be done regarding the transport of the prisoners of war, who had been held on buses for hours.[884] Subsequently, an order was given for the prisoners of war to be taken to Ovčara.[885] The Trial Chamber acknowledged that there was no direct evidence of either

[880] Trial Judgement, para. 299.
[881] Trial Judgement, para. 300.
[882] Mrkšić Appeal Brief, para. 179.
[883] *See* Mrkšić Appeal Brief, paras 179, 181-184, 187.
[884] *See supra* para. 258.
[885] *See* Trial Judgement, para. 305 (footnotes omitted): "An order was given for the prisoners of war to be taken to Ovčara, which was the location used by the JNA to hold prisoners of war over the night of 18/19 November 1991 during the Mitnica evacuation. At the same time, however, military police of 80 mtbr were despatched to Ovčara to be ready to secure the prisoners of war when the buses arrived. This last action is inconsistent with the view that Mile

order, but concluded that it was clear that the buses with the prisoners went from the JNA barracks to Ovčara, arriving between 13:30 and 14:30 hours, and the military police of 80 mtbr went to Ovčara and arrived there before the prisoners.[886] There is no indication that the Trial Chamber completely disregarded any particular piece of evidence.

270. Contrary to Mrkšić's arguments under this sub-ground of appeal,[887] the Trial Chamber did acknowledge that taking the prisoners of war to Ovčara was in accord with the JNA's handling of its prisoners of war during the Mitnica surrender.[888] However, the Trial Chamber further found that on 20 November 1991, unlike on 18 November 1991, there had been plenty of time for the prisoners on the buses to be driven to Sremska Mitrovica before nightfall, since the buses had reached Ovčara between 13:30 and 14:30 hours; yet the buses left Ovčara after the prisoners of war had been unloaded. This, in its view, indicated that it was not then the intention of Mrkšić that the prisoners of war should be transported to Sremska Mitrovica on 20 November 1991.[889] Accordingly, Mrkšić fails to show how the alleged error of fact had any impact on the findings of the Trial Chamber, so as to amount to a miscarriage of justice. Moreover, Mrkšić also fails to demonstrate that the Trial Chamber committed an error of law by misapplying the standard of proof beyond reasonable doubt.[890]

271. In light of the foregoing, sub-ground (c) of Mrkšić's third ground of appeal is dismissed.

272. The Appeals Chamber has found that the Trial Chamber did not err in its application of the standard of proof beyond reasonable doubt.[891] In addition, there is no indication that the Trial Chamber completely disregarded any particular piece of evidence.[892] Mrkšić fails to show why no reasonable trier of fact, based on the evidence, could reach the same conclusions as the Trial Chamber did regarding Mrkšić's role in preparing the evacuation of the Vukovar hospital and in the events on 20 November 1991.[893]

273. In light of the foregoing**,** the Appeals Chamber dismisses Mrkšić's third ground of appeal in its entirety.

Mrkšić had already decided to hand over the prisoners of war to the TO pursuant to the wishes of the 'government'. In accordance with normal practice these orders were no doubt given by Mile Mrkšić through his command staff at OG South". *See* also Trial Judgement, para. 612.

[886] Trial Judgement, para. 306.

[887] *See* Mrkšić Appeal Judgement, paras 179, 181-184.

[888] Trial Judgement, para. 612.

[889] *See* Trial Judgement, para. 612.

[890] *See supra* para. 222.

[891] *Ibid.*

[892] *See supra* paras 256, 262, 266 and 269.

[893] *See* Trial Judgement, paras 295-322.

4. Fourth Ground of Appeal: Alleged errors regarding the SAO "government's" session

274. Under his fourth ground of appeal, Mrkšić submits that the Trial Chamber erred in law at paragraphs 225 to 233, 304, 585 and 586 of the Trial Judgement "by not observing the standard [of] proof beyond reasonable doubt in evaluating the evidence relevant for proving the responsibility of [Mrkšić], as it has been determined in [the Trial Judgement]".[894] Mrkšić submits that no decision was made at the SAO "government's" session and that Panić could not have conveyed Mrkšić's consent "with the decisions made by [the] 'government' whatever they were".[895] Mrkšić's fourth ground of appeal consists of five sub-grounds of appeal which concern: (a) the timing of the SAO "government's" session;[896] (b) Panić's testimony concerning his role during the SAO "government's" session;[897] (c) the testimony of Colonel Bogdan Vujić ("Vujić"), a counter-intelligence officer;[898] (d) the interview given by Goran Hadžić, prime-minister of the SAO "government", to the media;[899] and (e) the evidentiary weight given to Rule 92*bis* witness statements.[900]

275. The Prosecution responds that Mrkšić's arguments: (i) do not challenge a finding upon which his conviction relies; (ii) are inconsistent and irrelevant; (iii) repeat submissions made at trial concerning the evidence of Panić and Vujić; and (iv) ignore relevant findings and are vague and difficult to comprehend.[901] Mrkšić replies that the events related to the "government" session are very important because they indicate the story fabricated by Vujić and Panić in order to redirect responsibility to Mrkšić.[902] He adds that it was necessary to paraphrase some "facts" from his Final Trial Brief in order to present to the Appeals Chamber, "exactly those frameworks presented to" [903] the Trial Chamber.

276. At the outset the Appeals Chamber observes that paragraphs 189, 201, 202, 204, 208, 210, 214, 216, 218 to 221, 223 to 226, 228, 232 to 237, 239 to 246 and 250 of Mrkšić's Appeal Brief merely repeat arguments made at paragraphs 195, 197, 577, 582, 605, 610 to 617, 619, 620, 626, 629 to 631, 635, 637 to 639, 641 to 643, 646 to 648, 652, 656, 658, 660, 661, 668, 670, 725, and 872 of Mrkšić's Final Trial Brief. The Appeals Chamber finds that Mrkšić fails to provide a clear explanation as to how these arguments, which repeat submissions rejected at trial, support the

[894] Mrkšić Appeal Brief, para. 188.
[895] Mrkšić Appeal Brief, para. 188.
[896] Mrkšić Notice of Appeal, paras 51-53; Mrkšić Appeal Brief, paras 191-200.
[897] Mrkšić Notice of Appeal, paras 54-55; Mrkšić Appeal Brief, paras 201-224.
[898] Mrkšić Notice of Appeal, paras 56-58; Mrkšić Appeal Brief, paras 225-245.
[899] Mrkšić Notice of Appeal, paras 59-61; Mrkšić Appeal Brief, paras 246-252.
[900] Mrkšić Notice of Appeal, paras 62-64; Mrkšić Appeal Brief, paras 253-254.
[901] *See* Prosecution Respondent's Brief, paras 258-267.
[902] Mrkšić Brief in Reply, para. 45.
[903] Mrkšić Brief in Reply, para. 45.

allegations raised under his fourth ground of appeal. He fails to show any need for intervention by the Appeals Chamber. For the foregoing reasons, the arguments brought under paragraphs 189, 201, 202, 204, 208, 210, 214, 216, 218 to 221, 223 to 226, 228, 232 to 237, 239 to 246 and 250 of Mrkšić's Appeal Brief are dismissed.

(a) Alleged errors regarding the timing of the SAO "government's" session

277. Under sub-ground (a) of his fourth ground of appeal, Mrkšić alleges that the Trial Chamber failed to consider relevant evidence which corroborated his claim that the SAO "government" session could not have started before 1400 hrs on 20 November 1991.[904] This argument, which is also advanced under sub-ground (a) of Mrkšić's third ground of appeal, has already been dismissed by the Appeals Chamber.[905] Accordingly sub-ground (a) of Mrkšić's fourth ground of appeal is dismissed.

(b) Alleged errors regarding Witness Panić's testimony concerning his role during the SAO "government's" session

278. Under sub-ground (b) of his fourth ground of appeal, Mrkšić avers that the Trial Chamber erred in fact at paragraphs 225 to 233, 258, 262, 285, 296, 298, 305 to 309, 318, 606 and 702 of the Trial Judgement "when [it] failed to consider clearly relevant evidence, failed to consider or fully consider all the evidence that corroborated that [Panić] as a Chief of Staff [of OG South] had an obligation to make decisions in the course of control and implementation [of commanders'] orders".[906] According to Mrkšić, Panić "tried to minimise his responsibility as a Chief of Staff who was present in the [different] locations and did nothing".[907]

279. Mrkšić essentially reargues that Panić's testimony was inconsistent and contradictory and challenges the reliability of this witness.[908] The Appeals Chamber recalls that the challenges against the Trial Chamber's reliance on the testimony of Witness Panić, have already been addressed and dismissed under Mrkšić's third ground of appeal.[909] Moreover, it has also dismissed numerous arguments advanced in support of sub-ground (a) of Mrkšić's fourth ground of appeal.[910] In light of the foregoing, sub-ground (b) of Mrkšić's fourth ground of appeal is also dismissed.

[904] Mrkšić Appeal Brief, para. 191. *See* also AT. 112-113.
[905] *See supra* para. 256.
[906] Mrkšić Appeal Brief, para. 201.
[907] Mrkšić Appeal Brief, para. 201.
[908] *See supra* para. 259.
[909] *See supra* paras 257-267.
[910] *See supra* para. 276.

(c) Alleged errors regarding the Trial Chamber's reliance on Witness Vujić's testimony

280. Mrkšić submits that the Trial Chamber erred in fact at paragraphs 169 to 175, 227 to 229 and 250 of the Trial Judgement "regarding roles and responsibility of Col. Vujić who was sent by General Vasiljević as a supreme officer of the Security Administration with [the] task to make triage and transfer [the prisoners of war] especially suspects of war crimes [to] the security detainees center".[911] Mrkšić fails to demonstrate under this sub-ground of appeal that any alleged error on the part of the Trial Chamber resulted in a miscarriage of justice. He fails to articulate how his challenge implicates any specific finding by the Trial Chamber on his criminal responsibility or sentence.[912] Moreover, the arguments advanced by Mrkšić in support of this sub-ground of appeal have been dismissed as they repeat his submissions at trial without justifying intervention by the Appeals Chamber.[913] In light of the foregoing, sub-ground (c) of Mrkšić's fourth ground of appeal is dismissed.

(d) Alleged errors regarding Goran Hadžić's interview

281. Under sub-ground (d) of his fourth ground of appeal, Mrkšić submits that the Trial Chamber erred in law and in fact at paragraphs 295 to 305 of the Trial Judgement "since it did not apply the standard of proof beyond a reasonable doubt, as it wrongly established the facts [by] failing to consider relevant evidence that could prove that Goran Hadžić, gave an interview at 17:00 [hours] on 20 [November] 1991 in Šid that is one hour drive from Vukovar".[914] He adds that Mrkšić could not have made "any decision, at the time when Goran Hadžić was giving the interview up to 17:00 [hours], which would mean that [the prisoners of war were] under the competence of the ['government']".[915]

282. First, the Appeals Chamber recalls that Mrkšić's allegation that the Trial Chamber erred in its application of the standard of proof beyond reasonable doubt has been dismissed.[916] Second, the Appeals Chamber notes that the timing of Goran Hadžić's interview was part of Mrkšić's submissions at trial[917] and finds that he does not demonstrate the relevance of this argument to the findings upon which his conviction relies. By failing to support this sub-ground of appeal with clear arguments, he fails to show any need for intervention by the Appeals Chamber. The Trial Chamber concluded that the interview where Goran Hadžić was reported as stating that there was an

[911] Mrkšić Appeal Brief, para. 225.
[912] *Cf. Blagojević and Jokić* Appeal Judgement, para. 41.
[913] *See supra* para. 276.
[914] Mrkšić Appeal Brief, para. 246.
[915] Mrkšić Appeal Brief, para. 252.
[916] *See supra* para. 222.

agreement with the military authorities to have the Croatian prisoners of war detained in detention camps in the surroundings of Vukovar, took place in the evening of 20 November 1991; it did not specify in its findings the exact time.[918] The Trial Chamber found that while Goran Hadžić's comments to the media provided an indication of the SAO "government's" determination that the JNA should not take the prisoners of war remaining in Vukovar to Sremska Mitrovica in Serbia, the evidence did not show that any such agreement or decision had been reached by the end of the session of the SAO "government".[919] The Trial Chamber focused not on the timing of the interview but on what eventually transpired in respect of the prisoners of war on 20 November 1991 following the session. The Trial Chamber found that this was consistent with the reported assertion of Goran Hadžić of an agreement reached at least by that evening with the military authorities to have the prisoners of war detained in the surroundings of Vukovar.[920] Hence, it concluded that the issue must have been pursued further with Mrkšić or his representatives following the session of the SAO "government" and that the statement attributed to Goran Hadžić appeared to have taken account of this development subsequent to the session of the SAO "government".[921] In light of the foregoing, sub-ground (d) of Mrkšić's fourth ground of appeal is dismissed.

(e) Alleged errors regarding the evidentiary weight given to Rule 92*bis* witness statements

283. Mrkšić submits that the Trial Chamber erred in law and in fact at paragraphs 225 to 233 of the Trial Judgement by "misapplying the standard of proof beyond a reasonable doubt and [failing] to consider clearly relevant evidence […] to consider or fully consider all the evidence that corroborated that [both parties] had no objection when [the Rule 92*bis* witness statements] were entered into evidence".[922] The Appeals Chamber considers that Mrkšić does not formulate his claim clearly nor does he proffer comprehensible arguments in support of his contention.[923] Mrkšić allegation is clearly without foundation.[924] Accordingly, sub-ground (e) of Mrkšić's fourth ground of appeal is dismissed.

284. In light of the foregoing, the Appeals Chamber dismisses Mrkšić's fourth ground of appeal in its entirety.

[917] *See* Mrkšić Final Trial Brief, para. 195.
[918] *See* Trial Judgement, paras 228-229, 304.
[919] *See* Trial Judgement, para. 304.
[920] *See* Trial Judgement, paras 229, 304.
[921] Trial Judgement, para. 304.
[922] Mrkšić Appeal Brief, para. 253.
[923] *See* Mrkšić Notice of Appeal, paras 63-64; Mrkšić Appeal Brief, paras 253-254; Mrkšić Brief in Reply, para. 46.
[924] *See Krnojelac* Appeal Judgement, para. 16; *Blaškić* Appeal Judgement, para. 13.

5. Fifth Ground of Appeal: Alleged errors regarding Mrkšić' responsibility and the events at Ovčara on 20 November 1991

285. Under his fifth ground of appeal, Mrkšić avers that the Trial Chamber erred in fact in concluding that he was informed about the events at the Ovčara farm before the daily briefing in Negoslavci on 20 November 1991.[925] Mrkšić's Notice of Appeal does not provide precise references to relevant paragraphs in the Trial Judgement to which the challenge is being made.[926] In light of this lack of compliance with the formal requirements for the filing of appeals against judgements,[927] this submission is dismissed.

286. Having dismissed one of the allegations raised under Mrkšić's fifth ground of appeal, the Appeals Chamber notes that, in his Notice of Appeal, Mrkšić also asserts that he did not have information about the "treatment of [the prisoners of war] in Ovčara hangar" and submits that "the Trial Chamber erred in law [in] convicting him for aiding and abetting torture and cruel treatment during the afternoon of 20 November 1991".[928] Since this submission is of essential importance to his appeal, in the interests of justice, the Appeals Chamber will consider whether this allegation is substantiated by the other challenges to factual findings raised under Mrkšić's fifth ground of appeal, where precise references to the relevant paragraphs in the Trial Judgement are provided.[929] Mrkšić challenges the following factual findings: (a) between 15:30 and 16:00 hours Witness P017 dug the hole that later served as a mass grave;[930] (b) the killings at Ovčara "started after 21:00 hour[s] and continued up to midnight";[931] (c) on 21 November 1991, pursuant to an order from the command of OG South, the Vukovar TO detachment was re-subordinated to the command of the 80 mtbr;[932] and (d) the "arrival of [the] buses [at Ovčara] [was] completely unpredictable for Lt.Col. Vojnović".[933]

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[925] Mrkšić Notice of Appeal, para. 65; Mrkšić Appeal Brief, para. 255. *See* also Mrkšić Brief in Reply, para. 48.
[926] Practice Direction on Formal Requirements for Appeals from Judgement (IT/201) of 7 March 2002 ("Practice Direction on Formal Requirements for Appeals from Judgement"), paras 1(c)(iii), 4(b)(ii). *See* also *Gacumbitsi* Appeal Judgement, para. 10; *Stakić* Appeal Judgement, para. 12; *Blaškić* Appeal Judgement, para. 13; *Vasiljević* Appeal Judgement, para. 11; *Kajelijeli* Appeal Judgement, para. 7; *Niyitegeka* Appeal Judgement, para. 10.
[927] Practice Direction on Formal Requirements for Appeals from Judgement, para. 17.
[928] Mrkšić Notice of Appeal, para. 65.
[929] The Appeals Chamber notes that given that the arguments advanced at paragraphs 256 and 257 of Mrkšić Appeal Brief, concerning the arrival of the buses at Ovčara, suffer from the same lack of compliance with the formal requirements, these arguments are not considered in the present Judgement.
[930] Mrkšić Appeal Brief, paras 258-259, citing Trial Judgement, paras 240-241. The Appeals Chamber notes that in the public redacted version of Mrkšić's Appeal Brief, the reference to the relevant paragraphs of the Trial Judgement is redacted.
[931] Mrkšić Appeal Brief, para. 260, citing Trial Judgement, para. 252. *See* also Mrkšić Appeal Brief, paras 261-265; Mrkšić Brief in Reply, paras 51-52.
[932] *See* Mrkšić Appeal Brief, para. 270, citing Trial Judgement, para. 253. *See* also Mrkšić Appeal Brief, paras 264, 266-269.
[933] Mrkšić Appeal Brief, para. 271, citing Trial Judgement, para. 261. *See* also Mrkšić Appeal Brief, paras 272-274.

287. The Prosecution responds that all of Mrkšić's arguments under his fifth ground of appeal should be summarily dismissed because they: (i) challenge factual findings on which his conviction does not rely; (ii) ignore relevant factual findings; (iii) challenge the Trial Chamber's evaluation of the evidence without showing how it was unreasonable; and (iv) challenge factual findings where the relevance of the factual finding is unclear and has not been explained.[934]

(a) Alleged error regarding the finding that Witness P017 dug the hole

288. Mrkšić fails to demonstrate that any alleged error on the part of the Trial Chamber concerning this finding resulted in a miscarriage of justice. Mrkšić does not articulate how his challenge to the findings on the excavation of the hole, its dimensions and location implicates any specific finding by the Trial Chamber on his criminal responsibility.[935] Accordingly, this challenge is dismissed.

(b) Alleged error regarding the timing of the killings at Ovčara on 20 November 1991

289. The Appeals Chamber considers that, as correctly noted by the Prosecution,[936] none of the evidence referred to in support of Mrkšić's argument that the killings must have started "after 22:35, or more precisely after 23:00 hours"[937] contradicts the Trial Chamber's finding that "[t]he killings started after 2100 hours and continued until well after midnight".[938] Mrkšić does not show how the challenged finding was unreasonable, nor does he elaborate on how the alleged error of fact resulted in a miscarriage of justice. Accordingly, this challenge is dismissed.

(c) Whether the Vukovar TO detachment was re-subordinated to the command of the 80 mtbr

290. The Trial Chamber found that on 21 November 1991, pursuant to an order from the command of OG South, the Vukovar TO detachment was re-subordinated to the command of the 80 mtbr and the Leva Supoderica volunteer detachment was re-subordinated to the 12th Mechanical Corps.[939] Mrkšić challenges this finding without elaborating on how the alleged error of fact resulted in a miscarriage of justice.[940] He contests the validity of the order relied upon by the Trial Chamber by largely repeating the following arguments advanced at trial: (a) the alleged re-subordination was not confirmed by witnesses, members of 80 mtbr, the Commander or Chief of Staff, or the Chief of Security; and (b) the order is not only grounded on something it cannot be

[934] *See* Prosecution Respondent's Brief, paras 269-278.
[935] *Cf. Blagojević and Jokić* Appeal Judgement, para. 41.
[936] Prosecution Respondent's Brief, para. 274.
[937] Mrkšić Appeal Brief, para. 265.
[938] Trial Judgment, para. 252.
[939] Trial Judgement, para. 253, citing Exhibit P422, "Order no. 464-1, signed by Mrkšić, 21 November 1991" and Radoje Trifunović, T. 8138.

grounded on, but it re-subordinates the units in a way which is contrary to the rules and without any need at all.[941] Moreover, Mrkšić's arguments do not even attempt to demonstrate how the challenged finding was relied upon by the Trial Chamber for his conviction. This omission constitutes a failure to discharge a burden incumbent upon him.[942] Accordingly, this challenge is dismissed.

(d) Whether LtCol Milorad Vojnović was aware that the prisoners of war were to be held at Ovčara

291. Even though the Trial Chamber did not accept as generally reliable the evidence of LtCol Milorad Vojnović, commander of the 80 mtbr, concerning his experiences at Ovčara in the afternoon of 20 November 1991, given that he had been away from his headquarters, it did accept that he was unaware at that time that his military police had been ordered to Ovčara. The Trial Chamber also found that he was unaware that prisoners were to be held at Ovčara on 20 November 1991, and concluded that "[t]he whole scene was, therefore, unexpected by Vojnović".[943] Mrkšić alleges that "[t]his conclusion was not made within the standard of applying proof beyond a reasonable doubt".[944] Recalling that it has found that the Trial Chamber did not err in its application of the standard of proof beyond reasonable doubt,[945] the Appeals Chamber further finds that Mrkšić's arguments under his fifth ground of appeal do not support the allegation that the Trial Chamber misapplied the standard of proof beyond reasonable doubt in paragraph 261 of the Trial Judgement.[946] Mrkšić fails to demonstrate how the alleged error concerning this finding had any impact on the findings of the Trial Chamber, so as to amount to a miscarriage of justice. Moreover, the Appeals Chamber finds that Mrkšić does not even attempt to demonstrate how this finding was relied upon by the Trial Chamber for his conviction. This omission constitutes a failure to discharge a burden incumbent upon him.[947] Accordingly, this challenge is dismissed.

292. The Appeals Chamber therefore finds that the allegation that the Trial Chamber erred in law in convicting him for aiding and abetting torture and cruel treatment during the afternoon of

[940] *Cf. Blagojević and Jokić* Appeal Judgement, para. 41.
[941] *See* Mrkšić Appeal Brief, paras 264, 266-270. *See* also Mrkšić Brief in Reply, para. 54; Mrkšić Final Trial Brief, paras 73-76, 226, 241-242, 868, 914.
[942] *Brdanin* Appeal Judgement, para. 22.
[943] Trial Judgement, para. 261.
[944] Mrkšić Appeal Brief, para. 271.
[945] *See supra* para. 222.
[946] *See* Mrkšić Appeal Brief, paras 272-278.
[947] *Brdanin* Appeal Judgement, para. 22.

20 November 1991,[948] is not substantiated by any of the challenges to factual findings raised under Mrkšić's fifth ground of appeal.

293. In light of the foregoing, the Appeals Chamber dismisses Mrkšić's fifth ground of appeal in its entirety.

6. Sixth Ground of Appeal: Alleged errors regarding the Trial Chamber's conclusion that Mrkšić ordered the withdrawal of the 80 mtbr from Ovčara

294. Under his sixth ground of appeal, Mrkšić submits that the Trial Chamber erred in law at paragraphs 245 to 253 of the Trial Judgement "by misapplying the standard of proof beyond a reasonable doubt […]. Every reasonable Trial Chamber would establish that [Mrkšić] did not give the order for the withdrawal of military police of 80MTBR from Ovčara, so that the order was given [after Mrkšić] had left for Belgrade on that evening of 20 [November] 1991".[949] The Appeals Chamber recalls that in sub-ground (a) of his first ground of appeal Mrkšić asserts that he "didn't order the withdrawal of [Military Police] units of 80MTBR from the Ovčara farm".[950] This assertion has been dismissed as it repeats submissions previously made at trial and rejected.[951] However, given that the finding that Mrkšić ordered the withdrawal was crucial to establishing his responsibility for aiding and abetting murder and thus is of essential importance to his appeal, the Appeals Chamber considers that it is in the interests of justice to address the arguments advanced under Mrkšić's sixth ground of appeal in support of his challenge against the Trial Chamber's findings concerning the withdrawal order. Mrkšić's sixth ground of appeal consists of four sub-grounds of appeal which concern: (a) errors regarding the timing of the order for withdrawal; (b) errors regarding the conclusion that Vojnović informed Mrkšić twice about the events at Ovčara, first at the OG South daily briefing and then later after the briefing; (c) errors regarding the role of Captain Dragi Vukosavljević ("Vukosavljević") at Ovčara on 20 November 1991; and (d) errors regarding the role of Colonel Radoje Trifunović ("Trifunović") on 20 November 1991.[952]

295. The Prosecution responds that Mrkšić's arguments should be dismissed as they: (i) fail to show how the Trial Chamber's conclusion was not reasonable; (ii) misrepresent the evidence;

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[948] Mrkšić Notice of Appeal, para. 65.
[949] Mrkšić Appeal Brief, para. 279; Mrkšić Notice of Appeal, para. 67. At the appeals hearing Mrkšić submitted that he did not order anything. AT. 50. He further argued that, "he could not have given the order for security to withdraw from the Ovčara Farm, especially not through the security officer, Captain Karanfilov, and then make sure that all the JNA structures keep quiet about it", because if he "had done that, on the following day he would have had to be arrested by the security organs whose task it is to discover the perpetrators of war crimes and other crimes", AT. 52; s*ee* also AT. 116-117.
[950] Mrkšić Appeal Brief, para. 26.
[951] *See supra* para. 229.
[952] Mrkšić Notice of Appeal, paras 69-75; Mrkšić Appeal Brief, paras 289-327.

(iii) are impermissibly vague, speculative and in some instances, unsupported by citations to the record; and (iv) ignore relevant factual findings and constitute mere assertions that the Trial Chamber failed to properly consider relevant evidence or failed to rely on one piece of evidence.[953]

(a) Alleged errors regarding the timing of the order for withdrawal

296. Mrkšić submits that the Trial Chamber wrongly concluded that he gave the order for withdrawal just before or just after the regular daily briefing in Negoslavci on 20 November 1991.[954] He contends that if the withdrawal order had been issued by him before the briefing, it would have been the subject of a report at the briefing and this was not confirmed by any witness.[955] He argues that the order could not have been issued during the briefing since "it has not been confirmed by any witness of the Prosecution, and cannot be found in any written document, not even in regular reports from the briefing".[956] He further claims that the Trial Chamber failed to evaluate the testimony of Witness Dušan Jakšić who testified that he went "to Mrkšić before the session of the 'government' in 'Velepromet' and that Mrkšić categorically refused to talk [about] surrendering [the prisoners of war] to civilian authorities, and also he testified that this issue was not discussed at the session of that 'government' in Velepromet".[957] At the appeals hearing, Mrkšić submitted that the withdrawal order could not have been issued after the briefing "because Witnesses Gluščević, Šljivančanin and Corić concluded a series of meetings that Mrkšić had in the Command before leaving for Belgrade […] so he had no opportunity to issue the order to Captain Karanfilov".[958]

297. The Appeals Chamber recalls that the Trial Chamber found that, on 20 November 1991, the regular OG South briefing held in the command post at Negoslavci began at approximately 18:00 hours.[959] It further found that the order to withdraw the last remaining JNA troops from Ovčara, namely, the military police of the 80 mtbr, was issued by Mrkšić *in the early evening* of 20 November 1991, *shortly before or after* the regular OG South briefing.[960] In the Trial Chamber's account, Mrkšić's withdrawal order was sent to Ovčara first through Captain Borče Karanfilov ("Karanfilov"), of the security organ of OG South, and later through Vojnović and Vukosavljević.[961] Based upon Vukosavljević's evidence, the Trial Chamber concluded that the withdrawal order had already been conveyed to Captain Dragan Vezmarović ("Vezmarović"),

[953] Prosecution Respondent's Brief, paras 279-304.
[954] Mrkšić Notice of Appeal, para. 70. *See* also Mrkšić Brief in Reply, paras 64-65.
[955] Mrkšić Appeal Brief, paras 289-291. *See* also AT. 54.
[956] Mrkšić Appeal Brief, para. 293. *See* also Mrkšić Appeal Brief, paras 292, 294; AT. 54-55, 118-119.
[957] Mrkšić Appeal Brief, para. 295, citing Dušan Jakšić, T. 11920, 11950-11951. *See* also AT. 56.
[958] AT. 118. *See* also AT. 119.
[959] Trial Judgement, para. 314.
[960] Trial Judgement, para. 293 (emphasis added).

commander of the military police of the 80 mtbr, and was in the process of being implemented by the time Vukosavljević reached Ovčara, which in the Trial Chamber's finding was close to 20:00 hours.[962] The Trial Chamber explicitly stated that

> [t]he evidence does not allow the Chamber to make a finding *as to the precise time* of the order of Mile Mrkšić for the withdrawal of the JNA security, then provided by the 80 mtbr, from Ovčara. The course of events and the available evidence both indicate that the order of Mile Mrkšić was made shortly before, or perhaps shortly after, the evening briefing.[963]

298. The Appeals Chamber considers that the fact that there is no record that such an order was mentioned *during* the briefing is not inconsistent with the relevant findings of the Trial Chamber.

299. With respect to the Trial Chamber's alleged failure to consider the testimony of Dušan Jakšić, the Appeals Chamber has held that a Trial Chamber is not obliged to refer to the testimony of every witness or every piece of evidence on the trial record in its judgement.[964] Bearing in mind its preliminary findings on the Trial Chamber's assessment of the evidence,[965] and considering the relevant findings of the Trial Chamber referred to above, the Appeals Chamber finds that Mrkšić's arguments fail to show why no reasonable trier of fact, based on this evidence, could have reached the same conclusions as the Trial Chamber did regarding the timing of the order to withdraw the last remaining JNA troops, namely, the military police of the 80 mtbr, from Ovčara. Accordingly, sub-ground (a) of Mrkšić's sixth ground of appeal is dismissed.

(b) Alleged errors regarding the conclusion that Vojnović twice informed Mrkšić about the events at Ovčara

300. Mrkšić submits that the Trial Chamber erred in finding that "after the second meeting when [Vojnović] and Mrkšić were walking together, Vojnović came back and issued an order to Vukosavljević to go to Ovčara and withdraw 80MTBR from there"[966] as such a conclusion could not have been reached by any reasonable Trial Chamber. In support of this submission Mrkšić: (i) challenges the credibility of Vojnović; (ii) asserts that the alleged meeting with Mrkšić after the OG South regular briefing was fabricated; (iii) suggests that Vojnović and Vukosavljević verified that their statements would be identical before testifying; and (iv) claims that Vojnović had a meeting with somebody else but not Mrkšić.[967]

[961] Trial Judgement, para. 293.
[962] *See* Trial Judgement, paras 276-277, 279.
[963] Trial Judgement, para. 321 (emphasis added).
[964] *See Kupreškić et al.* Appeal Judgement, para. 39.
[965] *See supra* para. 224.
[966] Mrkšić Appeal Brief, para. 297. *See* also Mrkšić Notice of Appeal, para. 72.
[967] Mrkšić Appeal Brief, paras 298-313. *See* also Mrkšić Brief in Reply, para. 74; AT. 56-57.

301. The Appeals Chamber recalls that deference to the finder of fact is particularly appropriate where the factual challenges concern issues of witness credibility. The finder of fact, in this instance the Trial Chamber, is particularly well suited to assess these kinds of questions as it had the opportunity to directly observe the witness' demeanor and assess his evidence in the context of the entire trial record.[968] Bearing in mind its previous findings on this issue,[969] the Appeals Chamber finds that Mrkšić has not shown that the Trial Chamber's credibility assessment was in error. His arguments fail to demonstrate that the Trial Chamber was unreasonable in its treatment of Vojnović's testimony for the following reasons.

302. First, as the Prosecution correctly points out, Mrkšić cites in support of his submission, inconsistencies that in fact were specifically considered by the Trial Chamber.[970] Mrkšić claims that "[a]ttention should be paid to what Vojnović testified in 1998 when his recollection was fresher and more objective".[971] However, the Appeals Chamber notes that the Trial Chamber did observe that Vojnović's official notes of interviews he gave in the course of military investigations held in Belgrade in 1998 into the events in Vukovar and Ovčara in November 1991, do not mention that he made any report to Mrkšić on 20 November about Ovčara.[972] The Trial Chamber made no finding about the truth or falsity of Vojnović's explanation concerning the absence of any reference in those notes to the reports to Mrkšić and stated that because of this, it would approach Vojnović's evidence with *extreme caution*.[973] Nonetheless it observed that "when dealing with this issue, Vojnović gave a clear impression of *being frank and honest*, in respect of the question of reporting to Mile Mrkšić, as best as his recollection of the interviews or proceedings in 1998 allowed".[974]

303. In support of his contention that the meeting in which Vojnović reported to Mrkšić on the situation at Ovčara was fabricated, Mrkšić relies on the testimony of Colonel Boriša Gluščević ("Gluščević"), assistant for logistics to Mrkšić. Mrkšić submits, repeating arguments previously raised at trial,[975] that Gluščević's testimony excludes the possibility that Vojnović reported to Mrkšić.[976] As noted by the Trial Chamber, Gluščević and LtCol Milovan Lešanović, who were present at the regular briefing of the OG South, did not give evidence of hearing Vojnović's report to Mrkšić, but nor did they deny that this occurred.[977] The Trial Chamber also considered Mrkšić's submission that because Gluščević and Mrkšić stayed in the operations room of the OG South

[968] *Ntakirutimana* Appeal Judgement, para. 178 (citation omitted).
[969] *See supra* paras 263-264.
[970] *See* Prosecution Respondent's Brief, paras 296-299.
[971] Mrkšić Appeal Brief, para. 298.
[972] Trial Judgement, para. 320.
[973] Trial Judgement, para. 321 (emphasis added).
[974] Trial Judgement, para. 321 (emphasis added).
[975] *See* Mrkšić Appeal Brief, paras 312-313; Mrkšić Final Trial Brief, para. 871. *See* also AT. 61.
[976] Mrkšić Appeal Brief, para. 305. *See* also AT. 59.
[977] Trial Judgement, para. 317.

command post for approximately 20 minutes after the briefing, it could not be accepted that there was a second discussion between Vojnović and Mrkšić.[978] The Trial Chamber concluded that it was not the effect of Vojnović's evidence that he spoke to Mrkšić for the second time immediately after the briefing, but rather that he only met Mrkšić later.[979] These findings illustrate that the Trial Chamber gave careful consideration to the evidence of the meeting between Mrkšić and Vojnović after the regular OG South briefing and the credibility of the relevant witnesses.

304. Before reaching its general conclusions on this sub-ground of appeal, the Appeals Chamber will first consider sub-ground (c) of Mrkšić's sixth ground of appeal as it raises similar issues.

(c) Alleged errors regarding the role of Vukosavljević at Ovčara on 20 November 1991

305. Mrkšić submits that the Trial Chamber erred in fact at paragraphs 269, 272, 273, 276, 277, 279 to 281, 284, 318 and 322 of the Trial Judgement in accepting the testimony of Vukosavljević about his activities at Ovčara in the afternoon and evening on 20 November 1991.[980] In support of this submission he claims that, in order to lessen his responsibility,[981] Vukosavljević falsely testified that in the hall in front of the briefing room, Vojnović told him how he informed Mrkšić about the alarming situation at Ovčara but got no answer from him.[982]

306. As already explained, given that the Trial Chamber is in a unique position to evaluate the demeanour of the testifying witness, where the factual challenges concern the issues of witness credibility, deference to the finder of fact is particularly appropriate.[983] The Trial Chamber's decision to find Vukosavljević's testimony credible is therefore entitled to substantial deference.[984] In light of the foregoing, and bearing in mind its previous findings on this issue,[985] the Appeals Chamber finds that Mrkšic fails to show that the Trial Chamber's credibility assessment of Vukosavljević was in error. Merely claiming that the Trial Chamber erred and citing a string of paragraphs from the Trial Judgement is not a valid argument on appeal and is not enough to demonstrate that the Trial Chamber was unreasonable in its treatment of Vukosavljević's testimony and that it committed an error of fact which resulted in a miscarriage of justice.[986]

[978] Trial Judgement, para. 319.
[979] Trial Judgement, para. 319.
[980] Mrkšić Notice of Appeal, para. 73.
[981] *See* AT. 40. At the appeals hearing Mrkšić claimed that Vukosavljević was concealing his personal responsibility or the responsibility of his friends and comrades.
[982] *See* Mrkšić Appeal Brief, paras 314, 316, 317, 318.
[983] *Ntakirutimana* Appeal Judgement, paras 178, 204.
[984] *Cf. Ntakirutimana* Appeal Judgement, para. 204.
[985] *See supra* paras 263-264.
[986] *Cf. Brdanin* Appeal Judgement, para. 500.

(i) Conclusions on sub-grounds of appeal (b) and (c)

307. Before discussing in detail the evidence concerning the decision to withdraw the military police of the 80 mtbr from Ovčara,[987] the Trial Chamber had found that following his return to Negoslavci from Ovčara, Vojnović had reported to Mrkšić twice that the prisoners of war from the hospital had been mistreated and that the security situation at Ovčara was serious. First, at the regular OG South briefing which started at 18:00 hours, and then later in a meeting with Mrkšić and Vukosavljević.[988] During the second meeting, Vojnović understood that Mrkšić's view was that Vojnović's men should not be at Ovčara at that stage; afterwards Vojnović returned and ordered Vukosavljević to go to Ovčara to withdraw the 80 mtbr from there.[989] These findings, which are part of the Trial Chamber's account of the events at Ovčara on 20 November 1991, were reached after the Trial Chamber had considered and analysed evidence regarding: (i) the events in the morning at the Vukovar hospital;[990] (ii) the events at and near the Vukovar hospital in the late morning and early afternoon;[991] (iii) the events at the JNA barracks in Vukovar;[992] (iv) the session of the SAO "government";[993]; and (v) the events at Ovčara.[994] Pursuant to this analysis, the Trial Chamber found that the military police of the 80 mtbr, who had been providing security at Ovčara, withdrew from Ovčara following the regular OG South briefing at Negoslavci.[995] It further found that Vojnović's evidence regarding his two reports to Mrkšić, explained how "[the withdrawal] came to happen" and was entirely consistent with this conclusion.[996]

308. In the Trial Chamber's account, Vojnović understood that Mrkšić was of the opinion that Vojnović and his troops should not be at Ovčara at that stage. Vojnović got this impression from the discussion following the briefing, during his second report to Mrkšić. Vojnović then acted from the command post in Negoslavci to withdraw his troops from Ovčara and sent Vukosavljević to convey the order.[997] Upon his arrival at Ovčara, Vukosavljević found that the troops had already prepared to withdraw, indicating that a previous order to do so had reached them independently of Vojnović's order and was already in the process of being implemented.[998] The previous order was the instructions that Mrkšić sent to Ovčara through Karanfilov.[999] After Karanfilov arrived at

[987] Trial Judgement, paras 315-322.
[988] Trial Judgement, para. 275.
[989] Trial Judgement, para. 275.
[990] Trial Judgement, paras 199-208.
[991] Trial Judgement, paras 209-214.
[992] Trial Judgement, paras 215-224.
[993] Trial Judgement, paras 225-233.
[994] Trial Judgement, paras 234-251.
[995] Trial Judgement, para. 321.
[996] Trial Judgement, para. 321.
[997] Trial Judgement, para. 321. *See* also Trial Judgement, para. 293.
[998] Trial Judgement, para. 321. *See* also Trial Judgement, paras 277, 293.
[999] Trial Judgement, paras 293, 329.

Ovačara and was informed by Vezmarović of the situation and actions taken, Karanfilov told Vezmarović that there had been a meeting and an agreement between the JNA and the Vukovar TO and that the TO was to take control of the security of the hangar and the prisoners. Karanfilov then introduced the Vukovar TO commanders to Vezmarović and told him that they would now be in charge of the prisoners' security and that Vezmarović was to pull his unit out. Vezmarović and his unit then left Ovčara and drove to Negoslavci while Karanfilov and the Vukovar TO commanders remained at Ovčara.[1000] Accordingly, the Trial Chamber found that Mrkšić was aware, before talking to Vojnović, that the order to withdraw the military police unit of the 80 mtbr had been sent to Ovčara through Karanfilov and thus Mrkšić was surprised to hear afterwards from Vojnović that the unit was still at Ovčara. Thus, after Mrkšić expressed his dissatisfaction in a way that made Vojnović realise that he should withdraw the military police, Vojnović sent Vukosavljević to Ovčara to convey again the withdrawal order to the troops in question.[1001] This account, which was confirmed by the evidence of Vojnović, Vukosavljević and Vezmarović,[1002] supports the Trial Chamber's finding that the order to withdraw the military police of the 80 mtbr from Ovčara could only have originated from Mrkšić.[1003] Mrkšić's arguments fail to demonstrate that this finding was one that no reasonable Trial Chamber could have made.[1004]

309. For the foregoing reasons, the Appeals Chamber finds that Mrkšić's arguments fail to show why no reasonable trier of fact, based on this evidence, could have reached the same conclusions as the Trial Chamber did to the effect that Vojnović reported to Mrkšić twice about the situation at Ovčara, first at the regular OG South briefing and then later in a meeting with Mrkšić and Vukosavljević. Mrkšić's arguments fail to show that the Trial Chamber committed any errors of fact which resulted in a miscarriage of justice when assessing the role and activities of Vukosavljević at Ovčara at the relevant time. Mrkšić does not demonstrate that the Trial Chamber committed any error of fact which resulted in a miscarriage of justice at paragraphs 269, 272, 273,

[1000] Trial Judgement, para. 277.
[1001] Trial Judgement, paras 281, 284.
[1002] Karanfilov denied that he had given the order to Vezmarović. However, the Trial Chamber was not persuaded by his account insofar as he sought to deny his involvement in the transmission of the order to withdraw to Vezmarović. The Trial Chamber found the evidence of Vezmarović on this point to be reliable. It reasoned that, given that Vezmarović was aware of the risk of being accused of having withdrawn his unit of his own accord, it would not have been reasonable for him to invent a story involving Karanfilov. The Trial Chamber further held that "[r]eceiving an order through his ordinary chain of command was more likely to be believed and would disavow the suspicion of him leaving Ovčara without an order or approval of his commander. [Vezmarović] also must have learned of the order sent through Captain Vukosavljević on his return to Negoslavci that evening. Yet, it was his testimony that it was Captain Karanfilov who conveyed the order to him" (Trial Judgement, para. 283). *See* also Trial Judgement, paras 278-280, 282.
[1003] *See* Trial Judgement, para. 321. *See* also AT. 93-99.
[1004] Mrkšić challenges this finding under sub-ground (b) of his sixth ground of appeal. *See* Mrkšić Notice of Appeal, para. 72.

275 to 277, 279 to 281, 284, 315, 316, 318 to 322 and 324 of the Trial Judgement.[1005] Accordingly, sub-grounds (b) and (c) of Mrkšić's sixth ground of appeal are dismissed.

(d) Alleged errors regarding the role of Trifunović on 20 November 1991

310. Mrkšić submits in his Notice of Appeal that the Trial Chamber erred in fact at paragraphs 314 and 317 of the Trial Judgement in accepting the testimony of Trifunović and further erred in concluding at paragraph 326 of the Trial Judgement that Mrkšić was in the command post in the night of 20 November 1991.[1006] In support of this submission, he argues that Trifunović testified falsely[1007] and deliberately falsified an entry in Exhibit P402[1008] which shows that Mrkšić departed in the morning of 21 November 1991 for Belgrade,[1009] and points to the "untruths of this witness which have been generally and unfortunately accepted by the Trial Chamber and completely contradictory to the derived evidence presented in the part of Mrkšić's departure for Belgrade, that [no] reasonable court would ever accept".[1010]

311. The Appeals Chamber notes that, in his Appeal Brief, Mrkšić does not provide precise references to relevant paragraphs of the Trial Judgement which are being challenged. This is an obvious formal deficiency.[1011] Turning to his Notice of Appeal,[1012] one of the findings challenged under this sub-ground of appeal concerns Trifunović's testimony "that the daily briefings at the OG [South] command post in Negoslavci 'were most often' held at 1700 hours".[1013] As pointed out by Mrkšić, the Trial Chamber did not rely on this evidence[1014] and instead found "the evening briefing at the OG [South] command post began at approximately 1800 hours on 20 November 1991".[1015] The other finding challenged in his Notice of Appeal[1016] concerns the Trial Chamber's account of Trifunović's testimony that he recalled having heard "from some officers at the command that Vojnović had been to the command post later that evening to speak to Mrkšić about the

[1005] *See* Mrkšić Notice of Appeal, paras 72-73.
[1006] Mrkšić Notice of Appeal, para. 74.
[1007] Mrkšić Appeal Brief, paras 329-330, 334, 336, 339. *See* also Mrkšić Reply Brief, paras 76, 78. At the appeals hearing Mrkšić claimed that Trifunović was concealing his responsibility or the responsibility of his friends and comrades (*see* AT. 40).
[1008] Exhibit P402, "JNA Guards Motorised Brigade log-book of incoming and outgoing orders".
[1009] Mrkšić Appeal Brief, para. 325. *See* also Mrkšić Reply Brief, para. 77; AT. 62.
[1010] Mrkšić Appeal Brief, para. 339. *See* also AT. 63-64.
[1011] Practice Direction on Formal Requirements for Appeals from Judgement, paras 1(c)(iii) and 4(b)(ii). *See* also *Gacumbitsi* Appeal Judgement, para. 10; *Stakić* Appeal Judgement, para. 12; *Blaškić* Appeal Judgement, para. 13; *Vasiljević* Appeal Judgement, para. 11; *Kajelijeli* Appeal Judgement, para. 7; *Niyitegeka* Appeal Judgement, para. 10.
[1012] Mrkšić Notice of Appeal, para. 74.
[1013] Trial Judgement, para. 314, citing Radoje Trifunović, T. 8229.
[1014] Mrkšić Appeal Brief, para. 322: "The Trial Chamber trusted this witness Trifunović, except in regard to one thing, and that is the time of holding regular briefings of OGSOUTH".
[1015] Trial Judgement, para. 314.
[1016] Mrkšić Notice of Appeal, para. 74.

mistreatment of prisoners 'on one of the previous days'".[1017] Mrkšić does not articulate how this challenge implicates any specific finding by the Trial Chamber on his criminal responsibility or sentence.[1018]

312. With respect to the argument related to Mrkšić's departure to Belgrade, the Appeals Chamber notes that, after recounting the testimony of Trifunović, the Trial Chamber stated that "the effect of this evidence is that Mile Mrkšić remained in Negoslavci during the night of 20/21 November 1991 and did not travel to Belgrade".[1019] However, it further concluded that even though it had been established that Mrkšić did travel to Belgrade, it had not been established whether he did so late on 20 November 1991 or early on 21 November 1991.[1020] It follows that Mrkšić's arguments do not adequately demonstrate that this is a finding on which the Trial Chamber relied for his conviction; this omission constitutes a failure to discharge a burden incumbent upon him.[1021] What is relevant to his conviction is the finding that he was still in Negoslavci at the time he gave the order for the military police of the 80 mtbr of the JNA to withdraw the security it was providing for the prisoners of war held in the hangar at Ovčara,[1022] an order which, as found by the Trial Chamber on the basis of the evidence before it, "was made by Mile Mrkšić in the early evening of 20 November 1991, shortly before or after the regular OG South briefing".[1023] The Trial Chamber also concluded that it was possible based on the evidence that Mrkšić could have departed from Negoslavci by road for Belgrade before the remaining 80 mtbr personnel actually withdrew from Ovčara.[1024]

313. The Appeals Chamber further notes that the allegation that Trifunović deliberately falsified an entry in Exhibit P402 repeats submissions made at trial[1025] without explaining why the Trial Chamber's rejection of them constituted such an error as to warrant the intervention of the Appeals Chamber. Accordingly this allegation is dismissed.

314. The Appeals Chamber considers that the remaining arguments advanced by Mrkšić are vague and do not articulate how any specific finding by the Trial Chamber on his criminal responsibility or sentence is implicated by his challenge under this sub-ground of appeal.[1026] Mrkšić fails to show any errors of fact which occasioned a miscarriage of justice at paragraphs 314,

[1017] Trial Judgement, para. 317.
[1018] *Cf. Blagojević and Jokić* Appeal Judgement, para. 41.
[1019] Trial Judgement, para. 326.
[1020] Trial Judgement, para. 329.
[1021] *Brdanin* Appeal Judgement, para. 22.
[1022] Trial Judgement, para. 329.
[1023] Trial Judgement, para. 293. S*ee* also Trial Judgement, para. 321.
[1024] Trial Judgement, para. 329.
[1025] *See* Mrkšić Final Trial Brief, paras 246-247.
[1026] *Cf. Blagojević and Jokić* Appeal Judgement, para. 41.

317 and 326 of the Trial Judgement. Accordingly, sub-ground (d) of Mrkšić's sixth ground of appeal is dismissed.

315. In light of the foregoing, the Appeals Chamber dismisses Mrkšić's sixth ground of appeal in its entirety.

7. Seventh Ground of Appeal: Alleged errors regarding Mrkšić's departure to Belgrade

316. Under his seventh ground of appeal, Mrkšić submits that the Trial Chamber erred in fact at paragraphs 325 to 329 of the Trial Judgement in concluding that he did travel to Belgrade but either late on 20 November 1991 or early on 21 November 1991, and contends that this led to the erroneous finding that he ordered the withdrawal of the military police from Ovčara.[1027] The Prosecution responds that Mrkšić's arguments should be rejected because they do not show that the Trial Chamber's finding was unreasonable and ignore evidence underlying this finding and other relevant findings.[1028]

317. The Appeals Chamber finds that Mrkšić's arguments fail to show that the Trial Chamber committed an error of fact which occasioned a miscarriage of justice at paragraphs 325 to 329 of the Trial Judgement, for the following reasons. In support of his seventh ground of appeal, Mrkšić repeats the allegation that Trifunović testified falsely and deliberately falsified an entry in Exhibit P402 which shows that Mrkšić departed in the morning of 21 November 1991 for Belgrade.[1029] The Appeals Chamber has dismissed this allegation[1030] and has found that it has not been shown that the Trial Chamber committed an error of fact at paragraph 326 of the Trial Judgement.[1031] In support of the contention that he left Negoslavci soon after the briefing on 20 November 1991, Mrkšić also relies on a number of arguments which repeat submissions made at trial.[1032] Mrkšić's main argument is that, because he left for Belgrade before 20:00 hours[1033] on 20 November 1991, and the withdrawal of the last JNA military police troops guarding the prisoners of war at Ovčara took place at 22:35 hours,[1034] he was not present when the order for the withdrawal of the military police from Ovčara was issued, thus somebody else must have given the

[1027] Mrkšić Appeal Brief, paras 340-341; Mrkšić Notice of Appeal, para. 76 (although in his Notice of Appeal he challenges paragraph 324 of the Trial Judgement, this paragraph is not challenged in his Appeal Brief). *See* also Mrkšić Brief in Reply, para. 79.
[1028] *See* Prosecution Respondent's Brief, paras 305-308.
[1029] Mrkšić Appeal Brief, paras 350-353. *See* also Mrkšić Brief in Reply, paras 76-78.
[1030] *See supra* para. 313.
[1031] *See supra* para. 314.
[1032] *See* Mrkšić Final Trial Brief, paras 218-221.
[1033] Mrkšić Appeal Brief, paras 342, 345-348. *See* also Mrkšić Appeal Brief, paras 357-363; Mrkšić Brief in Reply, para. 79.
[1034] Mrkšić Notice of Appeal, para. 77; Mrkšić Appeal Brief, para. 342. *See* AT. 67-68, 113.

order.[1035] The Appeals Chamber considers that this argument has been raised in his previous grounds of appeal. Essentially, the same allegation is raised under his sixth ground of appeal, which avers that the Trial Chamber erred in law as any reasonable Trial Chamber would have found that Mrkšić did not give the order for the withdrawal of military police from Ovčara, since the order was given after Mrkšić had left for Belgrade on 20 November 1991 in the evening,[1036] and under sub-ground (a) of his first ground of appeal, which asserts that he "didn't order the withdrawal of [Military Police] units of 80MTBR from the Ovčara farm".[1037] The Appeals Chamber recalls that it has dismissed Mrkšić's first and sixth grounds of appeal.[1038]

318. In light of the foregoing, the Appeals Chamber dismisses Mrkšić's seventh ground of appeal in its entirety.

8. Eighth Ground of Appeal: Alleged errors regarding Mrkšić's command of OG South

319. Under his eighth ground of appeal, Mrkšić avers that the Trial Chamber erred at paragraphs 82 to 86 of the Trial Judgement in concluding that the command of OG South, under Mrkšić's authority, had responsibility for the area of Vukovar between 8 October and 24 November 1991 "when [the] GMBTR left Vukovar",[1039] and that in this period the command of OG South had the power to appoint the commander of TO Vukovar Staff.[1040] Mrkšić's eighth ground of appeal consists of two sub-grounds of appeal which concern: (a) the conclusion that Mrkšić was the commander of OG South until 24 November 1991;[1041] and (b) the conclusion that Mrkšić had power to assign Miroljub Vujović as commander of TO Vukovar.[1042]

320. The Prosecution responds that Mrkšić's arguments should be dismissed as he challenges a factual finding on which the conviction does not rely.[1043] The Prosecution contends that Mrkšić's departure to Belgrade does not affect the Trial Chamber's findings concerning aiding and abetting the crimes of cruel treatment and torture, and that it is irrelevant whether Mrkšić was in Belgrade when the withdrawal order was carried out.[1044] Mrkšić replies that it is decisive whether he had left Negoslavci way before the withdrawal order was issued, "if such an order was issued at all".[1045]

[1035] Mrkšić Notice of Appeal, para. 78. *See* also Mrkšić Appeal Brief, paras 342, 344, 354.
[1036] Mrkšić Appeal Brief, para. 279.
[1037] Mrkšić Appeal Brief, para. 26.
[1038] *See supra* paras 229, 234 and 315.
[1039] Mrkšić Appeal Brief, para. 365.
[1040] Mrkšić Appeal Brief, para. 365. *See* also Mrkšić Notice of Appeal, paras 80-81.
[1041] Mrkšić Notice of Appeal, paras 80-81; Mrkšić Appeal Brief, paras 366-381.
[1042] Mrkšić Notice of Appeal, para. 82; Mrkšić Appeal Brief, paras 382-387.
[1043] Prosecution Respondent's Brief, paras 309-310.
[1044] Prosecution Respondent's Brief, para. 311.
[1045] Mrkšić Brief in Reply, para. 82.

(a) Alleged errors regarding the conclusion that Mrkšić was the commander of OG South until 24 November 1991

321. Mrkšić submits that he "was exercising a duty of Commander final to [the] evening of 20 [November] 1991 and not after that"[1046] and Panić became the Staff Commander until 22 November 1991.[1047] He adds that the "command of 80MTBR was assigned a task to organize further governance in Vukovar and even before Mrkšić's return from Belgrade, the governing role of GMTBR and [OG South] itself stopped".[1048] In support of his arguments, he challenges the validity of Exhibit P422 and relies upon Exhibits P425, P426, D780 and D444.[1049]

322. The Appeals Chamber considers that sub-ground (a) of Mrkšić's eighth ground of appeal essentially repeats submissions previously made at trial and rejected by the Trial Chamber.[1050] By failing to support his claims under sub-ground (a) of his eighth ground of appeal with clear arguments, Mrkšić fails to show that the Trial Chamber's rejection of them constituted an error which warrants intervention by the Appeals Chamber[1051] for the following reasons. As part of its analysis of the command structure of the Serb forces involved in the Vukovar operations and prior to reaching its conclusions on the 80 mtbr,[1052] the Trial Chamber first examined the structure of OG South.[1053] It held that all units serving in the zone of responsibility of OG South came under the *de jure* and the full effective command of Mrkšić and the Gmtbr command.[1054] The Trial Chamber found that, by 15 November 1991, the OG South was directly in command of 80 mtbr, except for 1/80 mtbr (which was within the zone of OG North).[1055] This conclusion was reached on the basis of evidence to the effect that: (i) on 7 November 1991, the 80 mtbr was re-subordinated to OG South except for 1/80 mtbr; (ii) the units of the 80 mtbr began deployment in the area of Vukovar on 8 November 1991; (iii) by order issued on 15 November 1991, Mrkšić assigned tasks to the 80 mtbr in the forthcoming operations; and (iv) OG South issued orders to the 80 mtbr assigning combat and other tasks and re-subordinating further units to it.[1056] In reaching these conclusions, the Trial Chamber relied upon, *inter alia,* Exhibits P412,[1057] D431,[1058] D422,[1059] P419,[1060] P420,[1061]

[1046] Mrkšić Appeal Brief, para. 366. *See* also Mrkšić Brief in Reply, paras 80-81.
[1047] Mrkšić Appeal Brief, para. 366. *See* also Mrkšić Brief in Reply, para. 81.
[1048] Mrkšić Appeal Brief, para. 369.
[1049] *See* Mrkšić Appeal Brief, paras 370-378.
[1050] *See* Mrkšić Appeal Brief, para. 366; Mrkšić Final Trial Brief, paras 919- 921.
[1051] *Cf. Kajelijeli* Appeal Judgement, para. 6, referring to *Niyitegeka* Appeal Judgement, para. 9. *See* also *Blaškić* Appeal Judgement, para. 13; *Rutaganda* Appeal Judgement, para. 18.
[1052] Trial Judgement, paras 74-82.
[1053] Trial Judgement, paras 69-73. *See* also AT. 105.
[1054] Trial Judgement, para. 70.
[1055] Trial Judgement, para. 77.
[1056] *Ibid*.
[1057] Exhibit P412, "Order no. 405-1, signed by Mrkšić, 15 November 1991".
[1058] Exhibit D431, "OG South Commander Decision/Order no. 409-1, signed by Mrkšić, 16 November 1991".
[1059] Exhibit P422, "Order no. 464-1, signed by Mrkšić, 21 November 1991".

D424[1062] and P425.[1063] Relying upon Exhibit P426,[1064] the Trial Chamber further held that the command of the 80 mtbr was to take over responsibilities from OG South on 23 November 1991.[1065] In the Trial Chamber's assessment, the totality of this evidence established that the command of OG South under Mrkšić functioned until the gmtbr left Vukovar on 24 November 1991.[1066] Mrkšić's arguments fail to show that the Trial Chamber committed an error of law invalidating the Trial Judgement or an error of fact which occasioned a miscarriage of justice, at paragraphs 82 to 86 of the Trial Judgement. [1067]

323. Regarding his challenge to the validity of Exhibit P422,[1068] Mrkšić asserts that the terminology used in Exhibit D444[1069] "excludes any form of subordination and that is why it may not be claimed that from 22 [November]1991 80MTBR was subordinated to [OG South], that equally refers to the Staff of TO Vukovar, since subordinated units do not act in concert, but as ordered from superior command".[1070] The Appeals Chamber considers that the fact that Exhibit D444 refers to "cooperation" of the Staff of TO Vukovar with the command of the 80 mtbr does not necessarily imply that Exhibits P422 and D444 contain mutually exclusive instructions. Apart from repeating submissions made at trial,[1071] Mrkšić takes Exhibit P422 out of context, as paragraph four of this exhibit clearly states that "Vukovar TO units [are] to be re-subordinated to the 80th mtbr/motorised Bde/".[1072] Moreover, the Appeals Chamber recalls that, under sub-ground (c) of his fifth ground of appeal, Mrkšić contested the validity of this exhibit and that this challenge has been dismissed.[1073] Accordingly, sub-ground (a) of Mrkšić's eighth ground of appeal is dismissed.

(b) Alleged errors regarding the conclusion that Mrkšić had power to assign Miroljub Vujović as commander of TO Vukovar

324. Mrkšić submits that the Trial Chamber erred in fact at paragraph 92 of the Trial Judgement in concluding that Mrkšić, as Commander of OG South, appointed Miroljub Vujović as

[1060] Exhibit P419, "Order no. 439-1, signed by Mrkšić, 20 November 1991".
[1061] Exhibit P420, "OG South order no. 446-1, signed by Mrkšić, 20 November 1991".
[1062] Exhibit P424, "Order no. 471-2, signed by Mrkšić, 22 November 1991".
[1063] Exhibit P425, "Regular Combat Report no. 473-1, signed by Mrkšić, 22 November 1991".
[1064] Exhibit P426, "OG South Regular Combat Report no. 500-1, signed by Mrkšić, 23 November 1991".
[1065] Trial Judgement, para. 82.
[1066] *Ibid*.
[1067] *See* Mrkšić Notice of Appeal, para. 79 (stating that: "errors in law and errors of facts in this Ground of Appeal [will be divided] in few sub-titles").
[1068] Exhibit P422, "Order no. 464-1, signed by Mrkšić, 21 November 1991".
[1069] Exhibit D444, "80 mtbr Command Order no. 37-3, signed by Vojnović, 22 November 1991".
[1070] Mrkšić Appeal Brief, para. 377. *See* also Mrkšić Appeal Brief, paras 373-376.
[1071] Mrkšić Final Trial Brief, para. 914. *See* also Mrkšić Final Trial Brief, para. 868.
[1072] Exhibit P422, "Order no. 464-1, signed by Mrkšić, 21 November 1991", para. 4, p.1.
[1073] *See supra* para. 290.

Commander of TO Vukovar and that he had power to do that.[1074] In his Notice of Appeal, he alleges that "[h]ere again we have the attempt of the witness Trifunović to testify something that could not be feasible because Mrkšić was not authorized to do [*sic*] appointment for TO nor anyone from JNA had the power [or] authority to do so".[1075] In his Appeal Brief, however, Mrkšić also appears to raise an allegation of an error of law, as he claims that "such a conclusion which was made opposite from the criterion to prove beyond a reasonable doubt is really surprising, since a great number of witnesses, including the [Prosecution's] witness-Trifunović, testified that something like that could not be possible ".[1076]

325. First, the Appeals Chamber recalls that not every factual finding in a Trial Judgement must be established beyond reasonable doubt.[1077] The standard of proof at trial requires that a Trial Chamber may only find an accused guilty of a crime if the Prosecution has proved each element of that crime and of the mode of liability, and any fact which is indispensable for the conviction, beyond reasonable doubt.[1078] The finding at paragraph 92 of the Trial Judgement does not concern a fact which is indispensable for conviction, as Mrkšić appears to admit.[1079] Therefore, the Trial Chamber was not required to apply the standard of proof beyond reasonable doubt. Second, the Appeals Chamber recalls that the allegation that Trifunović testified falsely raised by Mrkšic under sub-ground (d) of his sixth ground of appeal has been dismissed.[1080] Finally, the Appeals Chamber considers that the alleged error raised under sub-ground (b) of his eighth ground of appeal is clearly irrelevant to his conviction or sentence. Mrkšić fails to elaborate on how this error had any impact on the findings of the Trial Chamber so as to amount to a miscarriage of justice and to explain how the alleged factual error had an effect on the conclusions in the Trial Judgement.[1081] Accordingly, sub-ground (b) of Mrkšić's eighth ground of appeal is dismissed.

326. In light of the foregoing, the Appeals Chamber dismisses Mrkšić's eighth ground of appeal in its entirety.

[1074] Mrkšić Notice of Appeal, para. 82; Mrkšić Appeal Brief, para. 382. *See* also Mrkšić Brief in Reply, paras 83-84.
[1075] Mrkšić Notice of Appeal, para. 82.
[1076] Mrkšić Appeal Brief, para. 383 (footnote omitted).
[1077] *Halilović* Appeal Judgement, para. 125.
[1078] *Blagojević and Jokić* Appeal Judgement, para. 226. *See* also *Halilović* Appeal Judgement, para. 125; *Ntagerura et al.* Appeal Judgement, para. 174.
[1079] Mrkšić Brief in Reply, para. 83: "the Defense may agree with [the] opinion of the OTP that this fact is not important for eventual responsibility of Mrkšić".
[1080] *See supra* paras 310-314.
[1081] *Cf. Brdanin* Appeal Judgement, para. 31.

9. Ninth Ground of Appeal: Alleged errors regarding Mrkšić's responsibility under Article 7(1) of the Statute

(a) Alleged errors of law regarding Mrkšić's responsibility for aiding and abetting murder, cruel treatment and torture

327. Under sub-ground (a) of his ninth ground of appeal, Mrkšić submits that as a result of the factual errors alleged under his preceding eight grounds of appeal, the Trial Chamber erred in law at paragraphs 609 to 613 and 619 to 632 of the Trial Judgement in convicting him pursuant to Article 7(1) of the Statute for having aided and abetted the crimes of murder, cruel treatment and torture.[1082] His two main contentions are that: (i) he did not issue the order for the withdrawal of the remaining JNA soldiers guarding the prisoners of war;[1083] and (ii) he did not know that the prisoners of war at Ovčara "were treated with cruelty and tortured".[1084]

328. The Prosecution responds that Mrkšić arguments: (i) reiterate submissions made earlier in his Appeal Brief;[1085] (ii) ignore relevant findings;[1086] (iii) are irrelevant in some instances;[1087] and (iv) fail to show that no reasonable Trial Chamber could have found that he had the *mens rea* for aiding and abetting cruel treatment, torture and murder.[1088] It further relies upon its previous arguments in response to Mrkšić's first,[1089] second[1090] and sixth grounds of appeal.[1091]

(i) Mrkšić's *mens rea* for aiding and abetting the murder of the prisoners of war

329. Mrkšić contends that, since he did not issue the order to withdraw to the military police,[1092] he could not be charged with aiding and abetting the murders of the prisoners of war at Ovčara.[1093] In support of this argument, he challenges again the credibility of Witnesses Vujić,[1094] Panić[1095] and

[1082] Mrkšić Notice of Appeal, para. 84; Mrkšić Appeal Brief, para. 388. In his Appeal Brief Mrkšić refers to the errors alleged under grounds one to seven of his Notice of Appeal (*see* Mrkšić Appeal Brief, fn. 270).
[1083] Mrkšić Appeal Brief, para. 388.
[1084] Mrkšić Appeal Brief, para. 389.
[1085] Prosecution Respondent's Brief, para. 314.
[1086] Prosecution Respondent's Brief, para. 319.
[1087] Prosecution Respondent's Brief, para. 323.
[1088] Prosecution Respondent's Brief, para. 316. *See* also Prosecution Respondent's Brief, paras 319-322, 325, 327.
[1089] Prosecution Respondent's Brief, para. 318, fn. 907.
[1090] Prosecution Respondent's Brief, para. 315, fn. 898.
[1091] Prosecution Respondent's Brief, paras 313, 317, fns 891, 906.
[1092] *See* Mrkšić Appeal Brief, paras 388, 403, 409-413, 419, 422, 423. *See* also Mrkšić Appeal Brief, paras 426, 427.
[1093] *See* Mrkšić Appeal Brief, para. 422. *See* also Mrkšić Appeal Brief, para. 423: "The Prosecutor, if everything stated above is taken into account, was not able to prove that the accused knew that his actions would contribute to the [commission] of [the] crime or predicted that his acts could have resulted in such a consequence. Of course that the accused, since he did not issue any order on the withdrawal of the security from the Ovčara-farm, could not offer any significant support in [the commission] of the crime that would significantly contribute to the [commission] of [the] crime. He did not provide any support to perpetrators since the crime of murder, during his staying in Negoslavce, had not happened yet [...]".
[1094] Mrkšić Appeal Brief, paras 391-394. *See* also Mrkšić Brief in Reply, para. 86.
[1095] Mrkšić Appeal Brief, paras 395-396, 427.

Vojnović.[1096] The Appeals Chamber recalls that Mrkšić's challenges to the Trial Chamber's reliance on the evidence of Panić,[1097] Vujić[1098] and Vojnović[1099] have been dismissed.

330. Mrkšić also avers that either Šljivančanin or General Vasiljević must have issued the withdrawal order; as such an order was within the competence of security organs.[1100] In support of this contention, he refers to the fact that the buses transporting the prisoners of war were stopped at the JNA barracks which he claims was pursuant to Šljivančanin's order.[1101] At the appeals hearing, Mrkšić argued that the withdrawal order could have been issued by any officer from the "security line, the security chain all the way up to the top, or any officer of the Command of the 80th Motorised Brigade".[1102] Mrkšić further reiterated that the written order issued by him on 20 November 1991,[1103] concerned the evacuation of wounded and sick people from the Vukovar Hospital and did not refer to any treatment of prisoners of war; and that he did not have the right to decide on the transfer of these prisoners to anyone, nor was he authorised to do so as these prisoners were within the purview of the security organs.[1104] The Appeals Chamber notes that Exhibit D819 relied upon by Mrkšić during his submissions at the appeals hearing, does not support the argument that it was the security organs that had responsibility for the prisoners of war and not Mrkšić,[1105] and recalls its own finding that absent a specific delegation by the commander of the military unit in question, the security organs had no specific responsibility for the prisoners of war.[1106]

331. The Appeals Chamber further recalls that arguments to the effect that Mrkšić had no competence to issue orders regarding the triage and security of the prisoners of war since this fell within the jurisdiction of the security organs are advanced under his second ground of appeal[1107] and have been dismissed by the Appeals Chamber.[1108] Additionally, the Appeals Chamber notes that under sub-ground (a) of Mrkšić's ninth ground of appeal, paragraphs 424 and 429 of his Appeal

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[1096] Mrkšić Appeal Brief, paras 409-410, 415, 419-420. *See* also Mrkšić Final Trial Brief, paras 534-537.
[1097] *See supra* paras 262-265, 267.
[1098] *See supra* para. 280.
[1099] *See supra* paras 301-303, 309.
[1100] Mrkšić Appeal Brief, paras 403-405. *See* also Mrkšić Appeal Brief, para. 424; Mrkšić Brief in Reply, paras 87, 92.
[1101] Mrkšić Appeal Brief, paras 428-431. *See* also Mrkšić Brief in Reply, para. 91. At the appeals hearing Mrkšić submitted that Šlivančanin said that at the hospital he personally ordered that the buses should go to the JNA barracks without asking for Mrkšić's approval (*see* AT. 66-67).
[1102] AT. 41.
[1103] Exhibit P419, "Order No. 439-1 from Mrkšić, 20 November 1991".
[1104] AT. 46-47 (relying upon Exhibit D819, "Daily Operational Report for 11 October 1991"), 53. *See* also AT. 111.
[1105] *See* Exhibit D819, "Daily Operational Report for 11 October 1991". *See* also AT. 82-83.
[1106] *See supra* Section Section III(B)(4)(a) (ii): "Šljivančanin's authority as security organ of OG South". *See* also the Prosecution's submissions at the appeals hearing to the effect that Mrkšić's argument misunderstands the counter-intelligence function of the security organs, as the actual securing and transport of the prisoners of war were subject to Mrkšić's command (AT. 100-104).
[1107] *See* Mrkšić Appeal Brief, paras 117-149.
[1108] The Appeals Chamber notes that Mrkšić's contention that decisions concerning the triage and transport of the prisoners of war belonged to the security organs, repeats previous trial submissions. *See* Mrkšić Appeal Brief paras 125, 129 repeating arguments advanced in Mrkšić Final Trial Brief, paras 824, 875. *See supra* paras 237-238.

Brief repeat submissions made at trial.[1109] Mrkšić fails to show that the Trial Chamber's rejection of his arguments constituted an error which warrants intervention by the Appeals Chamber, as it has not been shown that the Trial Chamber's finding that he countermanded his order of the previous evening for the prisoners to be taken to Sremska Mitrovica in Serbia (with the consequence that the five buses transporting the prisoners were held at the JNA barracks awaiting a final decision about the prisoners' destination) was unreasonable.[1110] The Appeals Chamber further recalls that under his third ground of appeal, Mrkšić submits that the Trial Chamber erred in law and in fact at paragraphs 295, 305 and 607 to 610 of the Trial Judgement in concluding that he ordered that the convoy with prisoners of war go from the Vukovar hospital to the military barracks and that the Trial Chamber failed to consider relevant evidence that corroborated that Šljivančanin ordered, in agreement with Vujić, that the buses be diverted to the Vukovar JNA barracks.[1111] These allegations have been dismissed entirely.[1112]

332. The Appeals Chamber recalls that Mrkšić's contention that he did not issue the withdrawal order is also raised under his first, sixth and seventh grounds of appeal,[1113] all of which have been dismissed in their entirety.[1114] The Appeals Chamber found that it has not been shown that the Trial Chamber committed any error of law or fact at paragraph 321 of the Trial Judgement which concerns the withdrawal order.[1115] As previously recalled by the Appeals Chamber, the Trial Chamber had found that following his return to Negoslavci from Ovčara, Vojnović had reported to Mrkšić twice that the prisoners of war from the Vukovar hospital had been mistreated and that the security situation at Ovčara was serious.[1116] These findings followed the Trial Chamber's assessment of evidence regarding: (i) the events in the morning at the Vukovar hospital; (ii) the events at and near the Vukovar hospital in the late morning and early afternoon; (iii) the events at the JNA barracks in Vukovar; (iv) the session of the SAO "government"; and (v) the events at Ovčara. Pursuant to this evidence, the Trial Chamber found that the military police withdrew from Ovčara following the regular OG South briefing at Negoslavci. Vojnović's evidence regarding his two reports to Mrkšić explained how the withdrawal came about: during his second report to Mrkšić, following the briefing, Vojnović understood that in Mrkšić's view Vojnović and his troops should not be at Ovčara at that stage; accordingly he withdrew his troops from Ovčara and sent Vukosavljević to convey the order. When Vukosavljević arrived at Ovčara, he found that the troops

[1109] Mrkšić Final Trial Brief, paras 822, 824.
[1110] Trial Judgement, para. 607.
[1111] *See* Mrkšić Notice of Appeal, paras 34-35; Mrkšić Appeal Brief, paras 150, 152, 158, 161.
[1112] *See supra* para. 273.
[1113] *See supra* para. 317.
[1114] *See supra* paras 234, 315, 318.
[1115] *See supra* para. 309.
[1116] Trial Judgement, para. 275.

had already prepared to withdraw indicating that a previous order to do so had reached them.[1117] The Appeals Chamber found that this account supports the Trial Chamber's finding that such an order could only have originated from Mrkšić.[1118]

333. On the basis of its findings regarding Mrkšić's awareness of the essential nature of the criminal conduct against the prisoners of war kept at Ovčara under his orders, and his state of knowledge on 20 November 1991,[1119] the Trial Chamber concluded that when Mrkšić ordered the withdrawal of the military police, he knew that this left the TOs and paramilitaries with unrestrained access to the prisoners of war and that by enabling this access, he was assisting in the commission of their murder. [1120] Mrkšić fails to show that the Trial Chamber committed any error of law invalidating the Trial Judgement in reaching its findings on Mrkšić's *mens rea* for aiding and abetting the commission of the murder of the prisoners of war.

334. In light of the foregoing, Mrkšić's arguments to the effect that since the withdrawal order was not issued by him, he could not be convicted for aiding and abetting the crime of murder as he would lack the requisite *mens rea,*[1121] and hence "he could not offer any significant support […] that would significantly contribute to the [commission of the] crime",[1122] are dismissed.

(ii) Mrkšić's knowledge of the cruel treatment and torture of the prisoners of war

335. Mrkšić claims that he did not know or was not in a position to know of the cruel treatment or torture of the prisoners of war.[1123] In support of his claim, he asserts that he could not have known what happened during his absence as Vojnović and Vezmarović did not report anything to him concerning the mistreatment and provided assurances that everything was under control at Ovčara.[1124] He contends that he relied on the knowledge that the 80 mtbr had sufficient personnel and technical equipment to deal with the "attempts of paramilitary forces and civilians to jeopardize guarding of [the prisoners of war]"[1125] and emphasizes that he had re-subordinated 1000 soldiers

[1117] *See supra* paras 307-308.
[1118] *See supra* para. 308.
[1119] Trial Judgement, para. 621, fn. 2086. *See* also *infra* para. 336.
[1120] Trial Judgement, para. 621.
[1121] Mrkšić Appeal Brief, para. 422: "[i]f such order did not exist, then the accused Mrkšić could not be charged for the crime of aiding and [abetting] the killing of those persons. For the accused Mrkšić on his side, there would not be the required element of his knowledge for aiding and [abetting] [the commission] of [the] crimes by his acting, either practically or encouraging or supporting the moral of perpetrators" .
[1122] Mrkšić Appeal Brief, para. 423.
[1123] *See* Mrkšić Appeal Brief, paras 389, 397.
[1124] Mrkšić Appeal Brief, paras 397-399, 425. *See* also Mrkšić Brief in Reply, paras 86, 88. At the appeals hearing Mrkšić submitted that Panić reported to Mrkšić that the situation was under control, "but [that] Vojnović should be consulted in terms of whether he could provide for the security of the prisoners of war" (*see* AT. 68).
[1125] Mrkšić Appeal Brief, para. 389. *See* also Mrkšić Brief in Reply, para. 92.

and a number of armoured vehicles in the previous days to establish order and control in Ovčara.[1126] The Appeals Chamber considers that these arguments repeat submissions made at trial[1127] and finds that Mrkšić fails to show that the Trial Chamber's rejection of them constituted an error which warrants intervention by the Appeals Chamber for the following reasons.

336. First, after reviewing the evidence cited by Mrkšić, the Appeals Chamber finds that it does not support the contention that Vezmarović and Vojnović confirmed to Mrkšić that everything was under control at Ovčara.[1128] Second, the Appeals Chamber notes that Mrkšić's arguments ignore the following relevant findings concerning his knowledge of the events at Ovčara. The Trial Chamber was satisfied that Mrkšić was cognisant of the essential nature of the criminal conduct against the prisoners of war kept at Ovčara under his orders, namely, cruel treatment and torture, and that he was well aware of the propensity of the TO and paramilitary personnel towards extreme violence against the prisoners of war and of their desire to punish them.[1129] It reached these conclusions by virtue of its earlier findings regarding his state of knowledge: (i) Mrkšić was informed that prisoners were being killed at Velepromet when Vujić reported to him in the early hours of 20 November 1991;[1130] (ii) Mrkšić was informed of the mistreatment of prisoners of war at Velepromet by Serb TO members and paramilitaries and of their opposition to the removal of prisoners of war to Sremska Mitrovica, these matters were reported by an officer sent by Vujić and by Colonels Kijanović and Tomić;[1131] (iii) Mrkšić was informed by Šušić that TO members and paramilitaries posed a threat to the security and safety of the prisoners of war at the JNA barracks on 20 November 1991;[1132] (iv) Vojnović reported to Mrkšić twice on 20 November 1991 that the prisoners of war from the hospital had been mistreated and that the security situation at Ovčara was serious, first at the regular OG South briefing and then later in a meeting with Mrkšić and Vukosavljević at which a similar report was also made by Vukosavljević;[1133] (v) the Trial Chamber accepted Panić's evidence that he reported to Mrkšić that there was a serious threat to the prisoners held at Ovčara and that Mrkšić should offer security assistance to the commander of the 80 mtbr if required, and further found that there was no evidence to suggest that any action was taken by Mrkšić following this report;[1134] (vi) the Trial Chamber also heard the evidence of Major Ljubiša Vukašinović, deputy head of the security organ of OG South, about reporting the situation at Ovčara to Mrkšić at the OG South command post at Negoslavci, late in the afternoon of

[1126] *See* Mrkšić Appeal Brief, paras 390, 396, 400-401.
[1127] Mrkšić Final Trial Brief, paras 876-878.
[1128] Mrkšić Appeal Brief, para. 398, citing DraganVezmarović, T. 8422, 8424, 8428; Milorad Vojnović, T. 8983, 8986.
[1129] Trial Judgement, paras 626-628, 631.
[1130] Trial Judgement, paras 174 -175.
[1131] Trial Judgement, paras 174-175.
[1132] Trial Judgement, paras 298, 302.
[1133] Trial Judgement, para. 275. *See* also Trial Judgement, paras 315 (where the Trial Chamber provides an account of Vojnović's report to Mrkšić at the OG South briefing) and 321.

20 November 1991[1135] and found that even though Major Vukašinović was quite clear in his advice to strengthen the security, there was no evidence that any action was taken by Mrkšić in response to his report or advice;[1136] and (vii) Mrkšić was aware that on the previous day some prisoners had been executed by TO and paramilitary forces and of the difficulties experienced by JNA soldiers due to the efforts of TO and paramilitary forces to gain access to the prisoners of war.[1137] In light of the foregoing, Mrkšić's contention that he did not know or was not in a position to know of the cruel treatment and torture of the prisoners of war is dismissed.

337. Mrkšić further asserts that "concerning the torture and cruel treatment, he immediately, upon having learnt [this], undertook the measures that something like that is not repeated".[1138] The Appeals Chamber finds that this assertion is not substantiated by any evidence. Indeed, the Trial Chamber found that pursuant to Mrkšić's order during the day on 20 November 1991, the local TO members and others milling around the buses in the JNA barracks were removed from the barracks so that they could no longer be a threat to the prisoners of war being held on the buses.[1139] Nevertheless, the Appeals Chamber considers that because this order was issued before the crimes of torture and cruel treatment took place at Ovčara, and given the subsequent findings of the Trial Chamber on Mrkšić's failure to act upon learning about these crimes, this finding does not support Mrkšić's allegation. In the morning of 20 November 1991, Šušić informed Mrkšić that he was concerned with the conduct of TO members who were verbally insulting prisoners in the buses parked at the JNA barracks at Vukovar and that their safety and security was in danger; Mrkšić ordered Šušić to "[c]reate full security for these people who are on the buses".[1140] Pursuant to Mrkšić's order, Šušić tasked Captain Predojević with upgrading the strength of his troops and removing the group of TO members from the buses and the JNA barracks compound.[1141] Mrkšić subsequently ordered that the prisoners of war be taken to Ovčara, and then the military police of 80 mtbr were despatched to Ovčara so that they would be ready to secure the prisoners of war once the buses had arrived.[1142] However, the Trial Chamber subsequently found that once Mrkšić learned about the crimes committed against the prisoners kept at Ovčara under his orders,[1143] he did nothing.[1144] In light of the foregoing, Mrkšić's allegation is accordingly dismissed.

[1134] Trial Judgement, para. 309.
[1135] Trial Judgement, paras 311-312.
[1136] Trial Judgement, paras 312-313.
[1137] *See* Trial Judgement, para. 621, citing Trial Judgement, paras 174-175, 302, 309, 313, 315.
[1138] Mrkšić Appeal Brief, para. 423.
[1139] Trial Judgement, para. 302.
[1140] Trial Judgement, para. 298, citing Jovan Šušić, T. 14891.
[1141] Trial Judgement, para. 298.
[1142] Trial Chamber, para. 305.
[1143] *See supra* para. 336.
[1144] Trial Judgement, paras 626-627, 631.

(iii) Conclusion

338. After recalling its findings on the mistreatment and beatings suffered by the prisoners of war upon their arrival at Ovčara, at the hands of the Serb TO and paramilitary personnel[1145] and the attempts of the JNA to remove the TO and paramilitary personnel from the hangar,[1146] the Trial Chamber concluded that this state of affairs was reported to Mrkšić.[1147] As illustrated above, the Trial Chamber referred to its findings concerning the several reports made to Mrkšić in the afternoon of 20 November 1991.[1148] The Trial Chamber concluded that in addition to these reports, Mrkšić was aware of the level of animosity of TO and paramilitary personnel toward the Croat forces and had received earlier reports of the killing of Croat prisoners by TO and paramilitary personnel.[1149] Despite this, he took no steps during the afternoon of 20 November 1991 to reinforce security at Ovčara.[1150] In addition to its findings concerning the offence of cruel treatment,[1151] the Trial Chamber further established that the conduct of the TO members and paramilitaries constituted the offence of torture because the primary motivation of the TO and paramilitary forces was to punish and take revenge against the members of the Croat forces. These motives were underlying the ferocity of the beatings which had the obvious purpose of inflicting severe pain and suffering upon the victims.[1152] The Trial Chamber determined that Mrkšić was aware of the essential nature of the conduct and of the intention of the perpetrators to punish the prisoners of war. The Trial Chamber further concluded that his failure to act, which rendered practical assistance and encouragement to the perpetrators and had a substantial effect on the continuance of the acts of cruel treatment and torture, amounted to aiding and abetting the crimes of cruel treatment and torture.[1153]

339. Accordingly, the Appeals Chamber finds that the arguments advanced under sub-ground (a) of Mrkšić's ninth ground of appeal fail to demonstrate that the Trial Chamber committed any error of law invalidating the Trial Judgement, in reaching its findings at paragraphs 609 to 613 and 619 to 632 of the Trial Judgement.

340. In light of the foregoing, sub-ground (a) of Mrkšić's ninth ground of appeal is dismissed.

[1145] Trial Judgement, para. 624, citing Trial Judgement, paras 234, 237-238, 526, 537-538.
[1146] Trial Judgement, para. 625, citing Trial Judgement, paras 235, 255, 263, 265, 273.
[1147] Trial Judgement, para. 626.
[1148] Trial Judgement, para. 626, citing Trial Judgement, paras 308, 313, 315.
[1149] Trial Judgement, para. 626, citing Trial Judgement, paras 174-175.
[1150] Trial Judgement, para. 626.
[1151] Trial Judgement, paras 624-629.
[1152] Trial Judgement, para. 631.
[1153] Trial Judgement, paras 627-629, 631-632.

(b) Alleged errors of law regarding Mrkšić's responsibility under Article 7(3) of the Statute

341. Under sub-ground (b) of his ninth ground of appeal, Mrkšić submits that as a result of the errors of fact alleged under his preceding eight grounds of appeal, the Trial Chamber erred in law at paragraph 634 of the Trial Judgement "in finding pursuant to Article 7(3) of the Statute that Mile Mrkšić [committed] the crime of murder, the offence of cruel treatment and the offence of torture".[1154]

342. The Prosecution responds that unless the Trial Chamber's findings on Mrkšić's responsibility pursuant to Article 7(1) of the Statute are overturned, this sub-ground of appeal has no impact upon the verdict and thus can be summarily dismissed.[1155] The Prosecution further points to the Trial Chamber's findings which support the existence of the necessary elements to ground a conviction pursuant to Article 7(3) of the Statute.[1156]

343. The Appeals Chamber recalls that the Trial Chamber did not enter a conviction against Mrkšić pursuant to Article 7(3) of the Statute.[1157] Since it was persuaded of Mrkšić's responsibility under Article 7(1) of the Statute, the Trial Chamber expressly stated that it would "not make a further finding of guilt of the same offences under Article 7(3) [of the Statute]".[1158] Clearly, rather than a legal finding on Mrkšić's criminal responsibility, paragraph 634 of the Trial Judgement is a statement recording the Trial Chamber's intention not to enter a finding of guilt pursuant to Article 7(3) of the Statute. Accordingly, the Appeals Chamber declines to address Mrkšić's arguments in this respect, and dismisses sub-ground (b) of Mrkšić's ninth ground of appeal.

344. In light of the foregoing, the Appeals Chamber dismisses Mrkšić's ninth ground of appeal in its entirety.

10. Tenth Ground of Appeal: Alleged "other errors of law and fact"

345. Under his tenth ground of appeal, Mrkšić raises seven "disputable facts which were not so important for [t]he Trial Chamber in the [course] of [reaching its] decision but it is important for the Defence and the position of the JNA".[1159] Such "disputable facts" concern: (a) the Trial Chamber's oral ruling concerning Witness P019; (b) the burial of corpses from Velepromet; (c) Witness P017's testimony concerning the digging of the hole later used as a mass grave; (d) Witness P011's testimony regarding a military truck in Ovčara; (e) the finding that there were about 300 TO

[1154] Mrkšić Notice of Appeal, para. 86; Mrkšić Appeal Brief, para. 443.
[1155] Prosecution Respondent's Brief, para. 328.
[1156] Prosecution Respondent's Brief, paras 330-342.
[1157] Trial Judgement, paras 634, 712.
[1158] Trial Judgement, para. 634.

members and paramilitaries in Ovčara on 20 November 1991; (f) measures undertaken by Mrkšić; and (g) the finding that the custody of the prisoners of war passed to the TO units after the withdrawal order was issued.[1160]

346. The Prosecution responds that Mrkšić's arguments should be summarily dismissed as they: (i) are not substantiated; (ii) fail to explain how the alleged factual error had an effect on the conclusions in the Trial Judgement;[1161] (iii) challenge factual findings on which his conviction or sentence does not rely;[1162] (iv) ignore relevant factual findings;[1163] (v) misrepresent the evidence and other factual findings;[1164] and (vi) are vague and unclear.[1165]

347. The Appeals Chamber reiterates that as long as the factual findings supporting Mrkšić's conviction and sentence are sound, errors related to other factual conclusions do not have any impact on the Trial Judgement.[1166] The Appeals Chamber further recalls that, as a general rule, it will decline to discuss such errors.[1167] The Appeals Chamber understands from Mrkšić's submissions that, since he acknowledges that the challenges raised under his tenth ground of appeal concern findings which "were not so important for [t]he Trial Chamber in the [course] of [reaching its] decision",[1168] he appears to admit that the alleged errors have no impact on the conviction or sentence. Accordingly, the Appeals Chamber declines to address the allegations raised by Mrkšić under his tenth ground of appeal and dismisses all arguments advanced under "disputable facts" (a), (b), (c), (d), (e), (f) and (g).

348. In light of the foregoing, the Appeals Chamber dismisses Mrkšić's tenth ground of appeal in its entirety.

E. Conclusion

349. For the foregoing reasons the Appeals Chamber dismisses Mrkšić's appeal in its entirety.

[1159] Mrkšić Appeal Brief, para. 466; Mrkšić Notice of Appeal, para. 87.
[1160] Mrkšić Notice of Appeal, paras 88-89, 91-95; Mrkšić Appeal Brief, paras 467- 492.
[1161] Prosecution Respondent's Brief, paras 344-349, 351-352, 356.
[1162] Prosecution Respondent's Brief, paras 347-349, 351, 355-357.
[1163] Prosecution Respondent's Brief, paras 349, 352, 354, 357, 359, 360.
[1164] Prosecution Respondent's Brief, para. 353.
[1165] Prosecution Respondent's Brief, para. 358.
[1166] *See supra* para. 232.
[1167] *Strugar* Appeal Judgement, para. 19; *Brdanin* Appeal Judgement, para. 21.
[1168] Mrkšić Appeal Brief, para. 466.

VI. APPEALS AGAINST SENTENCE

350. The Trial Chamber sentenced Mrkšić to a single sentence of 20 years' imprisonment and Šljivančanin to a single sentence of five years' imprisonment.[1169] All three Parties appeal against the sentences rendered.[1170]

A. Standard for Appellate Review on Sentencing

351. The relevant provisions on sentencing are Articles 23 and 24 of the Statute and Rules 100 to 104 of the Rules. Both Article 24 of the Statute and Rule 101 of the Rules contain general guidelines for a Trial Chamber requiring it to take into account the following factors in sentencing: the gravity of the offence or totality of the culpable conduct; the individual circumstances of the convicted person; the general practice regarding prison sentences in the courts of the former Yugoslavia; and aggravating and mitigating circumstances.[1171]

352. Appeals against sentence, as appeals from a trial judgement, are appeals *stricto sensu*;[1172] they are of a corrective nature and are not trials *de novo*.[1173] Trial Chambers are vested with broad discretion in determining an appropriate sentence, due to their obligation to individualise the penalties to fit the circumstances of the accused and the gravity of the crime.[1174] This discretion includes determining the weight given to aggravating or mitigating circumstances.[1175] The

[1169] Trial Judgement, paras 713 and 716, respectively.
[1170] *See* Mrkšić Notice of Appeal, para. 96; Mrkšić Appeal Brief, paras 493-495; Šljivančanin Notice of Appeal, paras 31, 32, 35; Šljivančanin Appeal Brief, paras 470-477, 503-506; Prosecution Notice of Appeal, paras 13-17; Prosecution Appeal Brief, paras 157-178, 180-201.
[1171] *Strugar* Appeal Judgement, para. 335; *Hadžihasanović and Kubura* Appeal Judgement, para. 301; *Limaj et al.* Appeal Judgernent, para. 126; *Zelenović* Judgement on Sentencing Appeal, para. 9; *Bralo* Judgement on Sentencing Appeal, para. 7; *Čelebići* Appeal Judgement, paras 429, 716. In addition, Trial Chambers are obliged to take into account the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 10(3) of the Statute and in Rule 101(B)(iv) of the Rules.
[1172] *Hadžihasanović and Kubura* Appeal Judgement, para. 302; *Limaj et al.* Appeal Judgement, para. 127; *Zelenović* Judgement on Sentencing Appeal, para. 10; *Bralo* Judgement on Sentencing Appeal, para. 8; *Mucić et al.* Judgement on Sentencing Appeal, para. 11.
[1173] *Hadžihasanović and Kubura* Appeal Judgement, para. 302; *Limaj et al.* Appeal Judgement, para. 127; *Zelenović* Judgement on Sentencing Appeal, para. 10; *Bralo* Judgement on Sentencing Appeal, para. 8; *Čelebići* Appeal Judgement, para. 724. *See* also *Ndindabahizi* Appeal Judgement, para. 132.
[1174] *Strugar* Appeal Judgement, para. 336; *Hadžihasanović and Kubura* Appeal Judgement, para. 302; *Limaj et al.* Appeal Judgement, para. 127; *Zelenović* Judgement on Sentencing Appeal, para. 11; *Blagojević and Jokić* Appeal Judgement, para. 137; *Čelebići* Appeal Judgement, para. 717. *See* also *Karera* Appeal Judgement, para. 385; *Nahimana et al.* Appeal Judgement, para. 1037; *Ndindabahizi* Appeal Judgement, para. 132.
[1175] *Hadžihasanović and Kubura* Appeal Judgement, para. 302; *Zelenović* Judgement on Sentencing Appeal, para. 11; *Brdanin* Appeal Judgement, para. 500.

conclusion as to whether a fact amounts to a mitigating circumstance will be reached "on a balance of probabilities".[1176]

353. As a general rule, the Appeals Chamber will not revise a sentence unless the Trial Chamber has committed a "discernible error" in exercising its discretion or has failed to follow the applicable law.[1177] It is for the appellant to demonstrate how the Trial Chamber ventured outside its discretionary framework in imposing his sentence.[1178] Merely claiming that the Trial Chamber has erred is not a valid argument on appeal.[1179] To show that the Trial Chamber committed a discernible error in exercising its discretion, the appellants must demonstrate that the Trial Chamber gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, made a clear error as to the facts upon which it exercised its discretion, or that the Trial Chamber's decision was so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.[1180]

B. Mrkšić's Sentence

354. Mrkšić argues under his eleventh ground of appeal that his sentence is "too severe and unjust".[1181] The Prosecution argues in its fourth ground of appeal that the Trial Chamber abused its discretion by imposing a "manifestly inadequate" sentence of 20 years' imprisonment on Mrkšić.[1182]

1. Mrkšić's appeal against his sentence

355. Mrkšić contends that the Trial Chamber wrongly considered aggravating and mitigating circumstances,[1183] that the laws of the former Yugoslavia on the punishment of those found

[1176] *Hadžihasanović and Kubura* Appeal Judgement, para. 302; *Zelenović* Judgement on Sentencing Appeal, para. 11; *Bralo* Judgement on Sentencing Appeal, para. 8; *Babić* Judgement on Sentencing Appeal, para. 43; *Blaškić* Appeal Judgement, para. 697. *See* also *Čelebići* Appeal Judgement, para. 590.
[1177] *Strugar* Appeal Judgement, para. 336; *Hadžihasanović and Kubura* Appeal Judgement, para. 302; *Limaj et al.* Appeal Judgement, para. 127; *Zelenović* Judgement on Sentencing Appeal, para. 11; *Blagojević and Jokić* Appeal Judgement, para. 137; *Tadić* Judgement in Sentencing Appeal, para. 22. *See* also *Karera* Appeal Judgement, para. 385; *Nahimana et al.* Appeal Judgement, para. 1037; *Ndindabahizi* Appeal Judgement, para. 132.
[1178] *Strugar* Appeal Judgement, para. 336; *Hadžihasanović and Kubura* Appeal Judgement, para. 302; *Limaj et al.* Appeal Judgement, para. 127; *Zelenović* Judgement on Sentencing Appeal, para. 11; *Blagojević and Jokić* Appeal Judgement, para. 137; *Čelebići* Appeal Judgement, para. 725. *See* also *Ndindabahizi* Appeal Judgement, para. 132.
[1179] *Brdanin* Appeal Judgement, para. 500.
[1180] *Strugar* Appeal Judgement, para. 337; *Hadžihasanović and Kubura* Appeal Judgement, para. 303; *Limaj et al.* Appeal Judgement, para. 128; *Zelenović* Judgement on Sentencing Appeal, para. 11; *Brdanin* Appeal Judgement, para. 500; *Babić* Judgement on Sentencing Appeal, para. 44.
[1181] Mrkšić Appeal Brief, para. 494. *See* also Mrkšić Respondent's Brief, para. 57.
[1182] Prosecution Notice of Appeal, para. 17; Prosecution Appeal Brief, paras 154-156, 180-201.
[1183] Mrkšić Notice of Appeal, para. 96; Mrkšić Appeal Brief, para. 493.

convicted of like offences "could never refer to abettors but only to perpetrators" of such crimes,[1184] and hence that his sentence is "too severe and unjust".[1185]

(a) Aggravating and mitigating circumstances

356. The Appeals Chamber notes that, in his Appeal Brief, Mrkšić does not support the allegations raised under his eleventh ground of appeal by challenging the Trial Chamber's assessment of the aggravating or mitigating circumstances. Rather, as noted by the Prosecution[1186] and as he concedes,[1187] he challenges the Trial Chamber's factual findings on which his conviction relied, thus reiterating the arguments he pleaded in his other grounds of appeal.[1188] Nonetheless, at the appeals hearing, Mrkšić contended that the Trial Chamber did not take into account all the mitigating circumstances,[1189] and further submitted that it did not evaluate or give proper weight to his "impeccable life conduct […] professionally and personally; prior to that, his years of service, his family circumstances and the fact that he voluntarily surrendered to the Tribunal as soon as the law on the cooperation with the [International] Tribunal was adopted in Serbia".[1190] Mrkšić further claimed that the Trial Chamber did not take into account "his state of health, since he had open-heart surgery and the procedures that that involved during his time […] in the Detention Unit of the United Nations".[1191]

357. With respect to Mrkšić's professional life, the Appeals Chamber considers that this factor, which would also encompass Mrkšić's years of service as an officer of the JNA, was indeed considered by the Trial Chamber.[1192] The Trial Chamber found that Mrkšić's conduct as a JNA officer revealed "a preparedness to ignore the responsibility which was on him as a commander,

[1184] Mrkšić Appeal Brief, para. 495. *See* also Mrkšić Respondent's Brief, para. 59.
[1185] Mrkšić Appeal Brief, para. 494. *See* also Mrkšić Respondent's Brief, para. 57.
[1186] Prosecution Respondent's Brief, para. 363.
[1187] Mrkšić Brief in Reply, para. 109: "Although these are indeed the statements of the Appeal brief submission, however they are not the only reasons for denying the sentence in duration of 20 years of prison. Mrkšić's Defence considers that he did not do the criminal act of aiding in torture and killings and this is a separate subject of the Appeal brief submission".
[1188] Compare: Mrkšić Appeal Brief, para. 496 (Mrkšić submits that the Trial Chamber did not take into account that the unit responsible for the custody of the prisoners had sufficient soldiers to secure the safety of the prisoners and hence there was no need for any "special engagement of Commander [*sic*] of the entire OG who was faced at that moment with many other problems he had to solve") with Mrkšić Appeal Brief, paras 1, 389, 399; Mrkšić Appeal Brief, paras 496-498 (Mrkšić contends that he was not personally informed of any cruel treatment of prisoners at Ovčara during that afternoon; he was only informed, he submits, about the potential danger posed to the prisoners if the military police were not capable of protecting them and since he assessed that the 80 mtbr had both sufficient human and technical resources to adequately guard the prisoners, there was no need for him, as Commander, to specially intervene) and Mrkšić Brief in Reply, para. 108, with Mrkšić Appeal Brief, paras 389, 398-399; Mrkšić Appeal Brief, para. 499 (Mrkšić submits that the sentence does not adequately reflect the fact that he did not give an order to Karanfilov for the military police to withdraw from Ovčara) and Mrkšić Brief in Reply, para. 108, with Mrkšić Appeal Brief, Ground 6, paras 279-339.
[1189] AT. 70.
[1190] AT. 252.
[1191] AT. 252.

and by virtue of international law, to take appropriate measures for the care of prisoners of war in JNA custody, and a preference for an 'easy' solution to the problem of the demands of the TO (and other) forces and the SAO 'government' in respect of the prisoners".[1193] Thus, the Trial Chamber concluded that Mrkšić "failed to act as an officer in his position should have acted, with terrible consequences for the prisoners of war and their loved ones".[1194] Accordingly, Mrkšić fails to show that the Trial Chamber abused its discretion by failing to attach proper weight to this factor.

358. The Appeals Chamber notes that the Trial Chamber referred to Mrkšić's final trial submissions on his family circumstances.[1195] In his Final Trial Brief Mrkšić had made submissions concerning his family's financial situation after his retirement, and since his detention.[1196] Even though the Trial Chamber did not explicitly address Mrkšić's family circumstances in its findings on sentencing,[1197] the Appeals Chamber considers that the express reference to his final trial submissions in the Trial Judgement constitutes an indication that they were taken into account.[1198] Moreover, in its final analysis on the mitigating and personal circumstances submitted by Mrkšić, the Trial Chamber considered the fact that he and his wife were looking forward to a period of retirement which they planned to share and that a significant term of imprisonment at this stage of his life would place a heavy personal burden on both of them. However, it concluded that while this circumstance would be weighed, it was necessary for the Trial Chamber to have due regard for the serious nature of Mrkšić's conduct and its consequences for so many other people and families.[1199] Accordingly, Mrkšić fails to demonstrate that his family circumstances were either not taken into account or not given appropriate weight by the Trial Chamber.

359. Regarding Mrkšić's voluntary surrender, the Appeals Chamber recalls that the Trial Chamber did not take this factor into account either as an aggravating or mitigating circumstance because Mrkšić surrendered almost seven years after the initial Indictment against him had been confirmed and an international arrest warrant issued.[1200] At the appeals hearing Mrkšić argued that he surrendered as soon as the law on the cooperation with the International Tribunal was adopted in Serbia;[1201] however, at trial no allegation was submitted in this respect.[1202] In this regard, the

[1192] Trial Judgement, para. 702.
[1193] Trial Judgement, para. 702.
[1194] Trial Judgement, para. 702.
[1195] *See* Trial Judgement, para. 696, fn. 2192.
[1196] Mrkšić Final Trial Brief, para. 840.
[1197] The Appeals Chamber recalls that Mrkšić's Final Trial Brief was filed confidentially, thus it is possible that the Trial Chamber might have chosen not to disclose publicly his submissions on his family's financial situation, out of respect towards Mrkšić and his family.
[1198] *Cf. Deronjić* Sentencing Appeal Judgement para. 148; *Kupreškić et al.* Appeal Judgement, para. 430.
[1199] Trial Judgement, para. 703.
[1200] Trial Judgement, para. 698.
[1201] AT. 252.
[1202] Trial Judgement, para. 698.

Appeals Chamber recalls that as a general rule, a Trial Chamber is not under an obligation to hunt for information that counsel does not see fit to put before it at the appropriate time.[1203]

360. Concerning the alleged failure of the Trial Chamber to take into account Mrkšić's health, the Appeals Chamber notes that at trial Mrkšić's Defence did not submit this factor as a mitigating and personal circumstance.[1204] In this regard, the Appeals Chamber emphasizes that an appellant cannot expect the Appeals Chamber to consider on appeal evidence of mitigating circumstances which was available but not raised at trial.[1205] Since Mrkšić's health was not submitted as a mitigating circumstance before the Trial Chamber, the latter committed no error by not considering this fact in its assessment of the mitigating factors.

361. For the foregoing reasons, Mrkšić's arguments to the effect that the Trial Chamber wrongly considered aggravating and mitigating circumstances in determining his sentence are dismissed.

(b) The sentencing practices in the former Yugoslavia

362. Mrkšić contends that the highest sentence available in the laws of the former Yugoslavia for similar offences was 15 years' imprisonment and that a sentence of 20 years could only be given in exceptional cases for the most serious crimes where the death penalty was prescribed, and only for direct perpetrators.[1206] Thus, he argues that the sentence imposed on him "can not be adequate".[1207] The Prosecution responds that "the sentence [the Trial Chamber] ultimately imposed accords with sentencing for equivalent crimes in the former Yugoslavia".[1208]

363. When taking into account the sentencing practices in the former Yugoslavia, the Trial Chamber noted the penalties provided for in the applicable articles of the SFRY Criminal Code and observed that the maximum penalty could not exceed 15 years unless the crime was considered eligible for the death penalty, in which case the sentence could be up to 20 years.[1209] While Mrkšić argues that the maximum sentence of 20 years only applies to the most serious crimes, he does not attempt to demonstrate that the crimes for which he was convicted do not fall within that category. Hence, his only remaining argument is that he was only convicted for aiding and abetting and that the maximum sentence of 20 years could therefore not apply. In this respect, while Mrkšić is correct that the provisions of the SFRY Criminal Code referred to by the Trial Chamber only contemplate

[1203] *Kupreškić et al.* Appeal Judgement, para. 414.
[1204] Trial Judgement, para. 696.
[1205] "As regards additional mitigating evidence that was available, though not raised, at trial, the Appeals Chamber does not consider itself to be the appropriate forum at which such material should first be raised" (*Kvočka et al.* Appeal Judgement, para. 674). *See* also *Deronjić* Sentencing Appeal Judgement, para. 150.
[1206] Mrkšić Appeal Brief, para. 495; Mrkšić Brief in Reply, para. 109. *See* also AT. 247-248.
[1207] Mrkšić Appeal Brief, para. 495; Mrkšić Brief in Reply, para. 110.
[1208] Prosecution Respondent's Brief, para. 364.

ordering or committing crimes and not aiding and abetting, Article 24 of the SFRY Criminal Code provides that "[a]nybody who intentionally aids another in the commission of a criminal act shall be punished as if he himself had committed it". The provisions referred to by the Trial Chamber thus apply *mutadis mutandis* to cases of aiding and abetting.[1210] While it is true that Article 24 of the SFRY Criminal Code also provides that "punishment may also be reduced" when the convicted person aided and abetted the crimes, this is only a mere possibility, left to the Judges' discretion. Mrkšić's argument accordingly fails. Further, the Trial Chamber took into account the form of liability of aiding and abetting in sentencing Mrkšić, both when assessing the gravity of his crimes[1211] and when comparing the circumstances of his case with those of other cases before the War Crimes Chamber of the District Court in Belgrade in Serbia, where charges for similar crimes committed at Ovčara on 20 November 1991 had been brought.[1212]

364. In light of the foregoing, the Appeals Chamber finds that Mrkšić fails to identify any discernible error on the part of the Trial Chamber in its consideration of the general sentencing practice of the former Yugoslavia. Mrkšić's arguments in this regard are dismissed. Accordingly, Mrkšić's eleventh ground of appeal is dismissed in its entirety.

2. The Prosecution's appeal against Mrkšić's sentence

365. The Prosecution argues under its fourth ground of appeal that the Trial Chamber erred by imposing a "manifestly inadequate" sentence of 20 years' imprisonment on Mrkšić.[1213] It submits that: (a) insufficient weight was given to Mrkšić's role and responsibility[1214] and (b) insufficient weight was given to the gravity of his crimes, namely, aiding and abetting the torture and cruel treatment of the approximately 200 prisoners held at Ovčara and aiding and abetting the murder of 194 of them.[1215] It requests that Mrkšić's sentence be increased.[1216]

[1209] Trial Judgement, para. 707.
[1210] The Appeals Chamber notes that while Article 24 of the SFRY Criminal Code does not necessarily refer to aiding and abetting in the exact same way as in the Statute and case-law of the International Tribunal, it nevertheless provides guidance on the general practice regarding prison sentences in the courts of the former Yugoslavia concerning the mode of liability of aiding and abetting (s*ee Jokić* Judgement on Sentencing Appeal, para. 36). Miodrag Jokić pleaded guilty to superior responsibility under Article 7(3) of the Statute and aiding and abetting under Article 7(1) of the Statute for the shelling of the Old Town of Dubrovnik on 6 December 1991 (*see Jokić* Judgement on Sentencing Appeal, paras 9, 32).
[1211] Trial Judgement, para. 687.
[1212] Trial Judgement, para. 708.
[1213] Prosecution Appeal Brief, paras 156, 180-201.
[1214] Prosecution Notice of Appeal, para. 17; Prosecution Appeal Brief, paras 180-190.
[1215] Prosecution Notice of Appeal, para. 17; Prosecution Appeal Brief, paras 191-200.
[1216] Prosecution Notice of Appeal, para. 18; Prosecution Appeal Brief, para. 201. The Prosecution submits that "a sentence in the range of 30 years to life imprisonment should have been imposed".

(a) Mrkšić's role and responsibility

366. The Prosecution submits that the Trial Chamber failed to reflect the extent and seriousness of Mrkšić's conduct in light of its findings on his powers, authority, duties towards the prisoners and his knowledge.[1217] It emphasizes the Trial Chamber's findings that Mrkšić was the most senior officer of OG South directly responsible for the security of the prisoners[1218] and was obliged under international humanitarian law to take all necessary measures to prevent crimes committed by the TOs and the paramilitaries.[1219] Mrkšić knew that the TOs and paramilitaries had repeatedly and systematically beaten, tortured and abused the prisoners during the afternoon[1220] and was aware of the "considerable likelihood" that the prisoners would be gravely injured and murdered should the JNA withdraw, leaving the prisoners at the mercy of the TOs and paramilitaries.[1221] The Prosecution argues that Mrkšić's failure to take appropriate action and his decision instead to order the withdrawal of the remaining JNA forces from Ovčara "represent his wholesale abdication of responsibility".[1222] In doing so, he "deferred to the wishes of a government he knew had no legitimacy or authority".[1223] The Prosecution seeks an increase in the sentence of 20 years' imprisonment in order to properly reflect the extent and seriousness of his overall role and responsibility in these crimes.[1224]

367. Mrkšić responds that the Prosecution's arguments only concern his command role "which was not the subject of the judgment"[1225] and that "the Prosecution is trying to give higher significance to [his role] than established by the Trial Chamber itself".[1226] He disputes a number of the Trial Chamber's legal and factual findings regarding: (i) his knowledge of the cruel treatment of the prisoners;[1227] (ii) his failure to fulfil his duty to protect the prisoners;[1228] and (iii) his order for the withdrawal of the JNA from Ovčara and the time of this withdrawal.[1229] Further, he argues that the Prosecution's claim that he deferred to the wishes of a government that he knew did not have any legitimacy or authority is groundless.[1230]

[1217] Prosecution Appeal Brief, para. 181. *See* also AT. 307.
[1218] Prosecution Appeal Brief, para. 183, referring to Trial Judgement, para. 301.
[1219] Prosecution Appeal Brief, para. 183, referring to Trial Judgement, para. 86.
[1220] Prosecution Appeal Brief, para. 184, referring to Trial Judgement, paras 626, 627, 631.
[1221] Prosecution Appeal Brief, para. 184, referring to Trial Judgement, para. 621.
[1222] Prosecution Appeal Brief, para. 190.
[1223] Prosecution Appeal Brief, para. 189.
[1224] Prosecution Appeal Brief, para. 190.
[1225] Mrkšić Respondent's Brief, para. 68.
[1226] Mrkšić Respondent's Brief, para. 87.
[1227] Mrkšić Respondent's Brief, paras 77-80, 86.
[1228] Mrkšić Respondent's Brief, paras 62-63.
[1229] Mrkšić Respondent's Brief, para. 87. *See* also Mrkšić Respondent's Brief, paras 60, 66, 69, 71-73.
[1230] Mrkšić Respondent's Brief, para. 81.

368. The Prosecution replies that it does not attempt to rely on command responsibility under Article 7(3) of the Statute but rather highlights Mrkšić's power and authority as a high ranking officer in the military hierarchy as a factor aggravating his role and responsibility.[1231] With regard to Mrkšić's response that he did not defer to the wishes of the "government", the Prosecution replies that the fact that Mrkšić deferred to the wishes of the "government" by leaving the prisoners in the hands of the TOs is not merely a Prosecution claim, but is implicit in the Trial Chamber's logic.[1232]

369. The Appeals Chamber finds, as correctly noted by the Prosecution,[1233] that many of the arguments put forward by Mrkšić in his Respondent's Brief are either allegations of factual or legal errors on the part of the Trial Chamber or do not address the arguments raised in the Prosecution's Appeal Brief.[1234] Most arguments put forward by Mrkšić in response to the Prosecution's fourth ground of appeal constitute challenges in relation to his conviction which have been raised in his Appeal Brief.[1235] The Appeals Chamber disregards these arguments insofar as they go beyond the scope of a Respondent's Brief[1236] and have already been addressed in this Judgement.[1237]

370. The Trial Chamber analysed the role and responsibility of Mrkšić in assessing the gravity of the offence as follows:

> Relevant in considering the gravity of the offences is Mile Mrkšić's role in the commission of these crimes. In this respect, it should be noted that Mile Mrkšić has not been found guilty of ordering the commission of these crimes. It was not established that he participated in a joint criminal enterprise with the common purpose of committing these crimes. Mile Mrkšić has been found guilty for his decision to withdraw the JNA officers and soldiers who were guarding the prisoners of war at Ovčara. By this act Mile Mrkšić rendered substantial practical assistance to the TO and paramilitary forces at Ovčara who were then able to commit the murders. Further, Mile Mrkšić has been held responsible for his failure during the afternoon to prevent the continuance of offences of cruel treatment and torture occurring at Ovčara, of which he was informed. It is material that Mile Mrkšić was the commander of all Serb forces at Ovčara on 20/21November 1991.[1238]

[1231] Prosecution Brief in Reply, para. 122.
[1232] *See* Prosecution Brief in Reply, para. 127, citing Trial Judgement, paras 227, 296, 305, 585. The Prosecution reiterates the finding of the Trial Chamber that Mrkšić authorised Panić to attend the "government" meeting and to indicate that the wishes of the "government" would be respected. While the Trial Chamber could not conclude that Mrkšić had at that stage accepted the wishes of the government, his order to withdraw the 80 mtbr later that evening, leaving the prisoners at the mercy of the TOs, indicates that he did eventually defer to the government's wishes.
[1233] Prosecution Brief in Reply, para. 115.
[1234] *See* Mrkšić Respondent's Brief, paras 60, 65-66 (contesting the finding of the Trial Chamber that Mrkšić gave an order to the military police to withdraw from Ovčara), para. 62 (contesting the finding of the Trial Chamber that Mrkšić failed to prevent the violence and torture at Ovčara), paras 62-64 (contesting the finding of the Trial Chamber that Mrkšić had been informed of the abuse of the prisoners of war in the afternoon).
[1235] *See supra* fn. 1188.
[1236] Practice Direction on Formal Requirements for Appeals from Judgement (IT/201), 7 March 2002, para. 5 ("The statements and arguments [of the Respondent's Brief] […] shall be limited to arguments made in response to [the Appellant's] brief").
[1237] *See supra* Section V: "Mrkšić's Appeal".
[1238] Trial Judgement, para. 687.

Furthermore, in assessing Mrkšić's individual circumstances, the Trial Chamber noted, in response to Mrkšić's argument that his conduct had been that of an irreproachable officer, that:

> In respect of these offences his conduct in respect of the prisoners of war revealed, in the Chamber's view, a preparedness to ignore the responsibility which was on him as commander, and by virtue of international law, to take appropriate measures for the care of prisoners of war in JNA custody, and a preference for an "easy" solution to the problem of the demands of the TO (and other) forces and the SAO "government" in respect of the prisoners. In these respects he failed to act as an officer in his position should have acted, with terrible consequences for the prisoners of war and their loved ones.[1239]

371. Therefore, the Appeals Chamber finds that the Trial Chamber duly considered Mrkšić's position and his role as the overall commander in sentencing him. It considered his position and role both in the context of how he contributed to the commission of the crimes and in the context of assessing whether his conduct as an officer could be considered as a mitigating circumstance.

372. In light of the foregoing, the Appeals Chamber finds that the Prosecution fails to demonstrate that the Trial Chamber did not give weight or sufficient weight to Mrkšić's role and responsibility. The Prosecution's arguments are dismissed.

(b) Gravity of the crimes

373. The Prosecution submits that the Trial Chamber gave insufficient weight to the "objective gravity" of the crimes.[1240] It is of the view that Mrkšić's sentence "fails to properly reflect the horror of what the prisoners endured for hours on end before being killed".[1241] According to the Prosecution, the Trial Chamber focused on the murders and thereby overlooked the harsh conditions in which the 200 detainees were kept throughout the afternoon, as well as the continuous tortures they were forced to endure.[1242] In support of its argument, the Prosecution points to paragraph 688 of the Trial Judgement, in which the Trial Chamber referred to previous comparable cases involving mass killings in order to guide its sentencing, but did not refer to comparable cases involving cruel treatment and torture.[1243] It contends that a 20 year sentence does not properly reflect the scale and brutality of the torture and cruel treatment of the prisoners of war, and thus disregards the Trial Chamber's earlier findings as to the gravity of these crimes and their impact upon the victims.[1244] The Prosecution further submits that Mrkšić's sentence does not give sufficient weight to the "objective gravity of the systematic murder of […] 194 persons".[1245]

[1239] Trial Judgement, para. 702.
[1240] Prosecution Appeal Brief, paras 191-200. *See* also AT. 307.
[1241] Prosecution Appeal Brief, para. 197.
[1242] Prosecution Appeal Brief, para. 192, referring to Trial Judgement, para. 685.
[1243] Prosecution Appeal Brief, para. 192.
[1244] Prosecution Appeal Brief, paras 193-196, referring to Trial Judgement, paras 237, 245, 525, 537-538.
[1245] Prosecution Appeal Brief, para. 198. *See* also Prosecution Appeal Brief, paras 199-200.

374. Mrkšić responds that the sentence of 20 years' imprisonment is "too severe and overmeasured [*sic*]" for reasons explained in his appeal.[1246] As noted by the Prosecution,[1247] he does not specifically respond to the arguments raised in the Prosecution Appeal Brief regarding the gravity of the crimes, but contests the factual findings that led to his conviction.[1248] Accordingly, the Appeals Chamber disregards these arguments insofar as they go beyond the scope of a Respondent's Brief[1249] and have already been discussed in this Judgement.[1250]

375. The Appeals Chamber recalls that the gravity of the offence is "the litmus test for the appropriate sentence".[1251] While consideration of the gravity of the offence involves, in addition to consideration of the gravity of the conduct of the accused, consideration of the seriousness of the underlying crimes,[1252] the Appeals Chamber emphasizes that the gravity of the crime does not refer to a crime's "objective gravity", but rather to the particular circumstances surrounding the case and the form and degree of the accused's participation in the crime.[1253] Moreover, the Appeals Chamber recalls that there is no hierarchy of crimes within the jurisdiction of the International Tribunal.[1254] The Trial Chamber's duty remains to tailor the penalty to fit the individual circumstances of the accused and the gravity of the crime so that "the accused are punished solely on the basis of their wrongdoings"[1255] and not on the basis of "abstract distinctions among crimes".[1256]

376. With regard to the Prosecution's argument that the Trial Chamber erred by only considering comparable cases involving mass killings and not cases involving torture or cruel treatment, the Appeals Chamber recalls that similar cases do not provide a legally binding tariff of sentences, and that they can only be of assistance if they involve the commission of the same offences in substantially similar circumstances.[1257] In this respect, the Appeals Chamber notes that the Prosecution does not refer in its submission to any case concerning cruel treatment or torture to

[1246] Mrkšić Respondent's Brief, para. 84.
[1247] Prosecution Brief in Reply, para. 115.
[1248] *See* Mrkšić Respondent's Brief, paras 60, 65-66 (contesting the finding of the Trial Chamber that Mrkšić ordered the withdrawal of the JNA military police from Ovčara at paras 293 and 621 of the Trial Judgement); para. 62 (contesting the finding of the Trial Chamber that Mrkšić failed to prevent the violence and torture at Ovčara at para. 631 of the Trial Judgement); paras 62-64 (contesting the finding of the Trial Chamber that Mrkšić was informed about the cruel treatment of the prisoners of war at Ovčara during the afternoon at para. 626 of the Trial Judgement).
[1249] Practice Direction on Formal Requirements for Appeals from Judgement (IT/201), 7 March 2002, para. 5.
[1250] *See supra* Section V: "Mrkšić's Appeal".
[1251] *Čelebići* Trial Judgement, para. 1225, endorsed in *Aleksovksi* Appeal Judgement, para. 182 and *Čelebići* Appeal Judgement, para. 731.
[1252] *Cf. Čelebići* Appeal Judgement, para. 741.
[1253] *Aleksovski* Appeal Judgement, para. 182, citing *Kupreškić et al.* Appeal Judgement, para. 852.
[1254] *Stakić* Appeal Judgement, para. 375.
[1255] *Dragan Nikolić* Judgement on Sentencing Appeal, para. 46. *See* also *Stakić* Appeal Judgement, para. 375.
[1256] *Stakić* Appeal Judgement, para. 375.
[1257] *Strugar* Appeal Judgement, para. 348; *Limaj et al.* Appeal Judgement, para. 135; *Blagojević and Jokić* Appeal Judgement, para. 333; *Momir Nikolić* Judgement on Sentencing Appeal, para. 38; *Kvočka et al.* Appeal Judgement, para. 681; *Furundžija* Appeal Judgement, para. 250; *Čelebići* Appeal Judgement, paras 719, 721. *See* also *Musema* Appeal Judgement, para. 387.

which the Trial Chamber could have compared Mrkšić's convictions.[1258] The Appeals Chamber further recalls that the relevance of previous sentences is often limited by the principle of individualisation of sentences.[1259] In the present case, while the Trial Chamber only referred to cases involving mass killings committed in a concentrated geographical area and during a limited period of time and did not specifically mention cases dealing with mass torture or cruel treatment, it stated that it could not "identify a case before the Tribunal that may be said to involve the same offence and substantially similar circumstances as in the present case".[1260] Accordingly, it did not "engage in a comparison with previous decisions on sentence" and rather referred to its obligation to tailor its sentence to fit the individual circumstances of the case.[1261] Accordingly, the Appeals Chamber finds that the Prosecution fails to demonstrate that the Trial Chamber disregarded "previous comparable cases in relation to cruel treatment and torture".[1262]

377. The Appeals Chamber notes that the Trial Chamber was aware of its obligation under Article 24(2) of the Statute to take into account the gravity of the crime in its sentencing determination.[1263] The Trial Judgement is replete with detailed findings addressing the gravity of the underlying crimes.[1264] Further, in analysing the gravity of the offence in its sentencing considerations, the Trial Chamber specifically recalled its earlier finding that "over 200 persons" were removed as prisoners from the Vukovar hospital by JNA soldiers of OG South and subsequently taken to a hangar at Ovčara where they were "subjected to beatings and other forms of mistreatment".[1265] The Trial Chamber then outlined its earlier finding that after the JNA military police guarding the prisoners were withdrawn by an order of Mrkšić, the prisoners were executed, in groups, by Serb TO and paramilitary forces of OG South.[1266] The Trial Chamber reiterated that Mrkšić was found guilty "for his decision to withdraw the JNA officers and soldiers who were guarding the prisoners of war at Ovčara", by which he "rendered substantial practical assistance to the TO and paramilitary forces at Ovčara who were then able to commit the murders".[1267] The Trial Chamber further recalled that Mrkšić was "responsible for his failure during the afternoon to prevent the continuance of offences of cruel treatment and torture occurring at Ovčara, of which he was informed".[1268]

[1258] *See* Prosecution Appeal Brief, para. 192.
[1259] *See Furundžija* Appeal Judgement, para. 250. *See* also *Strugar* Appeal Judgement, para. 348; *Kvočka et al.* Appeal Judgement, para. 681; *Jelisić* Appeal Judgement, paras 96, 101; *Čelebići* Appeal Judgement, paras 719, 721, 756-757.
[1260] Trial Judgement, para. 688.
[1261] Trial Judgement, para. 688.
[1262] Prosecution Appeal Brief, para. 192.
[1263] Trial Judgement, paras 683-688.
[1264] Trial Judgement, paras 234-239, 245-252, 523, 525, 527-528, 537-538.
[1265] Trial Judgement, para. 686.
[1266] Trial Judgement, para. 686.
[1267] Trial Judgement, para. 687.
[1268] Trial Judgement, para. 687.

378. For the purposes of establishing the intent of the actual perpetrators regarding the crime of murder, the Trial Chamber emphasized that the victims were prisoners of war, were unarmed, and the majority were sick or wounded patients from a hospital.[1269] It further referred in particular to the very large number of victims and to the fact that almost all victims died from multiple gunshot wounds.[1270] For the purposes of establishing the elements of the crimes of torture and cruel treatment, the Trial Chamber made detailed findings as to the horrific condition in which the prisoners of war had been kept throughout the afternoon and the nature of the mistreatment to which they were subjected.[1271] The Appeals Chamber recalls that at least 200 prisoners of war were detained in inhumane conditions in a hangar.[1272] The hangar was bare, had a concrete floor, no toilet facilities, just a bit of hay strewn at one end.[1273] The prisoners were given no food or water,[1274] and those who were injured received no medical care.[1275] They were subjected to extreme violence, brutal beatings and physical abuse for hours in an atmosphere of extreme fear.[1276] After Mrkšić's order for the withdrawal of the JNA from Ovčara,[1277] the prisoners were left in the hands of the paramilitaries who generally "harboured extreme animosity towards their enemy, the Croat forces", allowing "the desire for revenge […] to be unleashed without restraint".[1278] Subsequently, the prisoners were removed from the hangar, they were taken in groups of 10-20 men by truck to a site where earlier a large hole had been dug, at least 194 of them were executed and their bodies were buried in the mass grave and remained undiscovered until several years later.[1279]

379. In recalling these findings, the Trial Chamber took into account Mrkšić's conviction for murder, torture and cruel treatment in assessing the gravity of the crimes. The Appeals Chamber emphasizes that the Trial Judgement must be read as a whole.[1280] The Trial Chamber's references to the underlying crimes in the sentencing part and its detailed findings in the body of the Trial Judgement as to the horrific condition in which the prisoners of war had been kept throughout the

[1269] Trial Judgement, para. 510.
[1270] Trial Judgement, para. 510.
[1271] *See* Trial Judgement, paras 523-539.
[1272] Trial Judgement, paras 523-526.
[1273] Trial Judgement, para. 525.
[1274] Trial Judgement, para. 537.
[1275] Trial Judgement, para. 239. The Trial Chamber was not persuaded that the acts of deprivation of medical care of those who had been previously injured, were in and of themselves, "of the nature to cause severe or serious pain or suffering to amount to torture or cruel treatment" (Trial Judgement, para. 528). The Trial Chamber observed "that the more seriously injured patients at the Vukovar hospital were not included in this group of prisoners and that, both at the JNA barracks and at Ovčara, they were not held for any extended time. [In the Trial Chamber's] view, while many prisoners received serious injuries at Ovčara, in such cases the infliction of injuries and the failure to provide treatment for the injuries caused, is in reality the same behaviour. The deprivation of medical care in such cases is subsumed in the acts of mistreatment themselves" (Trial Judgement, para. 528).
[1276] Trial Judgement, paras 525-527. *See* also Trial Judgement, paras 537, 596.
[1277] Trial Judgement, paras 276, 293-294, 613.
[1278] Trial Judgement, para. 620.
[1279] Trial Judgement, paras 248-252.
[1280] *Cf. Naletilić and Martinović* Appeal Judgement, para. 435.

afternoon, the nature of the mistreatment to which they were subjected, and the way in which 194 of them were murdered, indicate that the gravity of the underlying crimes was properly considered at the sentencing stage. However, the Appeals Chamber is unable to determine how the Trial Chamber weighed the consequences of the torture upon the victims and their families, or whether or to what extent it considered the particular vulnerability of the prisoners.[1281] Nonetheless, the Appeals Chamber finds that the Trial Chamber's sentence of 20 years' imprisonment is not so unreasonable that it can be inferred that the Trial Chamber must have failed to exercise its discretion properly.[1282] Accordingly, the Prosecution fails to show that the Trial Chamber committed any discernible error in the exercise of its discretion by imposing a sentence that does not reflect the gravity of the crimes Mrkšić aided and abetted.

380. In light of the foregoing, the Appeals Chamber dismisses the Prosecution's fourth ground of appeal in its entirety.

C. Šljivančanin's Sentence

381. Šljivančanin submits in his sixth ground of appeal that while the Trial Chamber correctly identified the principles of sentencing and the relevant factors to be considered pursuant to the jurisprudence of the International Tribunal, it nonetheless committed four discernible errors in imposing a sentence of five years on him.[1283] The Prosecution argues in its third ground of appeal that the Trial Chamber abused its discretion by imposing a "manifestly inadequate" sentence of five years' imprisonment on Šljivančanin.[1284] These claims are addressed in turn below.

1. Šljivančanin's appeal against his sentence

382. Šljivančanin argues that the Trial Chamber committed four discernible errors in imposing the five year sentence on him: (a) the Trial Chamber erred, when assessing his role and responsibility in the torture of the prisoners of war at Ovčara, in finding that the prisoners of war were under his immediate responsibility;[1285] (b) the Trial Chamber erred by considering his involvement in preventing international representatives from gaining access to the hospital on 20 November 1991 as an aggravating circumstance;[1286] (c) the Trial Chamber erred in failing to

[1281] The particular vulnerability of victims has been considered as an aggravating circumstance by the Appeals Chamber. *See Blaškić* Appeal Judgement, para. 686; *Kunarac et al.* Appeal Judgement, para. 353.
[1282] *Bralo* Judgement on Sentencing Appeal, para. 9; *Galić* Appeal Judgement, para. 394; *Momir Nikolić* Judgement on Sentencing Appeal, para. 95; *Babić* Judgement on Sentencing Appeal, para. 44.
[1283] Šljivančanin Notice of Appeal, para. 32; Šljivančanin Appeal Brief, paras 468, 470.
[1284] Prosecution Notice of Appeal, paras 13-15; Prosecution Appeal Brief, paras 153, 155-179.
[1285] Šljivančanin Appeal Brief, paras 471, 485.
[1286] Šljivančanin Appeal Brief, para. 472.

consider his good conduct and demeanour as a mitigating circumstance;[1287] and (d) the Trial Chamber did not properly take into account the sentencing practices in the former Yugoslavia.[1288] He submits that, in light of these alleged errors, the sentence imposed on him is manifestly excessive and that the Trial Chamber ventured outside its discretionary framework, which justifies the intervention of the Appeals Chamber.[1289] In his view, the appropriate sentence would be no more than three years' imprisonment.[1290]

(a) Whether the prisoners of war were under Šljivančanin's "immediate responsibility"

383. Šljivančanin submits that, in assessing his role and responsibility in the torture of the prisoners of war at Ovčara, the Trial Chamber erred in finding that the prisoners of war were under his immediate responsibility.[1291] He emphasizes that the Trial Chamber did not find that he personally supervised the detention of the prisoners of war at the JNA barracks[1292] and "makes no findings whatsoever that the prisoners of war were under [his] immediate responsibility […] at any time".[1293] He argues that even if he had been made responsible for the evacuation of the hospital, and for the transport and security of the war crimes suspects, this did not mean that the prisoners of war were under his "*immediate* responsibility",[1294] and emphasizes that the prisoners of war at Ovčara were under the immediate responsibility of the 80 mtbr, the JNA unit responsible for local security in the area.[1295]

384. The Prosecution responds that Šljivančanin fails to show how the Trial Chamber's use of the words "immediate responsibility" is "in any way discordant with its factual findings" regarding his responsibility for the tortures of the prisoners of war at Ovčara and that his allegation that other JNA soldiers had some responsibility over the prisoners is irrelevant.[1296]

385. The Appeals Chamber finds that Šljivančanin does not demonstrate that Trial Chamber's use of the words "immediate responsibility" is inconsistent with its previous findings regarding his responsibility for the prisoners of war at Ovčara. The Trial Chamber's impugned finding that the prisoners of war at Ovčara were under his "immediate responsibility"[1297] was made as part of the

[1287] Šljivančanin Appeal Brief, para. 473.
[1288] Šljivančanin Appeal Brief, para. 474.
[1289] Šljivančanin Appeal Brief, paras 475-476, 503-505.
[1290] Šljivančanin Appeal Brief, paras 477, 506.
[1291] Šljivančanin Appeal Brief, paras 471, 485.
[1292] Šljivančanin Appeal Brief, para. 481, referring to Trial Judgement, paras 372, 656-658.
[1293] Šljivančanin Appeal Brief, para. 482; Šljivančanin Additional Brief in Reply, paras 94-95.
[1294] Šljivančanin Appeal Brief, para. 483.
[1295] Šljivančanin Appeal Brief, para. 484.
[1296] Prosecution Supplemental Respondent's Brief, paras 64-65.
[1297] Trial Judgement, para. 704.

Trial Chamber's recollection of "[t]he circumstances which led to his conviction".[1298] In particular, the Appeals Chamber notes the Trial Chamber's earlier findings that Šljivančanin was appointed by Mrkšić "to be responsible for their transport and security",[1299] was "responsible for their security",[1300] and concluded that "Šljivančanin's duty to protect the prisoners of war brought to Ovčara on the afternoon of 20 November 1991 was of significance […] he was under specific orders of Mile Mrkšić for the security of the prisoners".[1301] Further, Šljivančanin fails to demonstrate how the words "immediate responsibility" imply that the Trial Chamber found him responsible for having personally supervised their detention, or that the fact that the 80 mtbr was the JNA unit generally responsible for security in the area including Ovčara[1302] undermines his own responsibility towards the prisoners of war at Ovčara that day. Accordingly, the Appeals Chambers dismisses Šljivančanin's arguments.

(b) Šljivančanin's involvement in preventing international representatives from accessing the Vukovar hospital as an aggravating circumstance

386. Šljivančanin argues that the Trial Chamber erred by considering his involvement in preventing international representatives from gaining access to the hospital on 20 November 1991 as an aggravating circumstance.[1303] In his view, this conduct does not directly relate to the commission of the offence as is required for aggravating circumstances in the jurisprudence of the International Tribunal.[1304] He notes that the Trial Chamber found that it was unable to conclude that his delaying of the international monitors was done in the knowledge that his conduct would assist in the commission of the crimes charged.[1305] The Prosecution responds that the Trial Chamber was entitled to consider this conduct as a circumstance directly related to the crimes committed because this act of deception was "a step in the chain of events which culminated in the torture of the prisoners of war later that afternoon" and was also "inherently linked to his subsequent total inaction".[1306]

[1298] Trial Judgement, para. 704.
[1299] Trial Judgement, para. 400. *See* also Trial Judgement, para. 667: "Veselin Šljivančanin had been officially vested by Mile Mrkšić with authority of a considerable scope in respect of the removal and security of the prisoners of war from the hospital […]".
[1300] Trial Judgement, para. 668.
[1301] Trial Judgement, para. 669.
[1302] Trial Judgement, para. 306.
[1303] Šljivančanin Appeal Brief, para. 472.
[1304] Šljivančanin Brief in Reply, para. 121, citing *Kunarac et al.* Trial Judgement, para. 850 and *Stakić* Trial Judgement, para. 911.
[1305] Šljivančanin Appeal Brief, para. 489, referring to Trial Judgement, para. 658; Šljivančanin Brief in Reply, paras 122-123.
[1306] Prosecution Respondent's Brief, para. 198.

387. The Appeals Chamber considers that it is not clear whether the Trial Chamber took into account Šljivančanin's involvement in preventing international representatives from accessing the Vukovar hospital as an aggravating circumstance as no express finding was made in this respect. Although the Trial Chamber referred to Šljivančanin's interference with the international representatives in Section XI of the Trial Judgement titled: "Sentencing", under the sub-section titled: "B. Individual circumstances of the Accused: aggravating and mitigating circumstances"[1307], it had previously set out that "[a]ggravating circumstances must be directly related to the commission of the offence"[1308] implying it would not have considered Šljivančanin's interference with the international observers to be an aggravating circumstance. However, even if the Trial Chamber had considered it to be an aggravating factor, Šljivančanin has not demonstrated that the Trial Chamber gave weight to this factor. In this respect, the Appeals Chamber recalls that, following its statement to the effect that Šljivančanin had been deceitful the Trial Chamber accepted that, "[b]y contrast, however […] on his own decision some spouses and family members of hospital staff were allowed to join the civilians who were evacuated to safety".[1309] The Trial Chamber accordingly balanced one factor against the other. These statements must be read in conjunction with the Trial Chamber's earlier findings to the effect that even though the purpose of the blocking of the passage of the international monitors on 20 November 1991 was to prevent them from carrying out their responsibilities under the Zagreb Agreement, it could not be concluded that the breach of the Zagreb Agreement demonstrated the intent to commit the crimes charged in the Indictment.[1310] Further, in its concluding sentence to the section on Šljivančanin's individual circumstances, the Trial Chamber found that "[t]here is nothing adverse to [Šljivančanin] about his past record or other personal circumstances".[1311] In light of the foregoing, the Appeals Chamber is not satisfied that if the Trial Chamber took into account this factor as part of its sentencing considerations, it was assigned sufficient weight to affect the verdict.[1312] The Appeals Chamber is thus not satisfied that the Trial Chamber committed a discernible error in exercising its discretion. Accordingly, Šljivančanin's arguments are dismissed.

[1307] Trial Judgement, paras 692-705.
[1308] Trial Judgement, para. 693.
[1309] Trial Judgement, para. 704.
[1310] *See* Trial Judgement, paras 211, 602-604.
[1311] Trial Judgement, para. 705.
[1312] *Cf. Krnojelac* Appeal Judgement, para. 260.

(c) Šljivančanin's good conduct and demeanour as a mitigating circumstance

388. Šljivančanin submits that the Trial Chamber erred in failing to consider his good conduct and demeanour as a mitigating circumstance.[1313] However, the Appeals Chamber notes that the Trial Chamber found that "[a]s far as the evidence of his good character and other material before the Chamber discloses, he was a capable and successful officer in the JNA until his resignation [and] had integrated successfully into civilian life following his resignation".[1314] The Trial Chamber accordingly considered evidence of his good character when sentencing him. While it is not clear whether the Trial Chamber took into account the specific factors Šljivančanin mentions on appeal as going to his good character,[1315] the Appeals Chamber notes that Šljivančanin did not make any sentencing submission at trial. Rule 86(C) of the Rules clearly indicates that sentencing submissions shall be addressed during closing arguments, and it was therefore Šljivančanin's prerogative to identify any mitigating circumstances, including his good conduct and demeanour. Šljivančanin is simply advancing arguments on appeal that he failed to put forward at the trial stage, and the Appeals Chamber "does not consider itself to be the appropriate forum at which such material should first be raised".[1316] Accordingly, Šljivančanin's arguments are dismissed.

(d) The sentencing practices in the former Yugoslavia

389. Šljivančanin argues that, when referring to the relevant provisions of the SFRY Criminal Code, the Trial Chamber did not take into consideration that Article 150, which prohibits "the cruel treatment of the wounded, sick and prisoners of war" and lays down a punishment of imprisonment for a term exceeding six months, but not exceeding five years,[1317] was the most appropriate provision. He further submits that Article 144 of the SFRY Criminal Code, which sets a minimum five years' sentence for the crime of torture against prisoners of war, is not applicable to his case as it does not cover the mode of liability of aiding and abetting.[1318] Finally, Šljivančanin also argues that the Trial Chamber did not consider Article 42, which provides that when the aim of punishment

[1313] Šljivančanin Appeal Brief, para. 473.
[1314] Trial Judgement, para. 705.
[1315] *See* Šljivančanin Appeal Brief, para. 492, where Šljivančanin refers to his actions taken on 18 November 1991 to keep families together; his invitation to doctors and nurses to stay in Vukovar and continue their work at the meeting of 20 November 1991; evidence that he did not support extremist positions; the goal of his brigade to defend the integrity of the SFRY and his dedicated searches for missing soldiers; his prioritization of the protection and care of the civilian population and the many positive descriptions of him by certain witnesses.
[1316] *Kvočka et al*. Appeal Judgement, para. 674; *Čelebići* Appeal Judgement, para. 790. *See* also *Muhimana* Appeal Judgement, para. 231; *Kamuhanda* Appeal Judgement, para. 354.
[1317] Šljivančanin Appeal Brief, paras 495-496.
[1318] Šljivančanin Appeal Brief, para. 495, fn. 366. *See* also Šljivančanin Brief in Reply, para. 130.

may be attained by a lesser punishment and there are mitigating circumstances present, the sentence should be below the minimum prescribed by law.[1319]

390. The Prosecution responds that Šljivančanin's submission that Article 150 of the SFRY Criminal Code is the most appropriate provision lacks merit because this relates to the crime of cruel treatment and not to the crime of torturing prisoners of war,[1320] that Article 24 of the SFRY Criminal Code renders Article 144 applicable, and that Article 42 is not applicable because Šljivančanin fails to demonstrate that there are mitigating circumstances which indicate that the aims of punishment can be attained by a lesser punishment and that in any case the court retains discretion to determine the appropriate sentence.[1321]

391. While the Trial Chamber found, as noted by Šljivančanin,[1322] that "the same physical beatings of the prisoners constitute the cruel treatment and the physical element of the torture",[1323] and hence found him guilty of both torture and cruel treatment (Counts 7 and 8),[1324] it entered a conviction for torture only, based on the fact that the crime of torture requires an element additional to the crime of cruel treatment (the specific purpose accompanying the act or omission).[1325] Hence, the applicable provision was clearly Article 144 of the SFRY Criminal Code, which refers to acts of torture against prisoners of war, and not Article 150, which refers to the crime of cruel treatment. Further, while it is true that Article 144 of the SFRY Criminal Code only mentions ordering or committing acts of torture, Article 24 of the same Code provides that "[a]nybody who intentionally aids another in the commission shall be punished as if he himself had committed it". Thus, Article 144 of the SFRY Criminal Code also applies to aiding and abetting the crime of torture against prisoners of war. Last, while the Trial Chamber did not mention Article 42 of the SFRY Criminal Code, Šljivančanin fails to demonstrate that the mitigating circumstances in his case indicate that the aims of punishment can be attained by a lesser punishment. Further, this provision provides that the reduction of sentences in these circumstances remains at the discretion of the court and the Trial Chamber was in any case aware of its obligation under Article 24(2) of the Statute and Rule 101(B)(ii) of the Rules to consider the mitigating circumstances before it,[1326] which it did.[1327] Accordingly, Šljivančanin's arguments are dismissed.

392. In light of the foregoing, Šljivančanin's sixth ground of appeal is dismissed in its entirety.

[1319] Šljivančanin Appeal Brief, paras 500-501; Šljivančanin Brief in Reply, paras 133-134.
[1320] Prosecution Respondent's Brief, para. 203.
[1321] Prosecution Respondent's Brief, para. 203.
[1322] Šljivančanin Brief in Reply, para. 129.
[1323] Trial Judgement, para. 690.
[1324] Trial Judgement, para. 679.
[1325] Trial Judgement, paras 679, 690.
[1326] Trial Judgement, para. 683.
[1327] Trial Judgement, para. 705. *See* also *supra* para. 388.

2. The Prosecution's appeal against Šljivančanin's sentence

393. The Prosecution submits under its third ground of appeal that the sentence of five years' imprisonment imposed by the Trial Chamber on Šljivančanin is manifestly inadequate because: (a) insufficient weight was given to Šljivančanin's role and responsibility[1328] and (b) insufficient weight was given to the "objective gravity" of the crimes, with regard to their scale, brutality and systematic nature and with regard to the impact on the victims and their vulnerability.[1329] The Prosecution also argues that a five year sentence has no deterrent value for people who will be similarly situated in the future.[1330] It seeks an increase in Šljivančanin's sentence to fall in the range of 15 to 25 years' imprisonment.[1331]

(a) Šljivančanin's role and responsibility

394. The Prosecution contends that insufficient weight was given to Šljivančanin's role and responsibility.[1332] The five year sentence, it argues, did not properly reflect the Trial Chamber's findings that Šljivančanin, as a senior security organ,[1333] had a legal duty to protect the prisoners,[1334] which stemmed from an "authority of a considerable scope in respect of the removal and security of the prisoners of war",[1335] that he breached it by failing to so act;[1336] that he specifically knew of instances of grave mistreatment and the imminent and ongoing threat to the security of the prisoners of war posed by the TOs and paramilitaries;[1337] and that his failure to act had a "substantial effect" on the commission of the tortures.[1338] In its view, the Trial Chamber erred by emphasizing what Šljivančanin had not been convicted of, finding him "only" responsible for aiding and abetting torture and thereby sentencing him to only five years' imprisonment.[1339]

395. Šljivančanin responds that, in assessing the gravity of the offence, the Trial Chamber gave due consideration to his role and responsibility.[1340] He points out that the Trial Chamber made express reference to and duly considered his particular contribution to the crimes by reason of his

[1328] Prosecution Notice of Appeal, para. 14; Prosecution Appeal Brief, paras 157-164.
[1329] Prosecution Notice of Appeal, para. 14; Prosecution Appeal Brief, paras 165-176.
[1330] Prosecution Appeal Brief, para. 178.
[1331] Prosecution Appeal Brief, para. 179.
[1332] Prosecution Appeal Brief, paras 157-164.
[1333] Prosecution Appeal Brief, para. 159, referring to Trial Judgement, paras 127-129.
[1334] Prosecution Appeal Brief, paras 159, 163, referring to Trial Judgement, para. 670.
[1335] Prosecution Appeal Brief, para. 160, quoting Trial Judgement, para. 667.
[1336] Prosecution Appeal Brief, para. 163, referring to Trial Judgement, para. 670.
[1337] Prosecution Appeal Brief, para. 161, referring to Trial Judgement, paras 175, 219, 371-372, 374-375, 388, 663-664. 666, 672.
[1338] Prosecution Appeal Brief, para. 163, referring to Trial Judgement, para, 670. *See* also Prosecution Brief in Reply, para. 97.
[1339] Prosecution Appeal Brief, para. 163, referring to Trial Judgement, para. 690. *See* also Prosecution Brief in Reply, paras 98-99.
[1340] Šljivančanin Respondent's Brief, para. 342.

duty, powers, authority and knowledge.[1341] He argues that the Prosecution misconstrues the Trial Chamber's use of the word "only" as minimising the seriousness of the crime; in his view, the Trial Chamber had appropriately observed that he had been acquitted or found not guilty of the other charges or bases of liability, indicating that the sentencing appropriately took into account the form and degree of the participation of the accused in the totality of his criminal conduct.[1342]

396. The Appeals Chamber notes that the Trial Chamber was aware of its obligation to consider the role and responsibility of the accused in assessing the gravity of the offence pursuant to Article 24(2) of the Statute[1343] and duly considered how Šljivančanin's role and responsibility contributed to the commission of the cruel treatment and torture of the prisoners of war:

> The Chamber has found Veselin Šljivančanin responsible for what happened at Ovčara during the afternoon and well before the executions. Despite being responsible for the security of the prisoners of war and having visited Ovčara at a time when they were being mistreated, Veselin Šljivančanin did nothing to stop the beatings or to prevent their continuation. He failed to give appropriate directions to military police guarding the prisoners, and he failed to secure, or even to seek, their reinforcement, it being within his capacity, and also his authority, to do those things.[1344]

397. The Appeals Chamber further notes that, in discussing his role and responsibility in the sentencing part, the Trial Chamber took care to reiterate its findings with regard to the exact scope of Šljivančanin's liability.[1345] The Trial Chamber stated that:

> […] it has only been established that Veselin Šljivančanin is criminally responsible for having aided and abetted the crimes of torture and cruel treatment by his omission to act, pursuant to Article 7(1) of the Statute. Further, as the same physical beatings of the prisoners constitute the cruel treatment and the physical element of the torture, Veselin Šljivančanin has been convicted only of aiding and abetting the crime of torture.[1346]

398. In the Appeals Chamber's view it is clear from the context of these statements that the Trial Chamber was not, contrary to the Prosecution's contention,[1347] emphasizing what Šljivančanin had not been convicted of or minimising the seriousness of his role, but was clarifying the sole basis of liability for the cruel treatment and torture of the prisoners that had been established. Indeed, the Trial Chamber used the word "only" twice in the portion of paragraph 690 of the Trial Judgement quoted above. However, the use of the word "only" in the second sentence of the quoted portion of paragraph 690 is meant to express that, as the same physical beatings of the prisoners constitute cruel treatment and the physical element of the torture, the Trial Chamber entered a conviction for torture only, based on the fact that the crime of torture requires an additional element. The

[1341] Šljivančanin Respondent's Brief, paras 333-334, referring to Trial Judgement, paras 667-668, 690.
[1342] Šljivančanin Respondent's Brief, paras 337-341.
[1343] Trial Judgement, para. 684.
[1344] Trial Judgement, para. 690.
[1345] Trial Judgement, paras 690-691.
[1346] Trial Judgement, para. 690.
[1347] Prosecution Appeal Brief, para. 163.

Prosecution thus fails to demonstrate that the Trial Chamber committed a discernible error in the exercise of its discretion in its consideration of Šljivančanin's role and responsibility in the crimes. In light of the foregoing, the Prosecution's arguments are dismissed.

(b) Gravity of the underlying crimes of the torture and cruel treatment of the prisoners

399. The Prosecution argues that insufficient weight was given to the "objective gravity" of the torture and cruel treatment of the prisoners in two respects: first, in terms of the scale of brutality and the systematic nature of the crimes and second, in terms of the impact on the victims in view of their vulnerability.[1348]

400. Indeed factors to be considered when assessing the gravity of the offence include, *inter alia,* the legal nature of the offence committed; the discriminatory nature of the crime where this is not considered as an element of the crime for the purposes of a conviction; the scale and brutality of the crime; the vulnerability of the victims and the consequences, effect or impact of the crime upon the victims and their relatives.[1349] Having said this, the Appeals Chamber emphasizes that as correctly noted by the Trial Chamber, a sentence must reflect the *inherent gravity* or the *totality* of the *criminal conduct of an accused*, giving due consideration to the particular circumstances of the case and to the form and degree of the participation of the accused.[1350] Thus, Šljivančanin's sentence must reflect the seriousness of the underlying crime of torture of the prisoners of war and the inherent gravity of his criminal conduct. Bearing this in mind, the Appeals Chamber will reach its conclusions on the Trial Chamber's assessment of the gravity of the offence after considering the Parties' submissions regarding those factors which were allegedly given insufficient weight by the Trial Chamber in reaching its determination.

(i) Arguments of the Parties

a. The scale, brutality and systematic nature of the crime

401. The Prosecution emphasizes the systematic and large-scale manner in which the torture of the prisoners of war was committed, as well as their extremely brutal nature,[1351] to argue that the "sheer horror" of this crime is not reflected in Šljivančanin's five year sentence.[1352]

[1348] Prosecution Appeal Brief, para. 165.
[1349] *See Rajić* Sentencing Judgement, paras 82-95; *Blaškić* Appeal Judgement, para. 683.
[1350] *Furundžija* Appeal Judgement, para. 249; *Blaškić* Appeal Judgement, para. 683.
[1351] Prosecution Appeal Brief, paras 166-171.
[1352] Prosecution Appeal Brief, para. 171.

402. Šljivančanin responds that although the "objective gravity" of a crime is always an important consideration in sentencing, such a factor "may well have a lesser effect on the determination of the appropriate sentence" in cases where the convicted person did not participate in any way in the *actus reus* of the crime.[1353] Therefore, he contends, the sentence appropriately reflects the fact that he did not participate in the perpetration of the torture of the prisoners of war at Ovčara, but was found guilty by reason of aiding and abetting by omission.[1354]

403. The Prosecution emphasizes in reply that the "objective gravity" of the crime, its scale, brutality and systematic nature are central factors to be considered in sentencing even if the accused participated as an aider and abettor and not as a committer[1355] and that the cases cited by Šljivančanin on this point do not support his view.[1356] It argues that there is no reason why a conviction for aiding and abetting by omission "should *per se* be considered of lesser gravity".[1357]

b. The impact on the victims and their vulnerability

404. The Prosecution submits that the sentence does not adequately take into account the Trial Chamber's acknowledgement of the serious mental and physical suffering of the victims in the Trial Judgement.[1358] It argues that the Trial Chamber, instead of considering the impact of the beatings and torture on the victims prior to their death, focused on the fact that almost all of the victims were subsequently murdered.[1359] Consequently, it argues, the five year sentence "does not reflect the objective gravity of the torture of 200 detainees".[1360] The Prosecution emphasizes the continuing impact of the torture upon the few survivors, as well as upon the families of all the victims.[1361] It further submits that the impact of the crimes on the victims was exacerbated by their extreme vulnerability at the time of the commission of the crimes, being *hors de combat* as a result of detention, and many being wounded or sick, having been taken from the Vukovar hospital.[1362]

405. Šljivančanin argues in response that the Prosecution's reliance on paragraph 685 of the Trial Judgement as evidence of this "downplaying" of the torture rather highlights the fact that very few

[1353] Šljivančanin Respondent's Brief, para. 349, citing *Aleksovski* Appeal Judgement, paras 182-190 and *Furundžija* Appeal Judgement, para. 249.
[1354] Šljivančanin Respondent's Brief, para. 350.
[1355] Prosecution Brief in Reply, para. 103.
[1356] Prosecution Brief in Reply, para. 103.
[1357] Prosecution Brief in Reply, para. 94.
[1358] Prosecution Appeal Brief, para. 172, referring to Trial Judgement, para. 525.
[1359] Prosecution Appeal Brief, para. 172, referring to Trial Judgement, para. 685.
[1360] Prosecution Appeal Brief, para. 165.
[1361] Prosecution Appeal Brief, paras 173-174.
[1362] Prosecution Appeal Brief, para. 175, referring to Trial Judgement, paras 510, 523, 528, 537-538.

of the people tortured that afternoon were not killed later that day.[1363] He submits that given that the consequences of murder are greater than the consequences of torture,[1364] and given that he was found not guilty in respect of the murders, the consequences of the torture on the families of the victims who were tortured and then murdered "is a criteria [*sic*] of lesser relevance in determining the appropriate sentence".[1365] He also contends that the Trial Chamber's findings in the body of the Trial Judgement as to the serious mental and physical suffering of victims as a result of the beatings indicate that the Trial Chamber took into consideration the consequences of the torture on both the surviving and the deceased victims in determining his sentence.[1366] He argues, in addition, that it cannot be established from the testimonies of the two witnesses referred to by the Prosecution in support of its argument on this point that they suffered from the consequences of what happened in Ovčara.[1367] Finally, he responds that the Trial Chamber duly considered the fact that the impact of the crimes was made worse by the fact that the victims were *hors de combat* and particularly vulnerable, as evidenced by many findings of the Trial Chamber recalled by the Prosecution in its Appeal Brief.[1368]

406. The Prosecution replies that Šljivančanin's submission that the Trial Chamber must have properly considered all the relevant sentencing factors since it made earlier findings on them misses the point, which is that the Trial Chamber "erroneously weighed these factors".[1369] It further replies that the Trial Chamber's brief noting of the "objective gravity" of the crimes and their impact on the victims and their families was "*solely* in relation to the killings", which indicates that the Trial Chamber did not properly consider the "objective gravity" of the tortures.[1370] It submits that Šljivančanin's argument that the impact on the families of those who were tortured and subsequently murdered should be a criterion of lesser importance is "unsupported" and "untenable" as it suggests that a crime should be considered less grave if followed by a more serious one and that the suffering of families caused by knowing that their loved one was tortured before being killed is less relevant just because the loved one was subsequently killed.[1371] The Prosecution contends that, contrary to Šljivančanin's submission, the consequences described by both witnesses referred to in its Appeal Brief are the direct effect of the events in Ovčara, as is clear from the Trial

[1363] Šljivančanin Respondent's Brief, paras 347-348, referring to Trial Judgement, para. 685, which reads: "Apart from a very few persons subjected to cruel treatment or torture, in the present case the victims of the offences were all murdered on the day".
[1364] Šljivančanin Respondent's Brief, para. 354.
[1365] Šljivančanin Respondent's Brief, para. 355.
[1366] Šljivančanin Respondent's Brief, para. 356.
[1367] Šljivančanin Respondent's Brief, para. 357. Šljivančanin contends that while Witness Berghofer claimed to suffer from the consequences of beatings in both Ovčara and Sremska Mitrovica, he testified that he was not hit while at the hangar.
[1368] Šljivančanin Respondent's Brief, para. 359, referring to Prosecution Appeal Brief, fns 321- 325.
[1369] Prosecution Brief in Reply, paras 95-96, 101.
[1370] Prosecution Brief in Reply, paras 102 and 104.

transcript.[1372] It also argues that while the Trial Chamber did find that the victims were *hors de combat*, as noted by Šljivančanin, it did not refer to their particular vulnerability as a factor when assessing his sentence.[1373]

(ii) Discussion

407. The Appeals Chamber agrees with Šljivančanin that the fact that an accused did not physically commit a crime is relevant to the determination of the appropriate sentence. Indeed, the determination of the gravity of the crime requires not only a consideration of the particular circumstances of the case, but also of the form and degree of the participation of the accused in the crime.[1374] However, while the practice of the International Tribunal indicates that aiding and abetting is a lower form of liability than ordering, committing, or participating in a joint criminal enterprise and may as such attract a lesser sentence,[1375] the gravity of the underlying crimes[1376] remains an important consideration in order to reflect the totality of the criminal conduct.

408. The Appeals Chamber notes that the Trial Chamber indicated its awareness that in assessing the gravity of the offence the overall impact of the crimes upon the victims and their families may be considered.[1377] In particular, the Trial Chamber noted that:

> Apart from a very few persons subjected to cruel treatment or torture, in the present case the victims of the offences were all murdered on the day. The consequences for them were absolute. Close family members have been left without their loved ones. In almost all cases the anguish and hurt of such tragedy has been aggravated by uncertainty about the fate which befell these victims.[1378]

409. The Trial Chamber did not make specific reference in the sentencing part of the Trial Judgement to the particular vulnerability of the prisoners of war at the time of the commission of the acts and the impact this had upon them, though there are findings to this effect in the body of the Trial Judgement.[1379] The Appeals Chamber observes that the Trial Chamber's consideration of the overall impact upon the victims and their families as reflected in the paragraph quoted above focused on the fact that most were murdered subsequent to being tortured "[a]part from a very few persons subjected to cruel treatment and torture". The Trial Chamber did not explicitly consider in the sentencing part of the Trial Judgement the consequences of the torture *per se* on the victims or

[1371] Prosecution Brief in Reply, para. 105.
[1372] Prosecution Brief in Reply, paras 106-109.
[1373] Prosecution Brief in Reply, para. 110.
[1374] *Furundzija* Appeal Judgement, para. 249; *Aleksovski* Appeal Judgement, para. 182.
[1375] *Simić* Appeal Judgement, para. 265; *Kvočka et al.* Appeal Judgement, para. 92; *Krstić* Appeal Judgement, para. 268; *Vasiljević* Appeal Judgement, paras 102, 182; *Krnojelac* Appeal Judgement, para. 75. *See* also *Semanza* Appeal Judgement, para. 388; *Orić* Trial Judgement, para. 280.
[1376] *Cf Čelebići* Appeal Judgement, para. 741.
[1377] Trial Judgement, para. 684.
[1378] Trial Judgement, para. 685.

their families. As Šljivančanin was convicted only for the torture of the prisoners of war, it is not entirely clear from the Trial Judgement how the Trial Chamber assessed the overall impact of the torture on the victims and their families in the determination of his sentence. The Appeals Chamber does not agree with Šljivančanin's contention that such consequences are a factor of "lesser relevance" in determining the appropriate sentence because the victims were subsequently murdered.[1380] With regard to Witnesses Cakalić and Berghofer, the trial transcripts relied upon by the Prosecution clearly show that they both suffer severe long-term harm from their mistreatment at Ovčara.[1381]

410. The Trial Chamber did not elaborate in the sentencing part of the Trial Judgement on the scale and brutality of the crimes.[1382] However, throughout the Trial Judgement, the Trial Chamber made a number of findings attesting to the horrific torture and cruel treatment of the prisoners of war. In particular, the Appeals Chamber recalls that all of the 200 prisoners of war, save four, were forced to pass through a gauntlet of Serb soldiers, who beat them severely as they passed through with a variety of implements including wooden sticks, rifle-butts, poles, chains and crutches, and verbally abused them.[1383] The beatings continued inside the hangar, and lasted for hours.[1384] Many were hit with implements such as iron rods and rife-butts and were kicked.[1385] Damjan Samardžić was punched and beaten so severely that he could not move for a long time.[1386] Kemal (Ćeman) Saiti was grabbed by the hair and his head was violently banged several times against the concrete floor.[1387] No one attempted to stop the violence,[1388] and there were shifts of soldiers organised to continue the beatings.[1389]

411. The Prosecution submits that the Trial Chamber's "acknowledgement that the beatings and tortures caused serious mental and physical suffering in the body of the [Trial Judgement] fails to recognise, in sentencing, the extremely damaging effect on the victims".[1390] The Trial Chamber had found that the beatings inflicted serious pain and suffering,[1391] and that the conditions of detention at Ovčara, including the atmosphere of terror and the constant threat of violence, caused serious

[1379] Trial Judgement, paras 510, 523, 537-538.
[1380] Šljivančanin Respondent's Brief, para. 355.
[1381] Prosecution Appeal Brief, paras 173-174. *See* Emil Cakalić, T. 5908, 5933-5934, Dragutin Berghofer, T. 5288, 5293.
[1382] Trial Judgement, paras 689-691.
[1383] Trial Judgement, para. 526.
[1384] Trial Judgement, para. 527.
[1385] Trial Judgement, para. 527.
[1386] Trial Judgement, para. 527.
[1387] Trial Judgement, para. 527.
[1388] Trial Judgement, para. 237.
[1389] Trial Judgement, para. 238.
[1390] Prosecution Appeal Brief, para. 172.
[1391] Trial Judgement, para. 527.

mental or physical suffering.[1392] In this respect, the Appeals Chamber notes that the pain inflicted upon the prisoners of war constituted one of the elements of the crime of torture and, as such, could not have been considered by the Trial Chamber in its assessment of the gravity of the offence for the purposes of sentencing. Nonetheless, "the extent of the long-term physical, psychological and emotional suffering of the immediate victims is relevant to the gravity of the offences".[1393]

412. While the Appeals Chamber acknowledges that the Trial Judgement, read as a whole,[1394] contains numerous findings to the effect that, in light of the murders of the prisoners of war, close family members had been left without their loved ones, and that in almost all cases the anguish and hurt of such tragedy had been aggravated by uncertainty about the fate which befell these victims,[1395] the Appeals Chamber is unable to determine how the Trial Chamber weighed the consequences of the torture upon the victims and their families, or whether or to what extent it considered the particular vulnerability of the prisoners,[1396] in the determination of Šljivančanin's sentence. As noted earlier, these crimes were characterized by extreme cruelty and brutality towards the prisoners of war, some of whom may have been previously injured as they had been taken from the Vukovar hospital; these persons were protected under international humanitarian law by reason of their status and particular vulnerability.[1397]

413. In light of the foregoing, the Appeals Chamber finds that there was a discernible error in the Trial Chamber's exercise of discretion in imposing the sentence.[1398] Even though the Trial Chamber did not err in its factual findings, considering the above findings of the Trial Chamber on the gravity of the crimes, and in particular the consequences of the torture upon the victims and their families, the particular vulnerability of the prisoners, and the very large number of victims, the Appeals Chamber finds that the sentence of five years' imprisonment is so unreasonable that it can be inferred that the Trial Chamber must have failed to exercise its discretion properly.[1399] The Appeals Chamber thus finds that a five years' imprisonment sentence does not adequately reflect the level of gravity of the crimes committed by Šljivančanin.

[1392] Trial Judgement, para. 525.
[1393] *Blaškić* Appeal Judgement, para. 683, quoting *Krnojelac* Trial Judgement, para. 512.
[1394] *Cf. Naletilić and Martinović* Appeal Judgement, para. 435.
[1395] Trial Judgement, para. 685.
[1396] The particular vulnerability of victims has been considered as an aggravating circumstance by the Appeals Chamber. *See Blaškić* Appeal Judgement, para. 686; *Kunarac et al.* Appeal Judgement, para. 353.
[1397] Hence, there is a Convention devoted to the treatment of prisoners of war. *See* generally Geneva Convention III. The vulnerability of the victims of a crime can be considered evidence of the gravity of the crime. *See Kunarac* Appeal Judgement, para. 352; *Blaškić* Appeal Judgement, para. 683.
[1398] *Cf. Aleksovski* Appeal Judgement, para. 187.
[1399] *Bralo* Judgement on Sentencing Appeal, para. 9; *Galić* Appeal Judgement, para. 394; *Momir Nikolić* Judgement on Sentencing Appeal, para. 95; *Babić* Judgement on Sentencing Appeal, para. 44.

(c) Deterrence

414. The Prosecution contends that Šljivančanin's sentence should convey to those in positions of power that their failure to meet their responsibilities will be properly punished; in light of this, an increased sentence would serve better as a deterrent than a mere five year sentence.[1400] Šljivančanin does not make any specific arguments in response to this contention.

415. The Appeals Chamber recalls that one of the purposes of the International Tribunal, in bringing to justice persons responsible for serious violations of international humanitarian law,[1401] is to deter future violations.[1402] However, even if deterrence is one of the main purposes of sentencing (the other being retribution),[1403] this factor "must not be accorded undue prominence in the overall assessment of the sentences to be imposed on persons convicted by the International Tribunal".[1404] The Trial Chamber's duty remains to tailor the penalty to fit the individual circumstances of the accused and the gravity of the crime.[1405]

416. Although the Trial Chamber did not refer specifically to deterrence when considering the factors it took into account in sentencing Šljivančanin, having referred to deterrence in general terms earlier as one of the "primary objectives of sentencing",[1406] it may be assumed that it was taken into account in sentencing him.[1407] Accordingly, the Prosecution's arguments are dismissed.

417. In light of the foregoing, the Prosecution's third ground of appeal is allowed in part, insofar as a five years' imprisonment sentence does not adequately reflect the level of gravity of the crimes committed by Šljivančanin.

D. Impact of the Appeals Chamber's Findings on Šljivančanin's Sentence

418. The Appeals Chamber recalls that, pursuant to Rule 87(C) of the Rules regarding imposition of sentences, a Trial Chamber "shall impose a sentence in respect of each finding of guilt and indicate whether such sentences shall be served consecutively or concurrently, unless it decides to exercise its power to impose a single sentence reflecting the totality of the criminal conduct of the

[1400] Prosecution Appeal Brief, para. 178.
[1401] *Tadić* Jurisdiction Decision, para. 72.
[1402] *Čelebići* Appeal Judgement, para. 801.
[1403] *Aleksovski* Appeal Judgement, para. 185; *Čelebići* Appeal Judgement, para. 806; *Blaškić* Appeal Judgement, para. 678.
[1404] *Tadić* Judgement in Sentencing Appeal, para. 48, cited with approval in the *Aleksovski* Appeal Judgement, para. 185, *Čelebići* Appeal Judgement, para. 801 and *Dragan Nikolić,* Judgement on Sentencing Appeal, para. 46.
[1405] *Čelebići* Appeal Judgement, para. 717.
[1406] Trial Judgement, para. 683, citing *Tadić* Judgement in Sentencing Appeal, para. 48; *Deronjić* Sentencing Appeal Judgement, paras 136-137 referring to *Čelebići* Appeal Judgement, paras 800-801, 860; *Kordić and Čerkez* Appeal Judgement, paras 1073-1075; 1079; *Blaškić* Appeal Judgement, para. 678; *Alekovski* Appeal Judgement, paras 145, 185; *Dragan Nikolić* Judgement on Sentencing Appeal, para. 46; *Stakić* Appeal Judgement, para. 402.
[1407] *Cf Čelebići* Appeal Judgement, para. 803.

accused". In imposing a single sentence of five years' imprisonment upon Šljivančanin,[1408] the Trial Chamber reflected the totality of his criminal conduct. The Appeals Chamber recalls that it has found that there was a discernible error in the Trial Chamber's exercise of discretion in imposing a five years' imprisonment sentence upon Šljivančanin for having aided and abetted the torture of prisoners of war at the hangar at Ovčara on 20 November 1991 under Count 7 of the Indictment.[1409] The Appeals Chamber further recalls that it has quashed Šljivančanin's acquittal for having aided and abetted the murder of prisoners of war at the hangar at Ovčara on 20 November 1991 under Count 4 of the Indictment.[1410]

419. In light of the foregoing, the Appeals Chamber, based on the circumstances of the case, including the seriousness of the crimes for which Šljivančanin was convicted and the quashing of his acquittal outlined above, raises, Judge Pocar and Judge Vaz dissenting, Šljivančanin's sentence to a term of 17 years' imprisonment.

[1408] Trial Judgement, para. 716.
[1409] *See supra* paras 412-413.
[1410] *See supra* para. 103.

VII. DISPOSITION

For the foregoing reasons, **THE APPEALS CHAMBER**,

PURSUANT TO Article 25 of the Statute and Rules 117 and 118 of the Rules;

NOTING the respective written submissions of the Parties and the arguments they presented at the appeals hearing on 21 and 23 January 2009;

SITTING in open session;

ALLOWS the Prosecution's first ground of appeal, in part, insofar as it argues that the Trial Chamber erred in law in finding that, for the purposes of Article 5 of the Statute, the individual victims of crimes against humanity must be civilians; **DISMISSES** the Prosecution's first ground of appeal in all other respects; **AFFIRMS** the acquittals of Veselin Šljivančanin and Mile Mrkšić under Article 5 of the Statute;

ALLOWS by majority, the Prosecution's second ground of appeal; **QUASHES**, Judge Vaz dissenting, Veselin Šljivančanin's acquittal under Count 4 of the Indictment, and **FINDS**, pursuant to Articles 3 and 7(1) of the Statute, Judge Pocar and Judge Vaz dissenting, Veselin Šljivančanin guilty under Count 4 of the Indictment for aiding and abetting the murder of 194 individuals identified in the Schedule to the Trial Judgement;

ALLOWS the Prosecution's third ground of appeal, in part, insofar as a five years' imprisonment sentence does not adequately reflect the level of gravity of the crimes committed by Šljivančanin;

DISMISSES the Prosecution's appeal in all other respects;

DISMISSES Mile Mrkšić's appeal in its entirety;

AFFIRMS Mile Mrkšić's convictions under Counts 4, 7 and 8 of the Indictment;

DISMISSES Veselin Šljivančanin's appeal in its entirety;

AFFIRMS Veselin Šljivančanin's conviction under Count 7 of the Indictment;

AFFIRMS Mile Mrkšić's sentence of 20 years of imprisonment, subject to credit being given under Rule 101(C) of the Rules for the period already spent in detention;

QUASHES Veselin Šljivančanin's sentence of five years of imprisonment imposed by the Trial Chamber and **IMPOSES** by majority, Judge Pocar and Judge Vaz dissenting, a sentence of 17 years, subject to credit being given under Rule 101(C) of the Rules for the period already spent in detention;

ORDERS, in accordance with Rule 103(C) and Rule 107 of the Rules, that Mile Mrkšić and Veselin Šljivančanin are to remain in the custody of the International Tribunal pending the finalisation of arrangements for their transfer to the State where their sentences will be served.

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

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Judge Theodor Meron, Presiding Judge Mehmet Güney

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Judge Fausto Pocar Judge Liu Daqun Judge Andrésia Vaz

Judge Fausto Pocar appends a partially dissenting opinion.

Judge Andrésia Vaz appends a partially dissenting opinion.

Dated this fifth day of May 2009,
At The Hague,
The Netherlands

[Seal of the International Tribunal]

VIII. PARTIALLY DISSENTING OPINION OF JUDGE POCAR

1. In this Judgement, the Appeals Chamber allows the Prosecution's second ground of appeal and the Prosecution's appeal on Šljivančanin's sentence.[1] I agree with the Majority's reasoning and conclusion that the Trial Chamber committed an error of law in finding that Šljivančanin's duty to protect the prisoners of war pursuant to the laws and customs of war came to an end upon Mrkšić's order to withdraw.[2] I am also in agreement with the Majority that the Trial Chamber committed a discernible error in the exercise of its discretion when it found that a sentence of five years' imprisonment adequately reflected the gravity of the crimes committed by Šljivančanin, and in particular, the consequences of the torture upon the victims and their families, the especial vulnerability of the prisoners, and the very large number of victims.[3] However, for the reasons detailed below, I am unable to agree with the rest of the reasoning developed by the Majority in the discussion of the Prosecution's second ground of appeal or with the consequent conviction of Šljivančanin for aiding and abetting murder.[4] I also disagree with the Majority's decision to increase the sentence imposed on Šljivančanin by the Trial Chamber.[5]

2. For the reasons already expressed in my dissenting opinions in *Prosecutor v. Galić*,[6] *Prosecutor v. Semanza*[7] and *Prosecutor v. Rutaganda*,[8] I do not believe that the Appeals Chamber has the power to remedy an error of the Trial Chamber by subsequently entering new or more serious convictions on appeal. Similarly, I do not believe that the Appeals Chamber has the power to impose a new sentence on the accused that is higher than that which was imposed by the Trial Chamber. The Appeals Chamber is bound to apply Article 25(2) of the Statute of the International Tribunal ("ICTY Statute") in such a manner as to comply with fundamental principles of human rights as enshrined in, *inter alia*, the International Covenant on Civil and Political Rights ("ICCPR").[9] Article 14(5) of the ICCPR provides that "[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law". Accordingly, the right to appeal convictions, not excluding convictions entered for the first time on appeal, should be granted to an accused before the International Tribunal.

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[1] Appeal Judgement, paras 101-103 and 417.
[2] Appeal Judgement, paras 64-74 and 75, first sentence.
[3] Appeal Judgement, para. 413.
[4] Appeal Judgement, paras 61-63 and 76-103.
[5] Appeal Judgement, paras 418-419.
[6] *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Judgement, 30 November 2006, Partially Dissenting Opinion of Judge Pocar, p. 187, para. 2.
[7] *Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-A, Judgement, 20 May 2005, Dissenting Opinion of Judge Pocar, pp. 131-133.
[8] *Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Case No. ICTR-96-3-A, Judgement, 26 May 2003, Dissenting Opinion of Judge Pocar ("*Rutaganda* Dissenting Opinion"), p. 4.
[9] International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, *entered into force* 23 March 1976.

3. The Appeals Chamber has had occasion to consider the scope of its powers in relation to Prosecution appeals against acquittals or sentencing in many cases. Regrettably, the practice of the International Tribunal and the International Criminal Tribunal for Rwanda ("ICTR") in relation to Prosecution appeals has been, and has been described as, "inconsistent".[10] I have analysed such practice in my previous dissents, and will not recall it here in detail.[11] I wish only to note that, in the framework of its past oscillating jurisprudence, the Appeals Chamber has never clarified which reasons, if any, justify the departure of the Appeals Chamber from the unconditional right preserved in the ICCPR to have both conviction and sentence reviewed by a higher court.[12] Nor does the Appeals Chamber do so in the present Judgement. I submit that the Appeals Chamber cannot regard its power to enter new convictions or impose higher sentences as self-evident. Furthermore, I consider that no reasons exist to permit the International Tribunal to subtract itself from applying the principles enshrined in the ICCPR, in accordance with the meaning given to them by the Human Rights Committee ("HRC"), that is, the very body entrusted to interpret the ICCPR for the overall purpose of monitoring its application and implementation.

4. The HRC has repeatedly stated that it is permissible for a person to be convicted and sentenced for the first time by the highest court in a jurisdiction, but that "this circumstance alone cannot impair the defendant's right to review of his conviction and sentence by a higher court".[13] Moreover, in *Gomaríz v. Spain*, the HRC held that Article 14(5) "not only guarantees that the judgement will be placed before a higher court […] but also that the *conviction* will undergo a second review".[14] That is, where a person is convicted after an appeal against an acquittal, he has a right to a second review of his conviction and sentence by a higher court. This accords with the

[10] *See, for example*, Bing Bing Jia, "The Right of Appeal in the Proceedings Before the ICTY and ICTR", in Gabriella Venturini and Stefania Bariatti (eds.), *Liber Fausto Pocar. Diritti individuali e giustizia internazionale* (Milano: Giuffrè, 2009), p. 425.

[11] *See Rutaganda* Dissenting Opinion, pp. 1-3; *see also Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Judgement, 19 April 2004, paras 219-229 and p. 87; *Prosecutor v. Milomir Stakić*, Case No. IT-97-24-A, Judgement, 22 March 2006, p. 144; *Prosecutor v. Milan Martić*, Case No. IT-95-11-A, Judgement, 8 October 2008, p. 128; *see contra Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-A, Judgement, 20 May 2005, pp. 131-133; *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Judgement, 30 November 2006, p. 186; *Prosecutor v. Athanase Seromba*, Case No. ICTR-2001-66-A, Judgement, 12 March 2008, para. 239.

[12] In the context of the *Rutaganda* Appeal Judgement, Judges Meron and Jorda observed in their Separate Opinion that the absence of any right to appeal a conviction entered for the first time by the Appeals Chamber, save in the case where the matter is remitted to the Trial Chamber, "is likely to infringe upon the fundamental principle of fairness recognized both in international law and many national legal systems". They noted that, as the sentence was not being increased, it was not necessary to fully determine, on that occasion, the compliance of the Appeals Chamber's approach with this "fundamental principle of fairness". Nevertheless, they considered that "given the importance of the issue raised, it is absolutely necessary for the Appeals Chamber to deal with it in the future, in order to find solutions consistent with fundamental principles of fairness and due process" (*Rutaganda* Appeal Judgement, Separate Opinion of Judges Meron and Jorda, p. 1). The Appeals Chamber has not yet addressed the abovementioned issue.

[13] HRC, Communication No. 1095/2002, *Gomaríz v. Spain*, 26 August 2005 ("*Gomaríz v. Spain*"), para. 7.1; HRC, Communication No. 1073/2002, *Terron v. Spain*, 5 November 2004, para. 7.4; HRC, Communication No. 836/1998, *Gelazauskas v. Lithuania*, 17 March 2003, para. 7.2; *see also* HRC, Communication No. 75/1980, *Finali v. Italy*, 31 March 1983, para. 12.

[14] *Gomaríz v. Spain*, para. 7.1 (emphasis added).

view of the HRC in *Larrañaga v. The Philippines*, where it was held that Article 14(5) was violated when the accused was denied the review of his death sentence after being convicted of rape and murder by the Supreme Court of the Philippines following an acquittal at first instance.[15]

5. This analysis confirms the position I have taken in my previous dissents, namely, that the standard of human rights espoused by the United Nations is that a person convicted on appeal following an acquittal at first instance is entitled to a review of his or her conviction by a higher tribunal according to law. Pursuant to the ICCPR and its interpretation by the HRC, over 150 States are held to this standard. It would be unjustifiable for the International Tribunal to adopt a lower standard of human rights, particularly given the serious nature of the prosecutions. In my view, there is no merit to any of the arguments which have been adduced over time to counter the binding value of the principles enshrined in the ICCPR for the International Tribunal. I will now address those arguments in turn.

6. The applicability of the principle contained in Article 14(5) of the ICCPR and accompanying jurisprudence to the International Tribunal has been brought into question on the ground that it does not reflect a custom. In particular, it has been observed that a number of States parties to the ICCPR have entered either interpretative declarations or reservations to Article 14(5) of the ICCPR. It has further been pointed out that 42 States parties to the ICCPR have also ratified the Seventh Protocol to the European Convention on Human Rights and Fundamental Freedoms ("ECHR").[16] Article 2(1) of the Seventh Protocol to the ECHR prescribes that "[e]veryone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal", but also states in the following paragraph that "[t]his right shall be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal". It has been argued that, in ratifying the Seventh Protocol to the ECHR, these 42 States expressed their position that there is nothing in Article 14(5) of the ICCPR which was efficacious to prohibit them from making exceptions to the obligation to provide for an appeal from a conviction.

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[15] HRC, Communication No. 1421/2005, *Larrañaga v. The Philippines,* 24 July 2006, para. 7.8; *see also* HRC, Communication No. 1381/2005, *Moreno v. Spain*, 25 July 2007, para. 7.2; HRC, Communication No. 1332/2004, *Juan García Sánchez and Bienvenida González Clares v. Spain*, 15 November 2006, para. 7.2; HRC, Communication No. 1325/2004, *Mario Conde Conde v. Spain*, 13 November 2006, para. 7.2; *compare with* HRC, Communication No. 521/1992, *Kulomin v. Hungary*, 22 March 1996, para. 11.7, in which the Supreme Court quashed the judgment of the Court of First Instance which had found the accused guilty of murder with cruelty, and instead convicted the accused of murder with cruelty and out of financial gain. The HRC held that there was no contravention of Article 14(5) as there was a subsequent review by the President of the Supreme Court of that decision.

[16] Protocol No. 7 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. 117, *entered into force* 1 November 1988 ("Seventh Protocol to the ECHR").

7. I observe, at the outset, that the Appeals Chamber had occasion to state that the ICCPR "is part of general international law and is applied on that basis".[17] I further note that, as the Appeals Chamber is bound to observe the principle enshrined in Article 14(5) of the ICCPR regardless of the status of customary international law on this point, the aforementioned objection to the applicability of the principles contained in the ICCPR is pointless. In any event, I submit that none of the aforementioned arguments is conclusive. First, only a very limited number of States have entered such declarations or reservations, a number of which present a different scope from that relevant to the present case.[18] Second, I note that the ICCPR and the ECHR provisions as to right of appeal are not in conflict, but rather present two different standards of protection of fair trial rights. One of the key principles in the international protection of human rights is that when there are diverging international standards, the highest should prevail. In addition, the difference in the scope of the obligations accepted by States under the ICCPR and ECHR is explained by the different enforcement mechanisms attached to those instruments. In ratifying the ECHR, States must accept the compulsory jurisdiction of the European Court of Human Rights, the decisions of which are binding on those States.[19] Accordingly, the fact that States parties to the ECHR have ratified an instrument wherein the scope of certain rights is limited, cannot be read as evidence that those States only recognise such rights within the specified limits. Rather, it means that those States have only accepted the *jurisdiction* of the European Court of Human Rights to that limited extent.

8. Another argument has been made that the International Tribunal, not being a State, cannot make reservations to Article 14(5) of the ICCPR, but that its Statute may be treated as having the effect of one. I disagree, as I consider that the fact that no reservation to Article 14(5) of the ICCPR could be entered on behalf of the International Tribunal further supports the argument that the principle enshrined in this Article applies to the International Tribunal without exception. Neither the fact that the International Tribunal is not a national tribunal, nor the fact that it cannot become a party to the ICCPR, challenge the binding value of the ICCPR or diminish the relevance of the views of the HRC. Rather, the particular circumstances of the International Tribunal militate against

[17] *Prosecutor v. Jean-Bosco Barayagwiza,* Case No. ICTR 97-19-AR72, Decision, 3 November 1999, para. 40. The Appeals Chamber continued by stating that, conversely, "[h]uman right treaties such as the [ECHR] and the American Convention on Human Rights, and the jurisprudence developed there under, are persuasive authorit[ies] which may be of assistance in applying and interpreting the Tribunal's applicable law. Thus, they are not binding of their own accord on the Tribunal. They are, however, authoritative as evidence of international custom".

[18] Only 14 States have entered reservations or declarations pertaining to Article 14(5). Not all of these reservations relate specifically to the question at hand. Rather, a reservation or declaration to not provide a right of appeal against a conviction pronounced on appeal following the reversal of an acquittal has been only specifically entered by Austria, Belgium, Germany, Luxembourg and Norway (however, following the adoption of the Criminal Procedure Act, which introduced the right to the re-examination of a conviction by an higher court, Norway limited its reservation, excluding the right to appeal against convictions entered on appeal only if the appeal is grounded on alleged errors in the assessment of evidence in relation to the issue of guilt; *see* HRC, Communication No. 789/1997, *Bryhn v. Norway,* 2 November 2000, in *Report of the Human Rights Committee, G.A.O.R.,* Supplement No. 40 (A/55/40, Vol. II)).

[19] ECHR, Section II; *see,* in particular, Articles 19 and 46.

such a finding. The International Tribunal is an organ of the United Nations, the General Assembly of which unanimously approved the ICCPR. As a direct expression of the very same international organization which instigated and unanimously endorsed the ICCPR, the International Tribunal is not entitled to avoid the application of the principles enshrined therein. The absence of any avenue of complaint about the International Tribunal's non-compliance with the ICCPR is all the more reason to carefully protect an individual's right to appeal, particularly given the serious nature of the prosecutions.

9. Further, the ICTY Statute cannot be read as exonerating the International Tribunal from observing the principle enshrined in Article 14(5) of the ICCPR. In particular, I find no merit in the argument that the logical consequence of provision in the ICTY Statute for the Prosecution to appeal acquittals is that convictions may be entered on appeal. In his Report, the Secretary General set out that the right to appeal should be provided for under the Statute "as it is a fundamental element of individual civil and political rights and has, *inter alia*, been incorporated in the [ICCPR]".[20] In light of the above, basic rules of interpretation dictate that, in the absence of an express exception, the Statute cannot be interpreted as derogating from the fundamental right to appeal enshrined in Article 14(5), if it can be interpreted in accordance with the right to appeal as reflected therein. The Prosecution's right to appeal acquittals may be ensured in the context of the ICTY Statute without infringing upon the accused's (superior) right to appeal against convictions. It can be done simply through a decision to remit a case to a Trial Chamber when the Appeals Chamber considers that a new conviction should be entered or a sentence increased. As a result, even if the text of the Statute were to permit a different interpretation, which I do not concede, the interpretation that conforms to the principle of the right to appeal must be preferred.

10. Finally, it has been argued that reasons of efficiency would militate against recognising an accused's right to appeal against convictions entered for the first time on appeal. This position, however, falls against the long-lasting jurisprudence of the Appeals Chamber, which has repeatedly stated that concerns about efficiency in the administration of justice can never be implemented to the detriment of human rights standards.[21]

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[20] Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. No. S/25704 (3 May 1993), para. 116.

[21] *See, for example, Prosecutor v. Naser Orić*, Case No. IT-03-68-AR73.2, Interlocutory Decision on Length of Defence Case, 20 July 2005, para. 8; *Prosecutor v. Edouard Karamera et al.,* Case No. ICTR-98-44-AR15*bis*.3, Decision on Appeals Pursuant to Rule 15*bis*(D), 20 April 2007, paras 24 and 28; *Prosecutor v. Jovica Stanišić and Franko Simatović,* Case No. IT-03-69-AR73.2, Decision on Defence Appeal of the Decision on Future Course of the Proceedings, 16 May 2008, para. 19; *Prosecutor v. Jadranko Prlić et al.,* Case No. IT-04-74-AR73.9, Decision on Slobodan Praljak's Appeal Against the Trial Chamber's Decision of 18 May 2008 on Translations, 4 September 2008, para. 25.

11. In addition, I observe that the International Tribunal and the ICTR, established by the Security Council on behalf of the international community to deal with the most serious crimes, stand as examples of best practice for the prosecution of international crimes. These bodies do so at a time of great importance in the history of international criminal law, as evident through the development of the International Criminal Court, currently engaging in its first prosecutions, and the establishment of *ad hoc* and mixed tribunals such as the Special Tribunal for Lebanon and the Extraordinary Chambers in the Courts of Cambodia. Accordingly, it is incumbent on the International Tribunal and the ICTR to apply the highest standard of human rights.

12. In conclusion, I consider that, after having found that the Trial Chamber committed an error of law in affirming that Šljivančanin did not have a duty to protect the prisoners of war following Mrkšić's order to withdraw, the Appeal Chambers should have taken a different course in this Judgement. It should have remitted the matter to the Judges of first instance for them to address whether the available evidence would show, beyond reasonable doubt, Šljivančanin's guilt for aiding and abetting murder. This approach was especially compelling in the circumstances of the present case as, in light of its finding that it was not incumbent on Šljivančanin to ensure the safety of prisoners of war, many circumstances of fact were completely unexplored by the Trial Chamber. The Appeals Chamber engages itself in highly fact-intensive evaluations of whether Šljivančanin was aware of Mrkšić's order to withdraw the JNA troops,[22] whether Šljivančanin's failure to act contributed to the murders of the prisoners of war,[23] and whether he realised that the killing of the prisoners of war at Ovčara had become a likely occurrence.[24] The Appeals Chamber enteres a conviction based on the trial record without having observed the witness testimony or the presentation of evidence, factors which may be particularly important in assessing witness credibility. In so doing, the Appeals Chamber enters, for the first time in this case, findings on matters which are primarily within the responsibility of the Trial Chamber, such as finding on issues of fact that are crucial to a verdict of guilt. Such findings are now destined to remain unchallenged, in clear violation of Šljivančanin's right to appeal against convictions.

13. Likewise, remitting the determination of sentence to the Trial Chamber in order to ensure that the right to appeal against sentence is upheld is especially important in the circumstances of this case. In this case, the Appeals Chamber does not consider that the Trial Chamber merely erred by improperly taking into account one of the sentencing factors at issue, or made an error as to some of the facts upon which it exercised its discretion, or failed to correctly note one or more of the legal principles governing sentencing. Rather, the Appeals Chamber finds that the Trial

[22] Appeal Judgement, paras 61-62.
[23] Appeal Judgement, paras 76-100.
[24] Appeal Judgement, para. 63.

Chamber completely erred in its determination of an appropriate sentence, even though it properly took into account all of the relevant sentencing factors, due to the extremely grave nature of the crimes committed. In other words, the Appeals Chamber considers that the sentence must be wholly reassessed. Such a *de novo* reassessment must be made by a Trial Chamber, being the Chamber with primary responsibility for evaluation of evidence and with broad discretion to fulfil its obligation to individualise penalties to fit the circumstances of the accused and the gravity of the crime. Such a complete reassessment makes it all the more imperative that the resulting sentence be subject to review by a higher court.

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

Done this fifth day of May 2009,
At The Hague
The Netherlands

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Judge Fausto Pocar

IX. PARTIALLY DISSENTING OPINION OF JUDGE VAZ

1. I support the Judgement of the Appeals Chamber in respect of the appeals filed by Mile Mrkšić and Veselin Šljivančanin. I regret not to be able to share the position of the majority as regards the second ground of appeal filed by the Prosecution. In my view, for the reasons explained below, the Appeals Chamber could not find beyond reasonable doubt that Šljivančanin aided and abetted the crime of murder and it, therefore, should have left the Trial Chamber's conclusion on acquittal undisturbed. Consequently, I cannot support the revision of the sentence based on the new conviction entered by the Appeals Chamber.[1]

A. ***Mens rea***

2. I am not entirely convinced that Šljivančanin possessed the required *mens rea* for aiding and abetting murder by omission.[2] In this regard, I note that in order to enter a conviction under this mode of responsibility, the Trial Chamber must have been satisfied beyond reasonable doubt that Šljivančanin knew that (i) killings of the prisoners of war were likely to take place at Ovčara and that (ii) his failure to take action in this regard would assist the commission of the murders.[3] The Trial Chamber found itself unable to so conclude and thus acquitted Šljivančanin of the crime of murder.[4] To overturn this acquittal, the Appeals Chamber must find that the inference made by the Trial Chamber was unreasonable and that the *only* reasonable inference on the evidence was that Šljivančanin did possess the required knowledge.[5]

3. Chronologically, the Trial Chamber – in full consideration of the circumstantial evidence, including Šlivančanin's knowledge of previous incidents of mistreatment and killing[6] - reasonably concluded that Šljivančanin could not foresee that the killings would occur as long as the prisoners of war remained under the authority of the JNA. These conclusions are confirmed by the Appeal Judgement.[7] The Trial Chamber then found that it was *only after the full execution of the order* to withdraw the JNA troops that the killings became a likely occurrence.[8] However, it was unable to conclude with certainty that Šljivančanin learnt about this order at the time it was given by Mrkšić.[9]

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[1] Appeal Judgement, paras 418-419.
[2] Appeal Judgement, paras 61-63.
[3] *Cf. Orić* Appeal Judgement, para. 43; Appeal Judgement, para. 49.
[4] Trial Judgement, paras 672-674.
[5] *Cf. Stakić* Appeal Judgement, para. 219; *Čelebići* Appeal Judgement, para. 458; *Kvočka* Appeal Judgement, para. 18; *Krnojelac* Trial Judgement, para. 67.
[6] Trial Judgement, paras 375, 663-666, 672, 691. This knowledge, coupled with the JNA's failure to protect the prisoner of war, formed basis for Šljivančanin's conviction for torture (Trial Judgement, paras 663-667, 672, 674, 715).
[7] Appeal Judgement, paras 57-60.
[8] Trial Judgement, para. 672.
[9] Trial Judgement, paras 387-389, 661, 672, 691.

On the contrary, it underlined that any suggestion that he was informed of it through "other means" than being at Negoslavci would be a mere conjecture.[10] In this situation, the Trial Chamber did not pursue the analysis as to when and whether he learnt about it at a later stage, because it found that Šljivančanin's responsibility came to an end "with the withdrawal of the last JNA troops".[11]

4. The Appeal Judgement concludes that Šljivančanin knew that the killings were likely to occur as soon as he learnt about the order to withdraw.[12] According to the Appeal Judgement, this happened during his meeting with Mrkšić "on the night of 20 November 1991" as "Mrkšić must have told Šljivančanin that he had withdrawn the JNA protection".[13] Yet, there is no clear evidence cited in support of this conclusion.[14] To the contrary, this crucial conclusion, which must be the *only* reasonable one, appears to be solely based on Šljivančanin's testimony that he inquired about further tasks and duties,[15] although there is no evidence as to what Mrkšić actually responded to that inquiry.[16] Moreover, there is no certainty about the exact time when this meeting took place and thus when Šljivančanin would have gained such knowledge.[17] In the circumstances of the case, where Šljivančanin would not have met with Mrkšić until after 8 p.m., the withdrawal of the troops was completed by 9 p.m.[18] and the killings followed shortly thereafter,[19] such lack of precision with regard to the culpable *mens rea* should be fatal to any conclusion regarding guilt beyond reasonable doubt.

5. In light of the strict standard of appellate review,[20] including the traditional deference accorded to Trial Chambers on factual matters, and having considered the trial record and the parties' submissions on appeal, I am not convinced that there exist sufficient grounds for overturning the Trial Chamber's conclusion in this regard. Naturally, absent his knowledge of the imminent likelihood of the murders, Šljivančanin could not have known that his inaction would contribute to the commission of those crimes.

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[10] Trial Judgement, para. 661.
[11] Trial Judgement, para. 673.
[12] Appeal Judgement, para. 62.
[13] Appeal Judgement, para. 62.
[14] *Cf.* Trial Judgement, para. 388; Veselin Šljivančanin, T.13663-13666, 13983-13990; Ljubisa Vukanović, T. 15046. Rather to the contrary, the Trial Chamber found that Šljavančanin was not involved in the transmission of Mrkšić's order to withdraw the JNA troops from Ovčara (Trial Judgement, para. 285) and did not attend the briefing at the command post in Negoslavci on 20 November 1991 (Trial Judgement, para. 387).
[15] Appeal Judgement, para. 62.
[16] I also note that this testimony was in fact given in the context of Šljivančanin's concern about the prisoners of war and his general feeling that they would be safe under the continuous JNA protection and not in reference to a particular discussion held in the context of the withdrawal (Veselin Šljivančanin, T.13981-13983).
[17] The Appeal Judgement remains silent on this issue.
[18] Trial Judgement, paras 86, 389.
[19] Trial Judgement, para. 252.
[20] *E.g. Blagojević and Jokić* Appeal Judgement, para. 9: "Where the Prosecution is appealing, the Appeals Chamber will reverse [an acquittal] only if it finds that no reasonable trier of fact could have failed to make the particular finding of fact beyond reasonable doubt and the acquittal relied on the absence of this finding."

6. In light of this conclusion, the issues of Šljivančanin's continuous duty to act and substantial contribution become moot, given that it would be impossible to enter a conviction absent the requisite *mens rea*. The analysis below illustrates my concerns in relation to the other two required elements, which I will deal with *ad abundantiam*, only to indicate that the Prosecution is far from having succeeded in eliminating "all reasonable doubt" as regards Šljivančanin's guilt.[21]

B. Šljivančanin's Duty to Act

7. While I share the Appeals Chamber's position with respect to the general legal principles applicable to the question of the continuity of the legal duty to protect prisoners of war,[22] I have some reservations on the specific facts of this case.

8. In the present case, the custody of the prisoners of war remained within the same Detaining Power all agents of which were bound to protect them, subject however to their respective hierarchical positions. Šljivančanin was subordinate to Mrkšić and, as opposed to a proper *de jure* authority, only had limited and temporarily delegated functions to protect the prisoners of war.[23] In these circumstances, the consequence of his commander's order to withdraw from Ovčara would be that Šljivančanin, while remaining an "agent" of the security organ of OG South, would cease to be the "agent in charge of the protection or custody".[24] Therefore, it did not, in my view, trigger Šljivančanin's duty towards the prisoners of war to the point that would require him to disobey (even assuming that he got informed of the order to withdraw in time) or take any other immediate measures.[25] In fact, this order returned the primary duty to Mrkšić and Šljivančanin had, at that moment in time, no valid reason to believe that his superior would fail to fulfil his obligation to ensure the protection of the prisoners of war.[26] In my mind, the Prosecution has failed to prove otherwise.

9. This leads me to my third point which concerns Šljivančanin's ability to act and the effect of his failure to do so.

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[21] *Cf.* Appeal Judgement, para. 49.
[22] I have reservations as to the direct application of Articles 12 and 46 of Geneva Convention III to the case at hand, given that there was no transfer to a different Detaining Power or to a different location, but support that the principle according to which the prisoners of war must be protected at all times "entails the obligation of each agent in charge of the protection or custody of the prisoners of war to ensure that their transfer to another agent will not diminish the protection the prisoners are entitled to." (Appeal Judgement, para. 71).
[23] See Trial Judgement, paras 399-400, 668, 673, 691. See also Appeal Judgement, paras 83-92.
[24] See Appeal Judgement, para. 89.
[25] The Appeal Judgement rightly underlines that "absent a specific delegation by the commander, Šljivančanin had no specific responsibility for prisoners of war, by virtue of his position as security organ of the OG South" (para. 86).
[26] See *supra*, para. 3.

C. Substantial Contribution

10. As rightly stated in the Appeal Judgement, to hold someone responsible for aiding and abetting by omission requires a showing beyond reasonable doubt of the substantial contribution by the reproached inaction to the commission of the specific crime.[27] Yet, the ultimate conclusions appear to be based on somewhat speculative suggestions as to what Šljivančanin should or could have done to prevent the crimes.[28]

11. The Appeal Judgement concedes that Šljivančanin can only be held responsible for omitting to take measures after he had learnt of the order to withdraw issued by his superior but does not specify when it actually happened.[29] The Appeal Judgement further concludes that Šljivančanin's authority over the military police of the 80 mtbr of the JNA was limited, as was his ability to act in order to protect the prisoners of war after Mrkšić's order.[30] The conclusions on Šljivančanin's ability to take the suggested measures thus appear to be based solely on his presumed influence over the troops that were no longer subordinated to him which would allow him to stop them from executing the order of their superior (Mrkšić).[31] In this sense, while I in no way contest the Appeals Chamber's finding regarding the principle that may require an officer to act beyond his *de jure* authority to counteract an illegal order,[32] I am not convinced that the facts of this case at the time when the order was given were such as to entail Šljivančanin's responsibility for failure to disobey or counteract that order, even assuming, *arguendo*, that he learnt of the order before its full execution.

12. In this sense, I note that there is no evidence on the record of the case as to how exactly Šljivančanin reacted when he learnt about the withdrawal (if he ever did so prior to the execution of the order), including whether he advised Mrkšić of the risks related thereto. It was not established at trial whether Šljivančanin spoke with General Vasiljević or with one of his colonels.[33] Furthermore, no evidence was adduced as to whether Šlivančanin attempted or not to stop the withdrawal. Finally and importantly, the limited time that elapsed between the moment when Šljivančanin supposedly

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[27] Appeal Judgement, para. 81.
[28] Appeal Judgement, paras 93, 96-100. I am furthermore not entirely convinced by the Prosecution's suggestion, taken on board by the Appeal Judgement (paras 97-98) that to have "a substantial effect on the crime" is the same as to fail to act in order to render those crimes "substantially less likely".
[29] Appeal Judgement, paras 79-80. See *supra*, para. 4, regarding the uncertainties with respect to the time available to Šljivančanin to act if he learnt about the order to withdraw less than an hour before its completion.
[30] Appeal Judgement, para. 92.
[31] Appeal Judgement, paras 93, 96-100.
[32] Appeal Judgement, para. 94 (3rd sentence *et seq.*). See also para. 99, fn. 331, clarifying that "[i]t is a principle of international humanitarian law that subordinates are bound not to obey *manifestly* illegal orders or orders that *they knew were illegal*" (emphasis added).
[33] Trial Judgement, para. 389; Veselin Šljivančanin, T. 13666-13667. Neither was Šlivančanin, or any other witness, questioned at trial as to whether he reported the withdrawal of the troops to Vasiljević and/or asked for any assistance in this regard.

learnt of the order to withdraw and the killings of the prisoners weakens most of the suggestions concerning the steps realistically available to Šljivančanin at that point. The Prosecution has not shown, at trial or on appeal, which additional avenues were available to Šljivančanin in this situation.[34]

D. Conclusion

13. In sum, I have reservations with respect to all three essential elements necessary to be established beyond reasonable doubt. Therefore, the analysis of the Appeal Judgement presents for me too many uncertainties to allow for the reversal for the acquittal. While the identified error of law needed to be corrected, the circumstances of the case are such that this error is without impact on the verdict. Indeed, the Prosecution has not shown that no reasonable Trial Chamber could make the factual findings leading to the conclusion on the acquittal. Furthermore, with respect to the findings that the Trial Chamber has not made (substantial contribution), the Prosecution has – in my mind – brought neither sufficient evidence at trial nor any compelling arguments on appeal to convince the Appeals Chamber to conclude on those matters beyond reasonable doubt itself.

14. According to the fundamental principle of criminal law, where there is doubt, there can be no conviction entered – *in dubio pro reo*. On appeal, this would mean that there are no sufficient reasons to overturn an acquittal.

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

Done this fifth day of May 2009,
At The Hague, The Netherlands

_____
Judge Andrésia Vaz

[34] AT. 234.

X. ANNEX I: PROCEDURAL HISTORY

A. Pre-Trial and Trial Proceedings

1. The initial indictment against Mile Mrkšić, Miroslav Radić and Veselin Šljivančanin was confirmed by Judge Fouad Riad on 7 November 1995.[1] Mrkšić surrendered to the International Tribunal on 15 May 2002. At his initial appearance on 16 May 2002, Mrkšić pleaded not guilty to all counts.[2] Veselin Šljivančanin was arrested in Belgrade on 13 June 2003 and transferred to the International Tribunal on 1 July 2003. At his initial appearance held on 3 and 10 July 2003, Šljivančanin pleaded not guilty to all charges.[3]

2. On 29 August 2002, the Prosecution filed a second amended indictment against Mrkšić alone.[4] On 21 July 2004, the Prosecution filed a motion for leave to file a consolidated amended indictment against Mrkšić, Radić and Šljivančanin. Pursuant to the Trial Chamber's decision of 23 January 2004, the Prosecution filed a consolidated amended indictment against the three Accused on 9 February 2004.[5] Following further Defence motions alleging defects in the form of that indictment, the Trial Chamber ordered the Prosecution to file a modified indictment,[6] which it did on 26 August 2004.[7] That indictment was again amended, by order of the Trial Chamber,[8] and the Prosecution filed the "Third Consolidated Amended Indictment" on 15 November 2004.[9] The "Third Consolidated Amended Indictment" is the operative indictment.[10]

3. The Trial Judgement was rendered on 27 September 2007. The Trial Chamber convicted Mrkšić under Articles 3 and 7(1) of the Statute for: (a) murder, (b) torture and (c) cruel treatment, as violations of the laws or customs of war.[11] The Trial Chamber sentenced Mrkšić to a single sentence of 20 years' imprisonment.[12]

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[1] *See Prosecutor v. Mile Mrkšić et al.* Case No. IT-95-13/1-I, Indictment, 7 November 1995; Confirmation of the Indictment, 7 November 1995.
[2] Trial Judgement, para. 718.
[3] Trial Judgement, para. 720.
[4] *See Prosecutor v. Mile Mrkšić et al.* Case No. IT-95-13/1-PT, Second Amended Indictment, 29 August 2002.
[5] Consolidated Amended Indictment, 9 February 2004.
[6] *See Prosecutor v. Mile Mrkšić et al.* Case No. IT-95-13/1-PT, Decision on Form of Modified Consolidated Amended Indictment, 20 July 2004.
[7] *See Prosecutor v. Mile Mrkšić et al.* Case No. IT-95-13/1-PT, Second Modified Consolidated Amended Indictment, 26 August 2004.
[8] *See Prosecutor v. Mile Mrkšić et al.* Case No. IT-95-13/1-PT, Decision on Form of Second Modified Consolidated Amended Indictment, 29 October 2004.
[9] *See Prosecutor v. Mile Mrkšić et al.* Case No. IT-95-13/1-PT, Third Consolidated Amended Indictment, 15 November 2004.
[10] *See Prosecutor v. Mile Mrkšić et al.* Case No. IT-95-13/1-PT, Decision on Third Modified [*sic*] Consolidated Amended Indictment, 9 March 2005, p. 6.
[11] Trial Judgement, para. 712.
[12] Trial Judgement, para. 713.

4. The Trial Chamber convicted Šljivančanin under Articles 3 and 7(1) of the Statute for torture as a violation of the laws or customs of war.[13] The Trial Chamber sentenced Šljivančanin to a single sentence of five years' imprisonment.[14]

B. Appeal Proceedings

1. Notices of appeal

5. The Prosecution, Šljivančanin and Mrkšić filed their Notices of Appeal on 29 October 2007.[15]

6. On 15 April 2008, the Prosecution requested leave to amend Ground One of its Notice of Appeal pursuant to Rule 108 of the Rules.[16] On 5 May 2008, the Appeals Chamber granted the request and ordered the Prosecution to file its Amended Notice of Appeal within two days of the decision,[17] which the Prosecution did.[18]

2. Assignment of Judges

7. By an order of 7 November 2007, the then President of the International Tribunal, Judge Fausto Pocar, designated the following Judges to form the Appeals Chamber in these proceedings: Judge Theodor Meron, Presiding, Judge Mohamed Shahabuddeen, Judge Mehmet Güney, Judge Liu Daqun, Judge Andrésia Vaz.[19] On 13 November 2007, Judge Theodor Meron designated himself as Pre-Appeal Judge.[20] On 12 November 2008, Judge Shahabuddeen was replaced by Judge Pocar.[21]

3. Appeal briefs

8. Mrkšić and Šljivančanin filed a joint defence motion on 23 November 2007, requesting that the time limits for the filing of their Appeal Briefs and their responses to the Prosecution's Appeal Brief did not begin to run until they had received the official B/C/S translation of the Trial

[13] Trial Judgement, para. 715.
[14] Trial Judgement, para. 716.
[15] Prosecution Notice of Appeal, 29 October 2007; Šljivančanin Notice of Appeal, 29 October 2007; Mrkšič Notice of Appeal, 29 October 2007.
[16] Prosecution Request for Leave to Amend Notice of Appeal, 15 April 2008. *See* also Joint Response to Prosecution Request for Leave to Amend Notice of Appeal, 25 April 2008; Prosecution Reply to Joint Response to Prosecution Request for Leave to Amend Notice of Appeal, 29 April 2008.
[17] Decision on Prosecution Request for Leave to Amend Notice of Appeal, 5 May 2008, paras 3-4.
[18] Prosecution Amended Notice of Appeal, 7 May 2008.
[19] Order Assigning Judges to a Case before the Appeals Chamber, 7 November 2007.
[20] Order Designating a Pre-Appeal Judge, 13 November 2007.
[21] Order Reassigning Judges to a Case Before the Appeals Chamber, 12 November 2008.

Judgement.[22] On 14 December 2007, the Appeals Chamber granted Mrkšić and Šljivančanin's motion in part, ordering that their Appeal Briefs and responses to the Prosecution's Appeal Brief be submitted within 40 days and 20 days respectively following receipt of the translation of the Trial Judgement.[23]

(a) Mrkšić's Appeal

9. Mrkšić filed his Appeal Brief confidentially on 8 July 2008.[24] However, on 14 July 2008, the Prosecution filed a motion requesting the Appeals Chamber to strike Mrkšić's Appeal Brief and Annex on the basis that the Appeal Brief exceeded the word limit as set out in the Practice Direction on the Length of Briefs and Motions, and the Annex was inaccurate and contained substantive argument.[25] Mrkšić responded on 18 July 2008, requesting permission to file a corrected Appeal Brief and Annex by 22 July 2008.[26] Accordingly, on 22 July 2008, Mrkšić filed a corrected confidential version of his Appeal Brief[27] which the Appeals Chamber recognized as the valid brief on 23 July 2008.[28] The Appeals Chamber further ordered the Prosecution to file a consolidated Respondent's Brief by 28 August 2008[29] which it did confidentially.[30] Mrkšić filed his Brief in Reply confidentially[31] along with a public version of his corrected Appeal Brief on 15 September 2008.[32] A public version of Mrkšić's Brief in Reply was filed on 6 October 2008.[33]

(b) Šljivančanin's Appeal

10. Šljivančanin filed his Appeal Brief confidentially on 8 July 2008.[34] However, the Prosecution filed a motion on 18 July 2008, requesting the Appeals Chamber to order Šljivančanin to seek leave to file an amended notice of appeal and to strike new grounds contained in his Appeal Brief.[35] On 26 August 2008, the Appeals Chamber granted the Prosecution's motion to strike in part

[22] Mile Mrkšić's and Veselin Šljivančanin [*sic*] Joint Defence Motion for Extension of Time in Which to File his [*sic*] Appeal Brief, 23 November 2007, pp. 3-4. *See* also Prosecution's Response to Joint Motion for Extension of Time in Which to File Mrkšić's and Šljivančanin's Appeal Briefs, 29 November 2007.
[23] Decision on Joint Defense Motion for Extension of Time Limits on Submission of Briefs, 14 December 2007, p. 2.
[24] Mile Mrkšić Appeal Brief (Confidential), 8 July 2008.
[25] Prosecution Motion to Strike Mrkšić's Appeal Brief and Annex, 14 July 2008.
[26] Mile Mrkšić's Defence Response Motion to Prosecution's Motion to Strike A [sic] Appeal Brief and Annex from 14 July 2008, 18 July 2008.
[27] Mile Mrkšić's Appeal Brief, Corrected on 22 July 2008 (Confidential), 22 July 2008.
[28] Order Concerning the Prosecution's Respondent's Brief, 23 July 2008, p. 3.
[29] *Ibid*, p. 3.
[30] Prosecution Consolidated Response Brief to Mile Mrkšić and Veselin Šljivančanin's Appeal Briefs (Confidential), 28 August 2008.
[31] Mile Mrkšić's Reply Brief to Prosecution's Response Brief (Confidential), 15 September 2008.
[32] Mile Mrkšić's Defence Appeal Brief, Corrected on 22 July 2008 (Public), 15 September 2008.
[33] Mile Mrkšić's Reply Brief to Prosecution's Response Brief (Public Redacted Version), 6 October 2008.
[34] Appellant's Brief on Behalf of Veselin Šljivančanin (Confidential), 8 July 2008.
[35] 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, 18 July 2008. *See* also Response on Behalf of Veselin Šljivančanin to

and ordered Šljivančanin to file, within three days, an amended Notice of Appeal.[36] The Appeals Chamber allowed the Prosecution to file, within 15 days, supplemental submissions to its Respondent's Brief and further ordered Šljivančanin to file his reply to the Prosecution's supplemental submissions within seven days of the Prosecution's filing.[37]

11. Accordingly, Šljivančanin filed an Amended Notice of Appeal on 28 August 2008.[38] On the same day, he filed an amended Appellant's Brief confidentially,[39] as well as a public redacted version.[40] The Prosecution also filed its confidential Consolidated Respondent's Brief to Mrkšić and Šljivančanin's Appeal Briefs on 28 August 2008.[41] On 10 September 2008, the Prosecution filed its Supplemental Respondent's Brief to Šljivančanin's Amended Appeal Brief confidentially,[42] followed by a public version of its Consolidated Respondent's Brief and Supplemental Respondent's Brief on 15 September 2008.[43] Šljivančanin filed his Brief in Reply confidentially on 12 September 2008,[44] and a Supplemental Brief in Reply on 18 September 2008.[45] Public versions of Šljivančanin's Brief in Reply and Supplemental Brief in Reply were filed on 20 October 2008 and 26 September 2008 respectively.[46]

(c) Prosecution's Appeal

12. On 14 January 2008, the Prosecution filed its Appeal Brief confidentially,[47] and filed a public redacted version on 8 February 2008.[48] Mrkšič and Šljivančanin each filed their Respondent's Briefs to the Prosecution's Appeal Brief on 18 June 2008, Mrkšić's being filed publicly and Šljivančanin's confidentially.[49] Šljivančanin's public version of his Respondent's Brief

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, 22 July 2008.

[36] 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, 25 August 2008, filed on 26 August 2008, p. 15.

[37] *Ibid*, p. 15.

[38] Amended Notice of Appeal on Behalf of Veselin Šljivančanin, 28 August 2008.

[39] Amended Appellant's Brief on Behalf of Veselin Šljivančanin (Confidential), 28 August 2008.

[40] Amended Appellant's Brief on Behalf of Veselin Šljivančanin (Public Redacted Version), 28 August 2008.

[41] Prosecution Consolidated Response Brief to Mile Mrkšić and Veselin Šljivančanin's Appeal Briefs (Confidential), 28 August 2008.

[42] Prosecution Supplemental Response Brief to Šljivančanin Amended Appeal Brief (Confidential), 10 September 2008.

[43] Prosecution's Consolidated Response Brief to Mile Mrkšić and Veselin Šljivančanin's Appeal Briefs and Prosecution's Supplemental Response Brief to Šljivančanin's Appeal Brief (Public Redacted Version), 15 September 2008.

[44] Reply Brief on Behalf of Veselin Šljivančanin (Confidential), 12 September 2008.

[45] Additional Reply on Behalf of Veselin Šljivančanin (Confidential), 18 September 2008.

[46] Reply Brief on Behalf of Veselin Šljivančanin (Public Redacted Version), 20 October 2008; Additional Reply on Behalf of Veselin Šljivančanin (Public Redacted Version), 26 September 2008.

[47] Prosecution Appeal Brief (Confidential), 14 January 2008.

[48] Public Redacted and Corrected Prosecution's Appeal Brief, 8 February 2008.

[49] Mile Mrkšić's Response Brief to Prosecution's Appeal Brief, 18 June 2008; Response Brief on Behalf of Veselin Šljivančanin (Confidential), 18 June 2008.

followed on 15 September 2008.[50] On 3 July 2008, the Prosecution filed its Brief in Reply confidentially,[51] and filed a public redacted version on 9 July 2008.[52]

13. In light of the impact of *Martić* Appeal Judgement, rendered on 8 October 2008, the Prosecution advised the Appeals Chamber in the present case, that it would not be pursuing the second sub-ground of appeal raised under its first ground of appeal.[53]

4. Other motions

14. On 26 March 2008, Šljivančanin filed a motion before the *Martić* Appeals Chamber requesting simultaneous adjudication of the Prosecution's appeal in the *Martić* case and the Prosecution's first ground of appeal in the *Mrkšić and Šljivančanin*, case, on the grounds, *inter alia,* that both cases raised a common legal issue regarding the application of Article 5 of the Statute.[54] However, the *Martić* Appeals Chamber denied Šljivančanin's motion on 16 April 2008.[55]

15. On 2 April 2008, Šljivančanin filed an expedited motion seeking access to confidential material in the *Kordić* case in order to "adequately respond" to the legal issues raised in the Prosecution's Appeal Brief under its first ground of appeal[56] but the Appeals Chamber denied the motion on 22 April 2008.[57]

16. On 20 October 2008, following the rendering of the *Martić* Appeal Judgement, Šljivančanin filed a motion seeking permission to make additional submissions during the presentation of his oral arguments at the appeals hearing in order to address the impact of the *Martić* Appeal Judgment

[50] Response Brief on Behalf of Veselin Šljivančanin (Public Redacted Version), 15 September 2008.
[51] Prosecution's Consolidated Reply to Mile Mrkšić and Šljivančanin's Response Briefs (Confidential), 3 July 2008.
[52] Prosecution's Consolidated Reply to Mile Mrkšić and Šljivančanin's Response Briefs (Public Redacted Version), 9 July 2008.
[53] Transcript of Status Conference, 16 October 2008, T. 25.
[54] Motion on Behalf of Veselin Šljivančanin Requesting Simultaneous Adjudication of the Prosecution Martić Appeal and Prosecution Mrkšić/Šljivančanin Appeal, 26 March 2008. *See* also Prosecution Response to Motion on Behalf of Veselin Šljivančanin Requesting Simultaneous Adjudication of the Prosecution Martić Appeal and Prosecution Mrkšić/Šljivančanin Appeal, 4 April 2008; Applicant's Reply to Prosecution Response to Motion on Behalf of Veselin Šljivančanin Requesting Simultaneous Adjudication of the Prosecution Martić Appeal and Prosecution Mrkšić/Šljivančanin Appeal, 8 April 2008.
[55] Decision on Veselin Šljivančanin's Motion Requesting Simultaneous Adjudication of the *Prosecutor v. Milan Martić* and *Prosecutor v. Mile Mrkšić and Veselin Šljivančanin* Cases, 16 April 2008.
[56] Expedited Motion on Behalf of Veselin Šljivančanin Seeking Access to Confidential Material in the *Kordić* Case, 2 April 2008. *See* also Prosecution's Response to Expedited Motion on Behalf of Veselin Šljivančanin Seeking Access to Confidential Material in the *Kordić* Case, 10 April 2008; Respondent's Reply to Prosecution's Response to Expedited Motion on Behalf of Veselin Šljivančanin Seeking Access to Confidential Material in the *Kordić* Case, 14 April 2008.
[57] Decision on Veselin Šljivančanin's Motion Seeking Access to Confidential Material in the *Kordić and Čerkez* Case, 22 April 2008, p. 4.

upon his arguments on appeal.[58] On 21 October 2008, Šljivančanin's motion was joined by Mrkšić.[59] These motions were granted by the Appeals Chamber on 25 November 2008.[60]

5. Additional evidence

17. Mrkšić filed two confidential motions on 15 October 2008[61] and 12 December 2008[62] respectively, seeking the admission of additional evidence pursuant to Rule 115 of the Rules. Both motions were denied on 13 February 2009.[63]

6. Provisional release

18. On 9 November 2007, Šljivančanin filed a motion for provisional release, modifying his prior request for early release,[64] which he amended on 13 November 2007.[65] On 11 December 2007, the Appeals Chamber granted Šljivančanin's motion for provisional release.[66] On 26 June 2008, Šljivančanin filed a motion seeking modification of the conditions of his provisional release.[67] The Appeals Chamber granted this motion on 22 July 2008.[68] On 4 December 2008,

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[58] Motion on Behalf of Veselin Šljivančanin Seeking Additional Time for the Presentation of Supplementary Submissions during the Appeals Hearing or and Alternative Remedy, 20 October 2008.
[59] Mr. Mile Mrkšić Motion on Behalf [*sic*] Seeking Additional Time for the Presentation of Supplementary Submissions during the Appeals Hearing or an Alternative Remedy, 21 October 2008. *See* also Prosecution's Joint Response to Veselin Šljivančanin and Mile Mrkšić's Motions Seeking Additional Time for the Presentation of Supplementary Submissions during the Appeals Hearing or and Alternative Remedy, 29 October 2008; Reply on Behalf of Veselin Šljivančanin to Prosecution's Joint Response to Veselin Šljivančanin and Mile Mrkšić's Motions Seeking Additional Time for the Presentation of Supplementary Submissions during the Appeals Hearing or and Alternative Remedy, 3 November 2008.
[60] Decision on Šljivančanin and Mrkšić Motions Seeking Additional Time for the Presentation of Supplementary Submissions during the Appeals Hearing or an Alternative Remedy and Scheduling Order for Appeals Hearing, 25 November 2008, p. 5.
[61] Mile Mrkšić's Rule 115 Motion (Confidential), 15 October 2008. *See* also Annex A to Mile Mrkšić's Rule 115 Motion (Confidential), 21 October 2008; Prosecution's Response to Mile Mrkšić's Rule 115 Motion (Confidential), 4 November 2008; Mile Mrkšić's Reply to the Prosecution Response to Rule 115 Motion (Confidential), 11 November 2008.
[62] Second Mile Mrkšić's Rule 115 Motion (Confidential), 12 December 2008. *See* also Prosecution's Response to Mile Mrkšić's Second Rule 115 Motion (Confidential), 19 December 2008; Mile Mrkšić's Reply to the Prosecution Response to Second Rule 115 Motion (Confidential), 29 December 2008.
[63] Decision on Mile Mrkšić's First Rule 115 Motion (Confidential), 13 February 2009; Decision on Mile Mrkšić's Second Rule 115 Motion, 13 February 2009.
[64] Veselin Šljivančanin's Motion for Provisional Release Modifying the Request on Behalf of Veselin Šljivančanin for Early Release or Alternatively Motion for Provisional Release filed on 5 October 2007 (Confidential), 9 November 2007.
[65] Veselin Šljivančanin's Amended Motion for Provisional Release (Confidential), 13 November 2007. *See* also Prosecution's Response to Veselin Šljivančanin's Amended Motion for Provisional Release (Confidential), 21 November 2007; Motion for Leave to Reply and Reply to Prosecution's Response to Veselin Sljivancanin's Amended Motion for Provisional Release (Confidential), 22 November 2007.
[66] Decision on the Motion of Veselin Šljivančanin for Provisional Release, 11 December 2007.
[67] Motion for the Modification of Conditions of the Provisional Release with Confidential Annex I (Partly Confidential), 26 June 2008. *See* also Prosecution's Response to Veselin Šljivančanin's Motion for Modification of Conditions of Provisional Release, 3 July 2008; Veselin Šljivančanin's Motion for Leave to File a Reply and the Reply to the Prosecution's Response to Veselin Šljivančanin's Motion for the Modification of Conditions of the Provisional Release, 4 July 2008.
[68] Decision on Veselin Šljivančanin's Motion for Modification of Conditions of Provisional Release, 22 July 2008.

Šljivančanin was recalled from provisional release for the duration of the appeals hearing.[69] On 9 April 2009, the Appeals Chamber terminated Šljivančanin's provisional release.[70]

19. Mrkšić filed a confidential motion for provisional release on 14 January 2009[71] which was denied by the Appeals Chamber on 16 February 2009.[72]

7. Status conferences

20. Status conferences in accordance with Rule 65*bis* of the Rules were held on 19 February 2008, 19 June 2008, 16 October 2008 and 23 January 2009.

8. Appeals hearing

21. The hearing on the merits of the appeals took place on 21 and 23 January 2009.[73]

[69] Order Recalling Veselin Šljivančanin from Provisional Release, 4 December 2008.
[70] Order Terminating the Provisional Release of Veselin Šljivančanin, 9 April 2009.
[71] Mile Mrkšić's Motion for Provisional Release (Confidential), 14 January 2009 *See* also Annex—Mile Mrkšić's Motion for Provisional Release (Confidential), 16 January 2009; Prosecution's Response to Mile Mrkšić's Motion for Provisional Release (Confidential), 26 January 2009.
[72] Decision on Mile Mrkšić's Motion for Provisional Release (Confidential), 16 February 2009.
[73] Decision on Šljivančanin and Mrkšić Motions Seeking additional Time for the Presentation of Supplementary Submissions during the Appeals Hearing or an Alternative Remedy and Scheduling Order for Appeals Hearing, 25 November 2008.

XI. ANNEX II: GLOSSARY OF TERMS

A. List of Tribunal and Other Decisions

1. International Tribunal

ALEKSOVSKI
Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-A, Judgement, 24 March 2000 ("*Aleksovski* Appeal Judgement").

BABIĆ
Prosecutor v. Milan Babić, Case No. IT-03-72-A, Judgement on Sentencing Appeal, 18 July 2005 ("*Babić* Judgement on Sentencing Appeal").

BLAGOJEVIĆ AND JOKIĆ
Prosecutor v. Vidoje Blagojević and Dragan Jokić, Case No. IT-02-60-A, Judgement, 9 May 2007 ("*Blagojević and Jokić* Appeal Judgement").

BLAŠKIĆ
Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-A, Judgement, 29 July 2004 ("*Blaškić* Appeal Judgement").

BRALO
Prosecutor v. Miroslav Bralo, Case No. IT-95-17-A, Judgement on Sentencing Appeal, 2 April 2007 ("*Bralo* Judgement on Sentencing Appeal").

BRĐANIN
Prosecutor v. Radoslav Brđanin, Case No. IT-99-36-A, Judgement, 3 April 2007 ("*Brđanin* Appeal Judgement").

ČELEBIĆI
Prosecutor v. Zejnil Delalić, Zdravko Mucić, a.k.a. "Pavo", Hazim Delić and Esad Landžo, a.k.a. "Zenga", Case No. IT-96-21-T, Judgement, 16 November 1998 ("*Čelebići* Trial Judgement").

Prosecutor v. Zejnil Delalić, Zdravko Mucić, a.k.a. "Pavo", Hazim Delić and Esad Landžo, a.k.a. "Zenga", Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeal Judgement").

DERONJIĆ
Prosecutor v. Miroslav Deronjić, Case No. IT-02-61-A, Judgement on Sentencing Appeal, 20 July 2005 ("*Deronjić* Sentencing Appeal Judgement").

ERDEMOVIĆ
Prosecutor v. Dražen Erdemović, Case No. IT-96-22-T, Sentencing Judgement, 29 November 1996 ("*Erdemović* 1996 Sentencing Judgement").

FURUNDŽIJA
Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-T, Judgement, 10 December 1998 ("*Furundžija* Trial Judgement").

Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-A, Judgement, 21 July 2000 ("*Furundžija* Appeal Judgement").

GALIĆ
Prosecutor v. Stanislav Galić, Case No. IT-98-29-A, Judgement, 30 November 2006 ("*Galić* Appeal Judgement").

HADŽIHASANOVIĆ AND KUBURA
Prosecutor v. Enver Hadžihasanović and Amir Kubura, Case No. IT-01-47-A, Judgement, 22 April 2008 ("*Hadžihasanović and Kubura* Appeal Judgement").

HALILOVIĆ
Prosecutor v. Sefer Halilović, Case No. IT-01-48-A, Judgement, 16 October 2007 ("*Halilović* Appeal Judgement").

JELISIĆ
Prosecutor v. Goran Jelisić, Case No. IT-95-10-A, Judgement, 5 July 2001 ("*Jelisić* Appeal Judgement").

JOKIĆ
Prosecutor v. Miodrag Jokić, Case No. IT-01-42/1-A, Judgement on Sentencing Appeal, 30 August 2005 ("*Jokić* Judgement on Sentencing Appeal").

KORDIĆ AND ČERKEZ
Prosecutor v. Dario Kordić and Mario Čerkez, Case No. IT-95-14/2-A, Judgement, 17 December 2004 *as corrected by Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Corrigendum to Judgement of 17 December 2004, 26 January 2005 ("*Kordić and Čerkez* Appeal Judgement").

KRNOJELAC
Prosecutor v. Milorad Krnojelac, Case No. IT-97-25-A, Judgement, 17 September 2003 ("*Krnojelac* Appeal Judgement").

KRSTIĆ
Prosecutor v. Radislav Krstić, Case No. IT-98-33-A, Judgement, 19 April 2004 ("*Krstić* Appeal Judgement").

KUNARAC, KOVAČ AND VUKOVIĆ
Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković, Case Nos IT-96-23-T and IT-96-23/1-T, Judgement, 22 February 2001 ("*Kunarac et al.* Trial Judgement").

Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković, Case Nos IT-96-23 and IT-96-23/1-A, Judgement, 12 June 2002 ("*Kunarac et al.* Appeal Judgement").

Z. KUPREŠKIĆ, M. KUPREŠKIĆ, V. KUPREŠKIĆ, JOSIPOVIĆ, PAPIĆ AND ŠANTIĆ
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MUCIĆ, DELIĆ AND LANDŽO
Prosecutor v. Zdravko Mucić, Hazim Delić and Esad Landžo, Case No. IT-96-21-A*bis*, Judgement on Sentence Appeal, 8 April 2003 ("*Mucić et al.* Judgement on Sentencing Appeal").

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D. NIKOLIĆ
Prosecutor v. Dragan Nikolić, Case No. IT-94-2-A, Judgement on Sentencing Appeal, 4 February 2005 ("*Dragan Nikolić* Judgement on Sentencing Appeal").

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2. ICTR

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MUVUNYI
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NIYITEGEKA
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NTAGERURA, BAGAMBIKI AND IMANISHIMWE
Prosecutor v. André Ntagerura, Emmanuel Bagambiki and Samuel Imanishimwe, Case No. ICTR-99-46-A, Judgement, 7 July 2006 ("*Ntagerura et al.* Appeal Judgement").

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RUTAGANDA
Prosecutor v. Georges Anderson Nderubunwe Rutaganda, Case No. ICTR-96-3-A, Judgement, 26 May 2003 ("*Rutaganda* Appeal Judgement").

SEMANZA
Laurent Semanza v. Prosecutor, Case No. ICTR-97-20-A, Judgement, 20 May 2005 ("*Semanza* Appeal Judgement").

SEROMBA
Prosecutor v. Athanase Seromba, Case No. ICTR-2001-66-A, Judgement, 12 March 2008 ("*Seromba* Appeal Judgement").

3. International Court of Justice

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment. I.C.J. Reports 1986.

B. List of Abbreviations, Acronyms and Short References

According to Rule 2(B), of the Rules of Procedure and Evidence, the masculine shall include the feminine and the singular the plural, and vice-versa.

1MP/gmtbr	1st Military Police Battalion of the Guards Motorised Brigade
2MP/gmtbr	2nd Military Police Battalion of the Guards Motorised Brigade
80 mtbr	80th Motorised Brigade (Kragujevac)
Additional Protocol I	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977, 1125 U.N.T.S. 3
AT.	Transcript page from hearings on appeal in the present case. All transcript page numbers referred to are from the unofficial, uncorrected version of the transcript, unless specified otherwise. Minor differences may therefore exist between the pagination therein and that of the final transcripts released to the public.
D	Designates "Defence" for the purpose of identifying exhibits
ECMM	European Community Monitoring Mission
Geneva Convention III	Geneva Convention III Relative to the Treatment of Prisoners of War of 12 August 1949, 75 U.N.T.S. 135
Geneva Conventions	Geneva Conventions I to IV of 12 August 1949
Gmtbr	Guards Motorised Brigade, also referred to in Mrkšić's submissions as "GMTBR"
HV	Croatian Army (*Hrvatska Vojska*)
ICTR	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January 1994 and 31 December 1994
ICRC	International Committee of the Red Cross
Indictment	*Prosecutor v. Mile Mrkšić, Miroslav Radić and Veselin Šljivančanin,* Case No. IT-95-13/1-PT, Decision on Third Modified [*sic*] Consolidated Amended Indictment, 9 March 2005, p. 6 ordering that the "Third Consolidated Amended Indictment" filed on 15 November 2004 should be the operative indictment
International Tribunal	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

JNA	Yugoslav Peoples' Army (Army of the Socialist Federal Republic of Yugoslavia)
LAD PVO	Light artillery anti-aircraft battalion
LtCol	Lieutenant Colonel
Mrkšić Appeal Brief	Mile Mrkšić's Defence Appeal Brief Corrected on 22 July 2008 (Confidential), 22 July 2008 (Public Redacted Version filed on 15 September 2008)
Mrkšić Brief in Reply	Mile Mrkšić's Brief in Reply to Prosecutions Response Brief, 15 September 2008 (Public Redacted Version filed on 6 October 2008).
Mrkšić Final Trial Brief	*Prosecutor v. Mile Mrkšić, Miroslav Radić, Veselin Šljivančanin,* Case No. IT-95-13/1-T, Mile Mrkšić's Defence Final Trial Brief (Confidential), 26 February 2007
Mrkšić Notice of Appeal	Mr. Mile Mrkšić's Defence Notice of Appeal and Request for Leave to Exceed the Word Limit, 29 October 2007
Mrkšić Respondent's Brief	Mile Mrkšić's Response Brief to Prosecution's Appeal Brief, 18 June 2008
MUP	Ministry of Internal Affairs of the Republic of Croatia
OG	Operation(s) Group or Operational Group
OG South	Operational Group South
P	Designates "Prosecution" for the purpose of identifying exhibits
Prosecution	Office of the Prosecutor
Prosecution Appeal Brief	Prosecution's Appeal Brief (Confidential), 14 January 2008 (Public Redacted and Corrected Version filed 8 February 2008)
Prosecution Brief in Reply	Prosecution's Consolidated Reply to Mile Mrkšić and Veselin Šljivančanin Response Briefs (Confidential), 3 July 2008 (Public Redacted Version filed on 9 July 2008)
Prosecution Final Trial Brief	*Prosecutor v. Mile Mrkšić, Miroslav Radić, Veselin Šljivančanin,* Case No. IT-95-13/1-T, Prosecution's Final Brief (Confidential), 26 February 2007
Prosecution Notice of Appeal	Prosecution's Notice of Appeal, 29 October 2007 (amended on 7 May 2008)
Prosecution Respondent's Brief	Prosecution's Consolidated Response Brief to Mile Mrkšić and Veselin Šljivančanin's Appeal Briefs (Confidential), 28 August 2008 (Public Redacted Version filed on 15 September 2008)

Prosecution Supplemental Respondent's Brief	Prosecution's Supplemental Response Brief to Šljivančanin Amended Appeal Brief (Confidential), 10 September 2008 (Public Redacted Version filed on 15 September 2008)
Rules	Rules of Procedure and Evidence of the International Tribunal
SAO	Serb Autonomous District ("*Srpska Autonomna Oblast"*)
Schedule to the Trial Judgement	Trial Judgement, Section XIII. Schedule: List of persons killed at Ovčara in the evening hours of 20/21 November 1991.
SFRY	Former Socialist Federal Republic of Yugoslavia
SFRY Criminal Code	Adopted on 28 September 1976 by the SFRY Assembly at the Session of Federal Council, declared by decree of the President of the Republic on 28 September 1976, published in the official Gazette SFRY No. 44 of 8 October 1976, took effect on 1 July 1977.
Šljivančanin Notice of Appeal	Notice of Appeal from the Judgment of 27 September 2007 by the Defence of Veselin Šljivančanin, 29 October 2007 (amended on 28 August 2008)
Šljivančanin Appeal Brief	Appellant's Brief on Behalf of Veselin Šljivančanin (Confidential), 8 July 2008 (Amended Public Redacted Version filed on 28 August 2008)
Šljivančanin Brief in Reply	Reply Brief on Behalf of Veselin Šljivančanin (Confidential), 12 September 2008 (Public Redacted Version filed on 20 October 2008)
Šljivančanin Respondent's Brief	Response Brief on Behalf of Veselin Šljivančanin (Confidential), 18 June 2008 (Public Redacted Version filed on 15 September 2008)
Šljivančanin Supplemental Brief in Reply	Additional Reply on Behalf of Veselin Šljivančanin (Confidential), 18 September 2008 (Public Redacted Version filed on 26 September 2008)
Šljivančanin Final Trial Brief	*Prosecutor v. Mile Mrkšić, Miroslav Radić, Veselin Šljivančanin,* Case No. IT-95-13/1-T, Veselin Šljivančanin's Defence Final Brief (Confidential), 26 February 2007
SSNO	Federal Secretary of National Defence
Statute	Statute of the International Tribunal
T	Transcript page from hearings at trial in the present case
Third Geneva Convention	Geneva Convention (III) Relative to the Treatment of Prisoners of War of 12 August 1949, 75 U.N.T.S. 135
TO	Territorial Defence
TOs	Members of the Territorial Defence
ZNG	"National Guards Corps" (*Zbor Narodne Garde*)