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APPEALS JUDGEMENT SUMMARY

APPEALS CHAMBER

(Exclusively for the use of the media. Not an official document)

The Hague, 5 May 2009

Summary of the Appeals Judgement Prosecutor v. Mile Mrkšić and Veselin Šljivančanin

Please find below the summary of the appeals judgement read out today by Judge Meron:

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 individuals taken from the Vukovar hospital by Serb forces on 20 November 1991. The city of Vukovar had been the object of attack by the Yugoslav Peoples' Army (hereinafter "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 Zagreb Agreement concluded on 18 November 1991, provided for such an evacuation; however, on the morning of 20 November 1991, JNA soldiers conducted a triage at the Vukovar hospital and loaded selected individuals onto buses. At minimum, the vast majority of the selected individuals were Prisoners of War. The prisoners were transported first to the JNA barracks in Vukovar and then onward to a pig farm at Ovčara. At Ovčara, the prisoners were unloaded from the buses and held in a hangar. As they were unloaded from the buses, almost all of the prisoners were forced to pass through a gauntlet of Serb soldiers, who beat them cruelly with a variety of implements including wooden sticks, rifle-butts, poles, chains and crutches, and verbally abused them. The beatings continued inside the hangar, and lasted for hours. Many were kicked or struck with implements such as iron rods and rifle-butts. That evening the JNA troops who had been guarding the prisoners were withdrawn, leaving the prisoners to the mercy of members of the Territorial Defence (hereinafter "TOs") and paramilitaries. The Trial Chamber found that, following the withdrawal of the 80th Motorised Brigade, TOs and paramilitaries murdered almost 200 of these individuals at Ovčara and buried them in a mass grave. These are identified in the Schedule to the Trial Judgement.

During the time relevant to the Indictment, Mile Mrkšić was a colonel in the JNA and commander of the Guards Motorised Brigade and Operational Group South (hereinafter "OG South"). As commander of OG South, he had command of all Serb forces including JNA, TO and paramilitary forces. Mr. Mrkšić was convicted under Articles 3 and 7(1) of the Statute for: 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; torture as a violation of the laws or customs of war, for having aided and abetted the torture of prisoners of war at the hangar at Ovčara on 20 November 1991; and 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. He was acquitted of all crimes charged as crimes against humanity which included persecutions, extermination, murder, torture and inhumane acts. The Trial Chamber sentenced him to a single term of 20 years' imprisonment.

During the period relevant to the Indictment, Veselin Šljivančanin was a major in the JNA and held the post of head of the security organ of both the Guards Motorised Brigade and the OG South. The Trial Chamber found that Mr. Šljivančanin was appointed by Mr. Mrkšić to evacuate the Vukovar hospital. It found that his responsibilities included the conduct of the triage, the selection of war crimes suspects removed from the Vukovar hospital on 20 November 1991, and the latter's transport and security, as well as the evacuation of civilians. The Trial Chamber 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

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Ovčara on 20 November 1991. It did not enter a conviction for cruel treatment as a violation of the laws and customs of war as it was impermissibly cumulative with his conviction for torture. Further, it acquitted him of all counts charged as crimes against humanity as well as for murder as a violation of the laws or customs of war. The Trial Chamber sentenced him to a single term of five years' imprisonment.

Following the practice of the International Tribunal, I will not read out the text of the judgement except for the disposition. Instead, I will summarise the issues on appeal and the findings of the Appeals Chamber. This summary is not part of the written judgement, which is the only authoritative account of the Appeals Chamber's rulings and reasons. Copies of the written judgement will be made available to the Parties at the conclusion of this hearing.

Grounds of Appeal

The Office of the Prosecutor (hereinafter "Prosecution") brought four grounds of appeal against the Trial Judgement and requests the Appeals Chamber to: reverse the acquittals of Veselin Šljivančanin and Mile Mrkšić under Article 5 of the Statute on crimes against humanity; overturn the acquittal of Veselin Šljivančanin for murder as a violation of the laws and customs of war; revise and increase Veselin Šljivančanin and Mile Mrkšić's sentences in order to properly reflect the gravity of their criminal conduct; and lastly, revise and increase Veselin Šljivančanin and Mile Mrkšić's sentences in case the Appeals Chamber enters new convictions under Article 5 of the Statute.

Mr. Mrkšić brought eleven grounds of appeal against the Trial Judgement. He requests 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. He further argues that the Trial Chamber erred in sentencing him to 20 years' imprisonment.

Mr. Šljivančanin brought six grounds of appeal against the Trial Judgement. He requests the Appeals Chamber to reverse the Trial Judgement and find him not guilty of aiding and abetting torture as a violation of the laws and customs of war under Article 3 of the Statute, or in the alternative to order a new trial on this count, or if the conviction is upheld, to reduce the sentence of five years' imprisonment imposed by the Trial Chamber.

The Appeals Chamber heard submissions of the Parties regarding these appeals on 21 and 23 January 2009.

Before addressing Mr. Mrkšić and Mr. Šljivančanin's appeals I will touch upon the Prosecution's first ground of appeal as it raises a legal issue which is relevant to both of them.

In its first ground of appeal, the Prosecution argues that the Trial Chamber erred in law by requiring the individual victims of crimes against humanity under Article 5 of the Statute to be civilians, thereby excluding persons *hors de combat*, and as a result erred in entering convictions for war crimes only. The Appeals Chamber finds that 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. Therefore, 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.

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". This is so because, in the present case, the perpetrators of the crimes committed against the prisoners at 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 widespread and systematic attack against the civilian population of Vukovar and renders their acts so removed from the attack that no nexus can be established. The Appeals Chamber finds that in the absence of the required nexus under Article 5 of the Statute, the crimes committed cannot be qualified as crimes against humanity.

Thus, the Appeals Chamber dismisses the Prosecution's first ground of appeal in all other respects and upholds the acquittals of Mr. Šljivančanin and Mr. Mrkšić under Article 5 of the Statute.

Mile Mrkšić's appeal

Under his first, second, third, fourth, sixth and tenth grounds of appeal, Mr. Mrkšić contends that the Trial Chamber erred by misapplying the standard of proof beyond reasonable doubt. However, the Appeals Chamber finds that he fails to show that the Trial Chamber erred in its application of the standard of proof beyond reasonable doubt.

Under his first ground of appeal, Mr. Mrkšić argues that the Trial Chamber wrongly evaluated the role and responsibility of the 80th Motorised Brigade, its command structure, and relevant evidence. The Appeals Chamber observes that a significant number of Mr. Mrkšić's submissions under this ground of appeal simply repeat arguments previously advanced before the Trial Chamber and rejected, without providing a clear explanation as to how his arguments support the allegations raised under his first ground of appeal. Mr. Mrkšić fails to discharge the burden incumbent upon him and the Appeals Chamber therefore dismisses his first ground of appeal in its entirety.

In his second ground of appeal, Mr. Mrkšić argues that the Trial Chamber erred in its analysis of security organ responsibility for separating and transporting the prisoners of war from the Vukovar hospital. The Appeals Chamber observes that a significant number of his submissions on appeal merely repeat arguments from his Final Trial Brief which were rejected by the Trial Chamber and some of his arguments ignore relevant Trial Chamber findings. Accordingly, the Appeals Chamber dismisses his second ground of appeal in its entirety.

Under his third ground of appeal, Mr. Mrkšić submits that the Trial Chamber erred regarding the role and responsibility of officers at the JNA barracks. He submits that the Trial Chamber erred regarding the timing of the transfer and the Serbian Autonomous Region (hereinafter "SAO") "government's" session. However, the Appeals Chamber notes that the Trial Chamber carefully considered all the conflicting evidence on this issue and there is no indication that the Trial Chamber completely disregarded any particular piece of evidence. Accordingly, the Appeals Chamber dismisses Mr. Mrkšić's third ground of appeal in its entirety.

Under his fourth ground of appeal, Mr. Mrkšić alleges errors regarding the SAO "government's" session. Again a number of Mr. Mrkšić's arguments merely repeat submissions made in his Final Trial Brief, or repeat allegations raised under other grounds or sub-grounds of appeal previously dismissed. Accordingly, the Appeals Chamber dismisses Mr. Mrkšić's fourth ground of appeal in its entirety.

Under his fifth ground of appeal, Mr. Mrkšić avers that the Trial Chamber erred in fact in concluding that he was informed about the events at Ovčara before the daily briefing in Negoslavci on 20 November 1991. However, the Appeals Chamber finds that Mr. Mrkšić fails to demonstrate that an alleged error on the part of the Trial Chamber concerning this finding resulted in a miscarriage of justice. Accordingly, the Appeals Chamber dismisses Mr. Mrkšić's fifth ground of appeal in its entirety.

Under his sixth ground of appeal, Mr. Mrkšić submits that the Trial Chamber erred in concluding that he ordered the withdrawal of the 80th Motorised Brigade from Ovčara. He challenges the timing of the withdrawal order; the conclusion that he was informed twice about the events at Ovčara; and alleges that the Trial Chamber's assessment of the role of Captain Dragi Vukosavljević and Colonel Radoje Trifunović on 20 November 1991 was erroneous. With respect to all of these arguments Mr. Mrkšić does not show that the factual assessments of the Trial Chamber, viewed with appropriate deference, were in error. Accordingly, the Appeals Chamber dismisses Mr. Mrkšić's sixth ground of appeal in its entirety.

Under his seventh ground of appeal, Mr. Mrkšić submits that the Trial Chamber erred in concluding that he did travel to Belgrade 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. The Appeals Chamber finds that Mr. Mrkšić's arguments fail to show that the Trial Chamber committed an error of fact which occasioned a miscarriage of justice and dismisses his seventh ground of appeal in its entirety.

Under his eighth ground of appeal, Mr. Mrkšić avers that the Trial Chamber erred in concluding that the command of OG South, under his authority, had responsibility for the area of Vukovar between 8 October and 24 November 1991. His arguments essentially repeat submissions previously made at trial and rejected by the Trial Chamber, and fail to elaborate on how the error alleged under one of his sub-grounds of appeal had any impact on the findings of the Trial Chamber so as to amount to a miscarriage of justice. Accordingly, the Appeals Chamber dismisses his eighth ground of appeal in its entirety.

Under his ninth ground of appeal, Mr. Mrkšić submits that as a result of the factual errors alleged under 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 the crimes of murder, cruel treatment and torture. Some of the arguments in support have either already been advanced under his previous grounds of appeal and dismissed, or repeat submissions made at trial without showing that the Trial Chamber's rejection of them constituted an error which warrants intervention by the Appeals Chamber. Consequently, Mr. Mrkšić fails to show that the Trial Chamber committed any error of law invalidating the Trial Judgement in reaching its findings on his *mens rea* for aiding and abetting the murder of the prisoners of war.

Under his ninth ground of appeal, Mr. Mrkšić also submits that as a result of the factual errors alleged under his preceding eight grounds of appeal the Trial Chamber erred in law in finding, under Article 7(3) of the Statute on command responsibility, that he committed murder, cruel treatment and torture. However, the Appeals Chamber recalls that the Trial Chamber did not enter a conviction against Mr. Mrkšić pursuant to Article 7(3) of the Statute. In light of the foregoing, the Appeals Chamber dismisses Mr. Mrkšić's ninth ground of appeal in its entirety.

Under his tenth ground of appeal, Mr. Mrkšić raises what he calls: "disputable facts"; these are facts which he acknowledges were not so important for the Trial Chamber in the course of reaching its decision but which he claims are important for the Defence and the position of the JNA. The Appeals Chamber reiterates that as long as the factual findings supporting Mr. Mrkšić's conviction and sentence are sound, as a general rule, it will decline to discuss errors related to other factual conclusions which do not have any impact on the Trial Judgement. In light of this and since he admits that the errors alleged under this ground of appeal have no impact on the conviction or sentence, the Appeals Chamber dismisses Mr. Mrkšić's tenth ground of appeal in its entirety.

Since Mr. Mrkšić's eleventh ground of appeal concerns his sentence it will be addressed at the end of the summary in the part relevant to sentencing.

I now turn to Mr. Šljivančanin's appeal.

Veselin Šljivančanin's appeal

Under his first ground of appeal, Mr. Šljivančanin argues that the Trial Chamber erred in finding that he was present in Ovčara on the afternoon of 20 November 1991. He contends that the Trial Chamber erred by relying exclusively on the testimony of Witness P009. The Appeals Chamber finds that the Trial Chamber properly considered the evidence in reaching its finding, and dismisses his first ground of appeal in its entirety.

Mr. Šljivančanin's second ground of appeal challenges aiding and abetting by omission as a mode of liability. In support of this challenge, he first argues that aiding and abetting by omission is not a mode of liability included in the International Tribunal's jurisdiction. However, 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.

Mr. Šljivančanin also submits that he was not put on notice that the Prosecution intended to rely on this mode of liability. The Appeals Chamber finds that the Indictment pled with sufficient particularity the nature of the charges against him with regard to aiding and abetting by omission the mistreatment of prisoners of war at Ovčara. Further, the Appeals Chamber finds that Mr. Šljivančanin failed to show that his defence was materially impaired by the alleged lack of notice.

Turning to the elements of aiding and abetting by omission, the Appeals Chamber considers 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. Thus, the 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 (which forms the *actus reus*). Further, 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 (which forms the *mens rea*). 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. Further, the Appeals Chamber considers 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.

With regard to the nature of the duty, 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. Mr. Šljivančanin's duty to protect the prisoners of war was imposed by the laws and customs of war. I will elaborate more on this point later on when I address the Prosecution's second ground of appeal. Thus, the Appeals Chamber considers that his breach of such duty gives rise to his individual criminal responsibility. Accordingly, Mr. Šljivančanin's second ground of appeal is dismissed in its entirety.

In his third ground of appeal, Mr. Šljivančanin argues that the Trial Chamber erred in finding that Mr. 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. 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 Mr. Šljivančanin was under a duty to protect the prisoners of war from the Vukovar hospital by reason of the responsibility delegated to him by Mr. Mrkšić. Accordingly, Mr. Šljivančanin's third ground of appeal is dismissed in its entirety.

In his fourth ground of appeal, Mr. Šljivančanin challenges the Trial Chamber's finding that he must have witnessed the mistreatment of the prisoners of war in Ovčara. The Appeals Chamber recalls that, with respect to Mr. Šljivančanin's first ground of appeal, it has found that that he failed to demonstrate that the Trial Chamber committed any error of law or fact with regard to his presence at Ovčara on the afternoon of 20 November 1991 and the time line of events of that afternoon. Under his fourth ground of appeal, Mr. Šljivančanin does not attempt to further substantiate his arguments under his first ground of appeal. Accordingly, his fourth ground of appeal is dismissed in its entirety.

In Mr. Šljivančanin's fifth ground of appeal, he submits that the elements of aiding and abetting the torture of the prisoners of war at Ovčara were not fulfilled.

First, with regard to whether Mr. Šljivančanin's failure to act had a substantial effect on the commission of the crimes at Ovčara, the Appeals Chamber finds that the fact that other officers better placed than him to ensure the protection of the prisoners of war at Ovčara also failed to act, does not itself negate the effect of Mr. Šljivančanin's failure to intervene to prevent the mistreatment. As to Mr. Šljivančanin's contention that he was not responsible for the security of the prisoners of war held at Ovčara and that it has not been proven that he could have prevented the mistreatment of prisoners of war, the Appeals Chamber recalls that it has upheld the Trial Chamber's finding that Mr. Mrkšić ordered Mr. 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. The Appeals Chamber finds that Mr. 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.

Second, with regard to Mr. Šljivančanin's argument that 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, the Appeals Chamber considers that, in light of the fact that Mr. 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. Mr. 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. As a result it was open to the Trial Chamber to conclude that Mr. Šljivančanin possessed the requisite *mens rea* for aiding and abetting torture. Accordingly his fifth ground of appeal is dismissed in its entirety.

Mr. Šljivančanin's sixth ground of appeal will be addressed at the end of this summary in the part relevant to sentencing.

I will now turn to the Prosecution's second ground of appeal which is also relevant to Mr. Šljivančanin.

Prosecution's Appeal

In its second ground of appeal the Prosecution argues that Trial Chamber erred in fact and in law in failing to find that Mr. Šljivančanin was responsible for aiding and abetting the murder of the 194 people identified in the Schedule to the Trial Judgement as having been killed at Ovčara on the evening of 20/21 November 1991.

The Prosecution submits that the Trial Chamber erred in failing to find that Mr. Šljivančanin knew, at the time of his visit to Ovčara, that the TOs and paramilitaries would likely kill the prisoners. With regard to the *mens rea* of aiding and abetting the murders, the Trial Chamber found that it was only upon the final withdrawal 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 Mr. Šljivančanin did not foresee the likelihood of the murders prior to learning of the withdrawal. The Appeals Chamber finds that it was not unreasonable for the Trial Chamber to have concluded that, as long as the presence of the JNA troops continued, they 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 Mr. Šljivančanin could reasonably have believed in the circumstances that the TOs and paramilitaries would be unlikely to resort to killing. As a result, the Appeals Chamber finds that Mr. Šljivančanin 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 Appeals Chamber notes that the Trial Chamber did not make a finding or draw any inference as to when or whether Mr. Šljivančanin became aware of the order to withdraw the JNA troops on the night of 20 November 1991. However, the only reasonable conclusion that can be drawn is that Mr. Mrkšić told Mr. Šljivančanin in the course of their meeting upon Mr. Šljivančanin's return to Negoslavci that night that he had withdrawn the JNA protection from the prisoners of war held at Ovčara. Given the Trial Chamber's finding that it was Mr. 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, the only reasonable inference is that upon learning of the order to withdraw the troops, Mr. Šljivančanin realised that the killing of the prisoners of war at Ovčara had become a likely occurrence.

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, Mr. 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 Mr. Mrkšić at their meeting of the night of 20 November 1991, the only reasonable inference is that Mr. Šljivančanin was 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 upon learning of Mr. Mrkšić's order to withdraw the JNA troops from Ovčara, Mr. Šljivančanin informed the *mens rea* for aiding and abetting murder

Under its second ground of appeal, the Prosecution also challenges the Trial Chamber's finding that Mr. Šljivančanin's legal duty towards the prisoners ended upon the withdrawal of the last JNA troops from Ovčara upon Mr. Mrkšić's orders.

Before elaborating on the correctness of this finding, it is pertinent at this juncture to recall 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. However, even in the context of an internal armed conflict, Geneva Convention III Relative to the Treatment of Prisoners of War applies where the parties to the conflict have agreed that the Convention shall apply. In this respect, the Appeals Chamber recalls the European Community Monitoring Mission's 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. In an order issued on 18 November

1991, Lt. General Života Panič directed that JNA units in the Vukovar area, including OG South, were to observe all aspects of Geneva Convention III. Furthermore, Colonel Nebojša Pavković advised the monitors of instructions from General Račeta to the effect that Croat forces would not be evacuated with the rest of the humanitarian convoy but remain as prisoners of war and that the Geneva Conventions would apply. The Appeals Chamber considers that this provides 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.

Turning to Mr. Šljivančanin's responsibility for the welfare and security of the prisoners of war in the context of Geneva Convention III, the Appeals Chamber recalls that the fundamental principle enshrined in Geneva Convention III, that prisoners of war must be treated humanely and protected from physical and mental harm, applies from the time they fall into the power of the enemy until their final release and repatriation. It thus entails the obligation of each agent in charge of the protection or with custody of the prisoners of war to ensure that their transfer to another agent will not diminish the protection to which the prisoners are entitled.

Further, 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 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. It 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.

The Appeals Chamber therefore considers that Mr. Šljivančanin was under a duty to protect the prisoners of war held at Ovčara and that this responsibility included the obligation not to allow the transfer of custody of the prisoners of a war to anyone without first satisfying himself that they would not be harmed. Mr. Mrkšić's order to withdraw the JNA troops did not relieve him of his position as an officer of the JNA. As such, Mr. 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. For the foregoing reasons, the Appeals Chamber finds that the Trial Chamber erred in finding that Mr. Šljivančanin's duty to protect the prisoners of war pursuant to the laws and customs of war came to an end upon Mr. Mrkšić's order to withdraw.

In light of these findings the Appeals Chamber turns to consider whether Mr. 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. The Appeals Chamber must be satisfied beyond reasonable doubt that the Prosecution has demonstrated that Mr. Šljivančanin substantially contributed to the killings by his inaction and that, when account is taken of the errors committed by the Trial Chamber, all reasonable doubt concerning Mr. Šljivančanin's guilt has been eliminated. In this regard, the Appeals Chamber recalls that aiding and abetting by omission implicitly requires that the accused had the ability to act but failed to do so.

The Trial Chamber found that at the relevant time, Mr. Šljivančanin was exercising the power and authority conferred on him by Mr. 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 rather than pursuant to his mandate as security organ. Accordingly, an order from Mr. Mrkšić terminating any specifically delegated duty for the security of the prisoners of war, would also have removed the power and authority that Mr. Šljivančanin had over the military police of the 80th Motorised Brigade.

Having said this, the Appeals Chamber considers that even though Mr. Šljivančanin no longer had *de jure* authority over the military police deployed at Ovčara, he could have informed the military police deployed at Ovčara that Mr. 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. Issuing an order contrary to Mr. Mrkšić's to the military police of the 80th Motorised Brigade was a course of action that would have required Mr. Šljivančanin to go beyond the scope of his *de jure* authority, which had been effectively removed by virtue of Mr. Mrkšić's withdrawal order. Nonetheless, the illegality of Mr. Mrkšić's order required Mr. Šljivančanin to do so. The Appeals Chamber considers that in certain circumstances 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.

The Appeals Chamber further considers that Mr. Šljivančanin could have attempted to persuade Mr. Mrkšić to abort the withdrawal order. Had his attempts to persuade Mr. Mrkšić not been successful, when Mr. Šljivančanin telephoned Belgrade in order to speak to General Vasiljević, he could have sought the General's assistance on the matter.

The Appeals Chamber considers that had Mr. Šljivančanin been successful in securing the return of the military police to Ovčara, the murder of the prisoners of war would have been substantially less likely. The Appeals Chamber thus finds that Mr. 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.

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 Mr. Šljivančanin's guilt has been eliminated.

I now turn to the **sentencing appeals**.

Sentencing

In his eleventh ground of appeal, Mr. Mrkšić argues that the Trial Chamber wrongly considered aggravating and mitigating circumstances, that the laws of the former Yugoslavia on the punishment of those found convicted of like offences could never refer to abettors but only to perpetrators of such crimes, and hence that his sentence is "too severe and unjust".

The Appeals Chamber rejects Mr. Mrkšić's challenges to the Trial Chamber's assessment of the aggravating and mitigating circumstances, and also finds that Mr. Mrkšić fails to identify any discernible error concerning the Trial Chamber's consideration of the general sentencing practice of the former Yugoslavia. Therefore, Mr. Mrkšić's eleventh ground of appeal is dismissed in its entirety.

Under its fourth ground of appeal, the Prosecution argues that the Trial Chamber erred by imposing a "manifestly inadequate" sentence on Mr. Mrkšić, as insufficient weight was given to Mr. Mrkšić's role and responsibility and 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. Consequently, it requests that Mr. Mrkšić's sentence be increased.

With regard to Mr. Mrkšić's role and responsibility, the Appeals Chamber finds that the Trial Chamber duly 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. The Prosecution's arguments are dismissed.

With respect to the Prosecution's submissions that the Trial Chamber gave insufficient weight to the "objective gravity" of the crimes, the Appeals Chamber emphasises that 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, the gravity of the crime does not refer to a crime's "objective gravity". 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 in the present case, the Trial Chamber 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". 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. The Appeals Chamber finds that the Prosecution fails to demonstrate that the Trial Chamber disregarded previous comparable cases.

The Appeals Chamber further 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. The Trial Judgement is replete with detailed findings addressing the gravity of the underlying crimes involving the mistreatment at Ovčara and the subsequent execution of at least 194 of the prisoners and their burial in a mass grave.

In recalling these findings, the Trial Chamber took into account Mr. 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. 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 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. 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. 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 Mr. Mrkšić aided and abetted.

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

I turn now to the appeals regarding **Veselin Šljivančanin's sentence**

Mr. Šljivančanin submits in his sixth ground of appeal that 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; erred by considering his involvement in preventing international representatives from gaining access to the hospital on 20 November 1991 as an aggravating circumstance; erred in failing to consider his good conduct and demeanour as a mitigating circumstance; and did not properly take into account the sentencing practices in the former Yugoslavia.

With regard to the Trial Chamber's finding that the prisoners of war were under his immediate responsibility, the Appeals Chamber finds that Mr. 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. His arguments are dismissed.

With regard to Mr. Šljivančanin's involvement in preventing international representatives from gaining access to the hospital on 20 November 1991, the Appeals Chamber considers that it is not clear whether the Trial Chamber took this factor into account as an aggravating circumstance. The Appeals Chamber is thus not satisfied that the Trial Chamber committed a discernible error in exercising its discretion. Accordingly, Mr. Šljivančanin's arguments are dismissed.

With respect to Mr. Šljivančanin's argument that the Trial Chamber erred in failing to consider his good conduct and demeanour as a mitigating circumstance, the Appeals Chamber notes that the Trial Chamber considered evidence of his good character when sentencing him. The Appeals Chamber notes that Mr. Šljivančanin did not make any sentencing submission at trial. Accordingly, his arguments are dismissed.

The Appeals Chamber also rejects Mr. Šljivančanin's challenges to the Trial Chamber's consideration of the general sentencing practice of the former Yugoslavia.

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

The Prosecution submits under its third ground of appeal that the sentence of five years' imprisonment imposed by the Trial Chamber on Mr. Šljivančanin is manifestly inadequate because insufficient weight was given to Mr. Šljivančanin's role and responsibility and insufficient weight was given to the "objective gravity" of the crimes. The Prosecution also argues that a five year sentence has no deterrent value for people who will be similarly situated in the future. It seeks an increase in Mr. Šljivančanin's sentence to fall in the range of 15 to 25 years' imprisonment.

With regard to Mr. Šljivančanin's role and responsibility, the Appeals Chamber notes that the Trial Chamber duly considered how Mr. Šljivančanin's role and responsibility contributed to the commission of the cruel treatment and torture of the prisoners of war. 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 Mr. Šljivančanin's liability.

With regard to the gravity of the underlying crimes of torture and cruel treatment of the prisoners, the Appeals Chamber first notes that the Trial Chamber did not elaborate in the sentencing part of the Trial Judgement on the scale and brutality of the crimes. However, throughout the Trial Judgement, it made a number of findings attesting to the horrific torture and cruel treatment of the prisoners of war. The Trial Chamber had found that the beatings inflicted serious pain and suffering, and that the conditions of detention at Ovčara, including the atmosphere of terror and the constant threat of violence, caused serious mental or physical suffering. In this respect, the Appeals Chamber notes that the long-term physical, psychological and emotional suffering of the immediate victims is relevant to the gravity of the offences.

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. 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.

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. 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 I just quoted focused on the fact that most were murdered subsequent to being tortured. 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 their families. As Mr. Šljivančanin was convicted only for aiding and abetting 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.

While the Appeals Chamber acknowledges that the Trial Judgement, read as a whole, 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, 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, in the determination of Mr. Šljivančanin's sentence. 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.

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. Even though the Trial Chamber did not err in its factual findings, considering the 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. The Appeals Chamber thus finds that a five years' imprisonment sentence does not adequately reflect the level of gravity of the crimes committed by Mr. Šljivančanin.

Finally, with regard to the Prosecution contention that Mr. Šljivančanin's sentence should convey to those in positions of power that their failure to meet their responsibilities will be properly punished, the Appeals Chamber finds that although the Trial Chamber did not refer specifically to deterrence when considering the factors it took into account in sentencing Mr. Šljivančanin, having referred to deterrence in general terms earlier as one of the "primary objectives of sentencing", it may be assumed that it was taken into account in sentencing him.

I will now read out in full the Disposition of the Appeals Chamber's Judgement, Mr. Mrkšić and Mr. Šljivančanin, will you please stand?

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 Veselin 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.

Judge Fausto Pocar appends a partially dissenting opinion.

Judge Andréia Vaz appends a partially dissenting opinion.

Mr. Mrkšić and Mr. Šljivančanin, you may be seated.

I now request the Registrar to please deliver copies of the Judgement to the Parties in this case. This hearing of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia stands adjourned.
