

A. Trial Chamber, Judgement - Paras 1 to 388

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[Source: ICTY, The Prosecutor v. Mile Mrkšić and Veselin Šljivančanin, IT-95-13/1-T, Trial Chamber II, Judgement, 27 September 2007, available at www.icty.org. Footnotes omitted]

IN TRIAL CHAMBER II

[...]

Judgement of 27 September 2007

PROSECUTOR v. MILE MRKŠIĆ MIROSLAV RADIĆ VESELIN ŠLJIVANČANIN

JUDGEMENT

[...]

I. INTRODUCTION

1. The Accused, Mile Mrkšić, Miroslav Radić and Veselin Šljivančanin, are charged in the Indictment with crimes allegedly committed on or about 18 to 21 November 1991 against Croats and other non-Serbs who were present in the Vukovar hospital after the fall of Vukovar. The Indictment, as ultimately amended, alleges that several hundred people had sought refuge at Vukovar hospital in the belief that the Vukovar hospital would be evacuated in the presence of international observers. It is alleged that [...] the JNA[1] was responsible for the evacuation of Vukovar hospital which was to be monitored by various international organisations. The Indictment alleges that in the afternoon of 19 November 1991

JNA units took control of the hospital in preparation for the evacuation and, in the morning of 20 November 1991 the JNA units removed about 400 Croats and other non-Serbs, loaded approximately 300 of them onto buses and moved them to the JNA barracks in Vukovar where for about two hours they were subjected to threats and psychological taunts, and some were beaten. It is alleged that the Croats and other non-Serbs who had been taken from Vukovar hospital to the JNA barracks, were then transferred to Ovčara farm. There Serb soldiers forced them to run between two lines of soldiers who beat them as they passed. It is alleged in the Indictment that after the initial beating, Serb forces continued to beat and assault the detainees for several hours, so seriously that at least two men died from the beatings, and that at least one female detainee was sexually assaulted. It is further alleged that at least 264 named detainees were then taken to a nearby location southeast of the Ovčara farm, where they were executed. [...]

2. The Indictment charges the Accused Veselin Šljivančanin, at the material time, a JNA major and later a colonel in the JNA, with individual criminal liability under Article 7(1) of the Statute, in particular, for allegedly planning, instigating, ordering or otherwise aiding and abetting the aforementioned crimes [...]. He is alleged to have personally directed the removal and selection of about 400 non-Serbs from Vukovar hospital on 20 November 1991, knowing or having reason to know they would be murdered, to have ordered or permitted JNA soldiers under his command to deliver custody of these detainees to other Serb forces knowing or having reason to know that they would be murdered, and to have been present at Ovčara farm on 20 November 1991 when criminal acts charged in the Indictment were being committed. [...]
3. The Prosecution alleges that at the material time the Serb forces subject to the command of Mile Mrkšić in OG South[2] comprised primarily elements of the JNA, including gmtbr,[3] but also forces of the TO[4] of the so-called Serbian Autonomous District/Slavonia, Baranja and Western Srem, which included TO forces from the Vukovar area ("local TOs"), TO forces of the Republic of Serbia, and various volunteer and paramilitary forces. For convenience in this decision, the Chamber will often refer to "TO forces" or "TOs" as including volunteer and paramilitary forces. Further, references to "paramilitary forces" and to "paramilitaries" include other volunteers.

VI. PREPARATION FOR THE EVACUATION OF VUKOVAR HOSPITAL AND EVENTS ON 20 NOVEMBER 1991

[...]

C. 20 November 1991

1. Events in the morning at Vukovar hospital

[...]

1. [S]ometime between 0700 and 0800 hours, JNA soldiers went through the hospital and told the patients and others who were able to walk to leave. At the exit, JNA soldiers were separating the men from women and children. The women and children were told to go towards the main gate of the hospital [...], and the men were told to go towards the side or emergency entrance [...]. The wounded who were unable to walk were to remain in their beds awaiting evacuation. [...]
2. It is important to emphasize that, in the Chamber's finding, the men taken to the buses had not been

randomly selected. The men, except the elderly, had been separated from women and children. [...] All males were searched for weapons or dangerous objects. They were placed under JNA armed guard. As will be discussed in more detail later in this Judgement, the evidence reveals that at least the vast majority of them, if not all, had been involved in Croat military formations active in the fighting at Vukovar. At the time all of them were thought by the JNA to have been so involved. The Chamber finds that at least by the time they were searched to ensure they were not armed and were under the armed guard of JNA soldiers, these men became prisoners of war. They will often be referred to as prisoners of war in what follows even though it is possible that individuals among them may not have been members of the Croat forces. The circumstances also demonstrate, in the Chamber's finding, that the two Croat women included with the men were also thought by the JNA to have been involved in the Croatian forces.

[...]

3. Events at the JNA barracks in Vukovar

1. The buses carrying the main body of male evacuees from the hospital, the prisoners of war, arrived at the JNA barracks in Vukovar at around 1030 hours. [...] In the barracks compound there were some regular JNA soldiers and also what were described as reservists, that is TOs and paramilitaries. The JNA soldiers at the barracks were mostly members of the military police [...].
2. Serb TO members and paramilitaries milled around the buses and started to threaten and to verbally abuse the men on the buses. [...]

[...]

1. As the Chamber finds elsewhere in this Judgement, Veselin Šljivančanin was present at the barracks at some time around 1100-1130 hours on 20 November 1991. Šljivančanin was standing about 15 metres from the buses with the prisoners and was talking to at least two other JNA officers.

[...]

1. The five buses left the JNA barracks together. [...] [I]n the Chamber's finding it was between 1300 and 1400 hours that the buses left the JNA barracks. They followed at least one military vehicle [...] and took the road to Negoslavci. [...] Before reaching Negoslavci the buses turned left and continued to Ovčara. There they stopped in front of a hangar that was normally used as a warehouse for agricultural machinery and belonged to the Vupik pig farm. The journey from the barracks took only some half hour.

[...]

5. Events at Ovčara

1. The buses arrived at Ovčara on 20 November 1991 between 1330 and 1430 hours. They were emptied one by one. [...] The prisoners of war were then stripped of their personal valuables; their money and jewellery was taken away while their IDs and other personal belongings were thrown in a ditch. Then

they had to pass between two rows of soldiers, about 10 to 15 on each side, who were beating them severely as they passed through. The soldiers beat the prisoners of war using wooden sticks, rifle-butts, poles, chains and even crutches. They were also kicking and punching the prisoners of war. The gauntlet was about eight to 10 metres long. Everyone from the buses, except for four persons, had to go through the gauntlet and was heavily beaten. It took approximately 15 to 20 minutes to unload each bus. After passing through the gauntlet some prisoners of war were further individually interrogated and mistreated.

2. Serb paramilitaries and TO members participated in the gauntlet. Individuals among them were recognised and have been identified in evidence. [...] Some regular JNA soldiers in uniform may also have participated in the gauntlet. The JNA military police of the 2MP/gmtbr,[5] who had provided the security on the buses, stayed on the buses while the men were made to run the gauntlet. At the hangar there were also 15-20 JNA soldiers who were securing the area. A witness described the soldiers around the hangar as JNA military policemen wearing olive-drab JNA uniforms with white belts. [...] No one tried to stop those who were hitting the prisoners of war.

[...]

1. Inside the hangar the beatings continued. The atmosphere was miserable. There were about 200 people from the buses and at least 40 Serb soldiers including paramilitaries, TO members and JNA soldiers. [...] The prisoners of war had to lean against the wall with their arms up and their legs spread. Some were hit with iron rods and rifle-butts and kicked. [...]
2. No prisoner of war received medical treatment, either at the JNA barracks, or at Ovčara, despite the fact that many were severely injured and many were extremely badly beaten.
3. At a time estimated as between 1400 and 1500 hours, a soldier approached a worker at the Vupik pig farm and told him to bring an excavating machine that was parked there and to go with him. The soldier was wearing a JNA uniform, had an officer's belt and a pistol but a regular cap. [...] While this description could well indicate the soldier was a JNA soldier, indeed some elements but not all would indicate an officer, it is too general to enable the Chamber to conclude that this soldier was not a TO or paramilitary officer. They left the farm compound. The soldier told the driver to turn right, then near the woods, to turn left. [...] The soldier told the worker to look for a place where it would be possible to dig. They drove to the end of the woods. To the right there was an old hole and the soldier asked the worker to dig there. The worker dug until the soldier told him: "Enough". The worker's estimation and recollection was that the hole excavated was about 10 metres long and three metres wide. It was between one and half to two metres deep. The worker and the soldier then returned to the Vupik pig farm. It was between 1530 and 1600 hours when they reached the yard. [...]
4. In the finding of the Chamber, the location of the hole dug by the worker, in the presence of the soldier, coincides exactly with the location of the mass grave which has since been located and identified [...].

[...]

1. Apart from the small number of men who were released from the hangar at Ovčara after the personal intervention of Serb forces who knew them, the vast majority of the prisoners of war, the men taken from the hospital on the morning of 20 November 1991, remained at Ovčara that evening. In the evening, when it was already dark outside, groups of 10 or 20 people were lined up and taken out of the hangar.

A soldier described as wearing an olive-grey JNA uniform with epaulets of a regular soldier, took the first group out. [...] After 10 to 15 minutes the soldier returned and took another group out. He told the men in this group that they would be transferred to another hangar. They got into a JNA military truck parked outside the hangar. It was a regular JNA freight vehicle, covered with a tarpaulin. The soldier who took the group out of the hangar joined the driver in the front cab. The truck set off in the direction of Grabovo.

[...]

1. At about 2300 hours on 20 November 1991, Colonel Vujić and his team of senior security administration officers [...] heard gunfire coming from an area he judged to be Ovčara. The shooting he heard lasted for some time. He thought this was at some time between 2200 and 2400 hours, although it is apparent he had no precise awareness of the time.
2. During the night of 20/21 November 1991, P014 heard at intervals bursts of fire coming from the direction of Grabovo. He also described hearing after midnight at intervals what he concluded was the sound of a digging machine. In this last respect the Chamber notes that the grave having been dug in the afternoon it would need to be covered again after the killing of the prisoners of war. That could explain what P014 heard even though, if so, there are unanswered questions as to who operated the machine and related matters.
3. In the Chamber's finding, in the evening and night hours of 20/21 November 1991 the prisoners of war were taken in groups of 10 to 20 from the hangar at Ovčara to the site where earlier that afternoon a large hole had been dug. There, members of Vukovar TO and paramilitary soldiers executed at least 194 of them. The killings started after 2100 hours and continued until well after midnight. The bodies were buried in the mass grave and remained undiscovered until several years later. [...]

[...]

F. Role of Veselin Šljivančanin

1. Participation in the events

1. Veselin Šljivančanin was actively involved in preparations for the evacuation. On 19 November 1991, he visited Vukovar hospital and received from Vesna Bosanac a list of the people to be evacuated. [...] In the morning of 20 November 1991, shortly before 0600 hours, Veselin Šljivančanin set off for the Vukovar hospital. [...] They arrived at about 0700 hours. [...]
2. Meanwhile, the persons removed from the hospital had been taken to the JNA barracks. There is evidence of the presence of Veselin Šljivančanin at the barracks. P009 testified that on 20 November 1991, at the time of his visit to the JNA barracks, he saw a JNA officer, whom he later identified as Veselin Šljivančanin. [...] The evidence of Veselin Šljivančanin confirms that in the afternoon of 19 November 1991, he was present in front of the hospital. [...]
3. It was the evidence of P009 that on 20 November 1991 he saw the officer whom he later learned was Veselin Šljivančanin within the compound of the JNA barracks. Šljivančanin was standing about 15 metres from the buses with prisoners removed from the hospital and was talking to at least two other JNA officers. [...]
4. [...] [T]he Chamber is persuaded by the evidence of P009 that Veselin Šljivančanin was present at the

barracks at some time around 1100-1130 hours on 20 November 1991. [...]

5. After his return to the hospital, Major Vukašinović[6] reported to Veselin Šljivančanin about the conduct of the TOs at the barracks and said that further transports of prisoners to and from the barracks might be difficult in such conditions. This report provided Veselin Šljivančanin with more details of the situation at the barracks, in addition to what he could personally observe when visiting the place.
6. Veselin Šljivančanin could also see signs of mistreatment on the prisoners brought back from the barracks. [...] The Chamber finds that after his visit to the barracks and the reports from Vukašinović and Karanfilov,[7] Veselin Šljivančanin was aware that the TOs were capable of resorting to physical abuse. He could appreciate the severity of that abuse when men with visible signs of mistreatment returned from the barracks to the hospital.
7. [...] Veselin Šljivančanin testified that he did not go to Ovčara at any point in time on 20 November 1991. However, two witnesses claimed that they saw him at Ovčara on that day. [...]
8. Having carefully weighed this evidence the Chamber accepts the evidence of P009 that he saw Veselin Šljivančanin at Ovčara on 20 November 1991. [...]

[...]

1. After his arrival at Negoslavci, Veselin Šljivančanin received a report on the events at Ovčara from his deputy Major Vukašinović. [...] Major Vukašinović says he informed them about problems with TO members at Ovčara and that he had managed to calm them down, after which they had departed. Nevertheless, he said he had the feeling that there might be more problems in the future and suggested the strengthening of security detail. [...]

[...]

Footnotes

All footnotes are authors' notes

- [1] Yugoslav People's Army
- [2] Operational Group South, of which Šljivančanin was in charge.
- [3] Guards Motorised Brigade
- [4] Territorial Defence
- [5] 2nd Military Police Battalion of the Guards Motorised Brigade
- [6] Major Ljubiša Vukašinović was Veselin Šljivančanin's deputy.
- [7] Captain Borče Karanfilov was an officer of the security organ of the Guards Motorised Brigade (gmtbr) and was subordinated to Veselin Šljivančanin.

Paras 655 to 674

IX. RESPONSIBILITY

[...]

B. FINDINGS

[...]

4. Responsibility of Veselin Šljivančanin

[...]

(iii) *Aiding and abetting*

1. The Prosecution alleges that Veselin Šljivančanin aided and abetted the crimes charged in the Indictment by, *inter alia*, ordering the selection of prisoners of war from amongst the persons taken from the hospital, ordering their transport to the barracks and then to Ovčara, transmitting the order to withdraw the military police of 80 mtbr[1] issued by Mile Mrkšić and failing to issue orders required to prevent the crimes. [...]

d. *Failure to give orders to prevent the commission of crimes*

1. The Indictment alleges that Veselin Šljivančanin is responsible under Article 7(1) for having aided and abetted in the planning, preparation or execution of the crimes charged. The Prosecution contends that Veselin Šljivančanin aided and abetted the crimes charged in the Indictment by having failed to give orders necessary for the prevention of those crimes. It is established that a person may aid and abet by omission. The Indictment alleges that Veselin Šljivančanin “permitted JNA soldiers under his command to deliver custody of ... detainees to other Serb forces who physically committed the crimes” and “was personally present at Ovčara farm on 20 November 1991 when criminal acts charged in this indictment were being committed”. [...]
2. As established earlier, Veselin Šljivančanin personally visited Ovčara. He was seen there at about 1430 or 1500 hours, at which time in the Chamber’s finding the unloading of the prisoners of war and their having to pass through the gauntlet towards the hangar were still in progress. While the evidence does not establish that he entered the hangar the violence of TOs and paramilitaries to the prisoners, and the freedom of the TOs and paramilitaries to enter the hangar were only too obvious. Veselin Šljivančanin was thus present at Ovčara at the time when prisoners of war were seriously mistreated by TOs and volunteers and must have witnessed the mistreatment. In the Chamber’s finding he was aware that crimes were being committed. The evidence does not allow a conclusion to be reached that during his visit to Ovčara Veselin Šljivančanin observed the actual conditions in which the prisoners were detained inside the hangar and thus it is not established that he was aware that the offence of cruel treatment was being committed this way.

[...]

1. The evidence indicates that, despite having witnessed the mistreatment of prisoners of war at Ovčara and being aware of similar and worse previous acts, Veselin Šljivančanin made no effort to prevent the continuing commission of crimes at Ovčara. There is nothing to suggest that his immediate subordinates were committing the offences at the time of his visit at Ovčara. [...] However, 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, authority which, in the Chamber's finding, continued at the time of Veselin Šljivančanin visit to Ovčara that afternoon. In particular, he had been specifically invested with command authority over OG South military police for these purposes [...]. Yet, he gave no orders to the military police or to his own immediate subordinates present, directed to the prevention of the commission of further crimes. No evidence has been adduced, and it has not been advanced, that Veselin Šljivančanin made any attempt to stop the mistreatment of prisoners of war then occurring at Ovčara, even though he was in a position to take necessary measures.

2. 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 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. [...]
3. For these reasons, the Chamber is satisfied that Veselin Šljivančanin duty to protect the prisoners of war brought to Ovčara on the afternoon of 20 November 1991 was of significance. Veselin 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. It 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. [...]
4. The breach of the legal duty imposed on Veselin Šljivančanin resulted in the intermittent but continuing, and at times virtually unimpeded, commission of crimes by TOs and paramilitaries during the afternoon. Had he chosen to give clear direction to the military police present, and if necessary to order other military police to assist at Ovčara, he would have been able to obstruct the commission of further crimes. [...] Accordingly, the failure of Veselin Šljivančanin to act pursuant to the legal duty on him to ensure the security of the prisoners of war had a substantial effect on the commission of crimes in Ovčara, in the afternoon of 20 November 1991. As established earlier, Veselin Šljivančanin knew that the TOs and paramilitaries were mistreating the prisoners of war and thereby committing the crimes of torture and cruel treatment. In the circumstances, he must have been aware that by failing to give clear direction to the military police present or to secure other military police to assist at Ovčara he facilitated the commission of those crimes.

[...]

1. During the visit of Veselin Šljivančanin at Ovčara crimes of torture and cruel treatment were being committed. As the security of the prisoners of war was insufficient, the commission of crimes continued. As established earlier, in the evening of that day, TOs and paramilitaries who had gathered at Ovčara took the prisoners of war to the mass grave site and murdered them. It is true that Veselin Šljivančanin must have been aware, on the basis of his knowledge of the events at Velepromet on 19 November 1991, that at least some of the TOs and paramilitaries were capable of killing. However, at the time of

his visit to Ovčara, the prisoners of war remained under the security and authority of the JNA. Veselin Šljivančanin could reasonably have believed in the circumstances that the TOs and paramilitaries would be unlikely to resort to killing. It was only after the final withdrawal that evening of the JNA troops from Ovčara, the military police of 80 mtbr, when the TOs and paramilitaries were able to have unrestrained access to the prisoners of war who had been left in their control, that murder became a likely occurrence. Therefore, the Chamber is unable to conclude that Veselin Šljivančanin knew at the time of his visit to Ovčara that killings would probably be committed. He can only be held responsible for the crimes that he witnessed when visiting Ovčara and for the continued commission of similar crimes during the afternoon.

2. The Chamber further observes that the acts of murder took place after the order to withdraw the military police of 80 mtbr of the JNA from Ovčara had been issued and the prisoners of war were in the custody of the TO and paramilitaries. This withdrawal had been ordered by Mile Mrkšić. It follows that the responsibility for providing security for the prisoners of war removed from the hospital, which Veselin Šljivančanin had received on the preceding day from Mile Mrkšić, was necessarily at an end with the withdrawal of the last JNA troops. For this reason, the Chamber finds that it has not been established that Veselin Šljivančanin aided and abetted the commission of murder at Ovčara by failing to discharge a legal duty.
3. For the reasons given, the Chamber concludes that by the failure to discharge his legal duty to protect the prisoners of war held in Ovčara from acts of mistreatment, Veselin Šljivančanin aided and abetted the crimes of torture and cruel treatment; not the crime of murder.

[...]

Footnotes

- [1] 80th Motorised Brigade (Kragujevac)

B. Appeals Chamber, Judgement - Paras 45 to 103

[Source: ICTY, The Prosecutor v. Mile Mrkšić and Veselin Šljivančanin, IT-95-13/1-A, Appeals Chamber, Judgement, 5 May 2009, available at www.icty.org. Footnotes omitted]

IN THE APPEALS CHAMBER

[...]

Judgement of 5 May 2009

PROSECUTOR V. MILE MRKŠIĆ VESELIN ŠLJIVANČANIN

JUDGEMENT

[...]

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

1. Introduction

1. 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. 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. [...] 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. 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.
2. 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". It submits that this finding was reached as a result of erroneous conclusions of law and fact [...]. 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 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 and increase his sentence to a term of 30 years to life imprisonment.
3. 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; 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.

[...]

1. 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. 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". 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. 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. 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". [...]

3. Šljivančanin's legal duty towards the prisoners

1. 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. The Prosecution submits that the Trial Chamber erred in delineating the temporal scope of Šljivančanin legal duty. 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. 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; (ii) his duty in his capacity as chief of the security organ; and (iii) his duty under Mrkšić's specific delegated authority. [...]
2. 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. [...]
3. 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" [...].
4. 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. 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. In this respect, the Appeals Chamber recalls the ECMM[1] 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. [...]
5. 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, 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 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, 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, which applies to the transfer of prisoners of war to another High Contracting Party. [...] 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.
6. 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". The JNA Regulations further explicitly state that "[e]very individual – a member of the military or a civilian – shall be personally accountable for violations of the

laws of war if he/she commits a violation or orders one to be committed". 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. The Appeals Chamber agrees with this submission.

7. 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. [...]
8. 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.
9. 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.

[...]

5. Conclusion

1. 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 Šljivančanin 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 [...] that the TOs and the paramilitaries would succeed in fully satisfying their revenge and kill the prisoners [of war]". 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.
2. 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.
3. 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.

[N.B.: On 8 December 2010, the Appeals Chamber revised its judgement in light of new facts brought before it by the counsel of the defence. No questions of law were revised. Šljivančanin's sentence of seventeen years of imprisonment was eventually reduced to ten years' imprisonment.]

Footnotes

[1] European Community Monitoring Mission

Discussion

1. a. (*Appeals Chamber, para. 69*) Do the Chambers qualify the conflict? How could the conflict in November 1991, before Croatia was recognized by any State, have been of an international character? Why does the Appeals Chamber apply GC III? Is it applicable only because of the Special Agreements on the application of the Geneva Conventions? Are they binding on the parties? [See Former Yugoslavia, Special Agreements between the Parties to the Conflicts]
- b. If the conflict had not been of an international character, but the parties had agreed to treat captured combatants in accordance with GC III, what would Article 12(2) of GC III imply? That such combatants could not be transferred to any entity not party to such an agreement?
2. (*Trial Chamber, para. 207*) Why were the victims in this case combatants? Why were they POWs? At what point did they become POWs?
3. a. (*Appeals Chamber, paras 71-74*) Who are the provisions of the Geneva Conventions addressed to? Are they addressed only to States Parties, or also to all agents of the State?
- b. (*Appeals Chamber, para. 71*) Does Article 46 of GC III create an obligation for the State agents responsible for the transfer? Does it imply an obligation not to transfer POWs in certain circumstances? Does it imply an obligation not to leave them in the power of certain entities or people?
4. (*Trial Chamber, para. 7; Appeals Chamber, para. 71*) Does Article 12 of GC III apply to the situation, even though the forces to which the POWs have been transferred, i.e. the TOs and paramilitaries, belong to the same party to the conflict?
5. a. (*Appeals Chamber, para. 72*) Can Article 12 of GC III be understood as attributing obligations to State agents in charge of POWs? May this obligation be extended to all transfers of POWs, regardless of who the receiving power is? Do you agree with the Appeals Chamber's finding that Šljivančanin had a legal obligation under IHL to satisfy himself of "the willingness and ability of the TOs" to treat the POWs humanely? Can it be argued that Šljivančanin violated IHL in transferring the POWs to the TOs and paramilitaries?
- b. Who is responsible, under IHL, for ensuring that the receiving power has "the willingness and the ability [...] to apply the Conventions"? Does the obligation concern every State agent? Was the obligation under IHL binding for all JNA soldiers present at Ovčara? Did all the JNA soldiers violate IHL when they withdrew from Ovčara that night?
6. a. Is there an obligation, under IHL, to disobey unlawful orders? Can it be argued that the order, given

by Mrkšić, to withdraw from Ovčara was unlawful? If yes, did Šljivančanin have an obligation, under IHL, to disobey? (CIHL, Rules 154 and 155)

- b. Did Šljivančanin have an obligation, under IHL, to take action to prevent the commission of crimes against the POWs by the TOs and paramilitaries, although the latter were not under his command, but under that of Mrkšić? (GC III, Arts 12 and 13; P I, Arts 86 and 87; CIHL, Rule 153)

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