

**UNITED
NATIONS**



International Residual Mechanism
for Criminal Tribunals

Case No: MICT-15-96-A

Date: 22 September 2021

Original: English

IN THE APPEALS CHAMBER

Before: Judge Carmel Agius
Judge Lee G. Muthoga
Judge Aminatta Lois Runeni N’gum
Judge Yusuf Aksar
Judge Claudia Hoefer

Registrar: Abubacarr Tambadou

THE PROSECUTOR

v.

**JOVICA STANIŠIĆ
FRANKO SIMATOVIĆ**

PUBLIC

**PROSECUTION RESPONSE TO STANIŠIĆ’S MOTION TO
STRIKE AND/OR AMEND PROSECUTION NOTICE OF
APPEAL**

The Office of the Prosecutor:

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Barbara Goy

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1. The Appeals Chamber should dismiss Stanišić’s Motion.¹ The Prosecution’s Notice of Appeal² is not defective. It complies with the applicable law and follows standard practice. As such, the Defence cannot show prejudice. Should the Chamber find otherwise, the Prosecution should be given the opportunity to amend its Notice before any grounds or sub-grounds are struck.

I. THE PROSECUTION’S NOTICE OF APPEAL COMPLIES WITH ALL REQUIREMENTS

2. The Prosecution’s Notice meets all of the formal requirements of the Rules and relevant Practice Direction. For each ground and sub-ground, the Notice properly identifies the alleged errors, the paragraph numbers where they occur and the relief sought.³ More detailed arguments made to support the grounds of appeal belong in the Appellant’s brief.⁴ Since the Prosecution sufficiently described the alleged errors, the Respondents are now in a position to focus on the arguments which will be developed subsequently in the Appellant’s brief,⁵ and therefore cannot show prejudice.

A. The Prosecution sufficiently identified the errors of law

1. The Prosecution explained the nature of the errors of law

3. Contrary to what Stanišić argues, the Prosecution did not simply state that the Trial Chamber applied an “incorrect legal standard”,⁶ but explained in relation to which specific element of the mode of liability the erroneous standard was applied. It is standard practice to

¹ Stanišić Defence Motion to Strike and/or Amend Prosecution Notice of Appeal, 13 September 2021 (“Motion”).

² Prosecution Notice of Appeal, 6 September 2021 (“Notice”).

³ Rule 133, Rules of Procedure and Evidence, MICT/1/Rev.7, 4 December 2020 (“Rules”); Art.2, Practice Direction on Requirements and Procedures for Appeals, MICT/10/Rev.1, 20 February 2019. *See Prosecutor v. Šainović et al.*, Case No.IT-05-87-A, Decision on Nebojša Pavković’s Second Motion to Amend his Notice of Appeal, 22 September 2009, para.17.

⁴ *See Prosecutor v. Mrkšić et al.*, Case No.IT-95-13/1-A, 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, para.8 (“The only formal requirement under the Rules is that the notice of appeal contains a list of the grounds of appeal; it does not need to detail the arguments that the parties intend to use in support of the grounds of appeal, the place for detailed arguments being the Appellant’s brief.”); *In the case against Florence Hartmann*, Case No.IT-02-54-R77.5-A, Decision on Motions to Strike and Requests to Exceed Word Limit, 6 November 2009 (“Hartmann Decision”), para.14.

⁵ *Prosecutor v. Bošković & Tarčulovski*, Case No.IT-04-82-A, Judgement, 19 May 2010, para.246 *citing Prosecutor v. Bagilishema*, Case No.ICTR-95-1A-A, Decision on Motion to Have the Prosecution’s Notice of Appeal Declared Inadmissible, 26 October 2001, p.3.

⁶ Motion, para.12.

identify an error of law in relation to a particular element of a mode of responsibility or a crime without going into further detail as to how the law applied to that element is erroneous.⁷

4. Sub-Ground 1(A)(i) provides sufficient detail for the Respondents to understand the alleged error.⁸ The nature of the error is clear: the Trial Chamber applied an incorrect legal standard in its assessment of whether the Accused made a significant contribution to the common criminal purpose. This error pervades the entire range of paragraphs referred to and is further evidenced by the specific paragraphs cited where the standard is articulated. Furthermore, the sub-ground is broken down into two separate components—what can constitute a contribution, and the significance of the contributions—to further focus the mind of the Respondents.

2. The Prosecution identified the issues to which the “failure to adjudicate” or “failure to provide a reasoned opinion” relate

5. By alleging a failure to adjudicate or a failure to provide a reasoned opinion in relation to a particular issue, a party has properly identified an error of law. A party is not required to identify which specific findings or items of evidence were disregarded or the “way” they were disregarded.⁹ Sub-grounds 1(A)(ii), 1(B)(ii) and 2(A) clearly explain the nature of what was disregarded by the Trial Chamber, and sub-ground 1(A)(iii) refers to a single paragraph, clearly identifying what was excluded from adjudication, thus fulfilling the requirements of a notice of appeal.

B. The Prosecution sufficiently identified the error of fact

6. For errors of fact, it is standard practice for an appellant to list the challenged paragraphs, and argue that no reasonable trier of fact could have come to the conclusion in

⁷ See e.g. *Prosecutor v. Mladić*, Case No.MICT-13-56-A, Prosecution’s Notice of Appeal, 22 March 2018 (“*Mladić* Prosecution Notice”), para.7; *Prosecutor v. Mladić*, Case No.MICT-13-56-A, Notice of Appeal of Ratko Mladić, 22 March 2018 (“*Mladić* Defence Notice”), para.34; *Prosecutor v. Karadžić*, Case No.MICT-13-55-A, Prosecution’s Notice of Appeal, 22 July 2016 (“*Karadžić* Prosecution Notice”), para.21; *Prosecutor v. Prlić et al.*, Case No.IT-04-74-A, Jadranko Prlić’s Notice of Appeal, 5 August 2014 (“*Prlić* Defence Notice”), para.8; *Prosecutor v. Šainović et al.*, Case No.IT-05-87-A, Prosecution Notice of Appeal, 27 May 2009, para.4.

⁸ *Contra* Motion, para.11.

⁹ *Contra* Motion, paras.15(i), 17(i), 23(i), 30(i). See e.g. *Prosecutor v. Šešelj*, Case No.MICT-16-99-A, Prosecution’s Notice of Appeal, 2 May 2016 (“*Šešelj* Prosecution Notice”), para.5; *Prosecutor v. Prlić et al.*, Case No.IT-04-74-A, Prosecution’s Notice of Appeal, 27 August 2013 (“*Prlić* Prosecution Notice”), paras.8-9; *Prosecutor v. Prlić et al.*, Case No.IT-04-74-A, Slobodan Praljak’s Notice of Appeal, 28 June 2013, paras.276-277; *Prosecutor v. Stanišić & Simatović*, Case No.IT-03-69-A, Prosecution’s Notice of Appeal, 28 June 2013 (“*ICTY Stanišić & Simatović* Prosecution Notice”), paras.5, 11, 17; *Prosecutor v. Tolimir*, Case No.IT-05-88/2-A, Defence Amended Notice of Appeal, 9 September 2013, para.39; *Prosecutor v. Stanišić & Župljanin*, Case No.IT-08-91-A, Amended Notice of Appeal on Behalf of Mićo Stanišić, 23 April 2014 (“*M.Stanišić* Defence Notice”), para.23.

question.¹⁰ It is not for the Prosecution to “indicate the origin or cause”¹¹ of the Trial Chamber’s unreasonable conclusions. As noted above, further detail is to be provided in the Appellant’s Brief.¹² As with sub-ground 2(A),¹³ sub-ground 2(B) cites to the section on “Aiding and Abetting”, where the Trial Chamber’s adjudication and reasoning on whether Stanišić and Simatović aided and abetted crimes in locations other than Bosanski Šamac should have been. A more specific reference was impossible considering the Trial Chamber’s lack of adjudication or reasoning.¹⁴

C. The use of paragraph ranges is permitted

7. The Prosecution’s reference to paragraph ranges in the Notice¹⁵ is permitted¹⁶ and consistent with standard practice.¹⁷ Contrary to what Stanišić argues, the *Tarčulovski* Decision¹⁸ does not stand for the proposition that ranges are impermissible in a notice of appeal.¹⁹ *Tarčulovski*’s Amended Notice of Appeal failed to set out whether the errors were of fact or law and failed to identify paragraphs for each error and sub-error.²⁰ In this context, the Appeals Chamber decided that the paragraph ranges cited did not satisfy that requirement.²¹

8. The range referred to in paragraphs 6, 7 and 9 of the Notice encompasses the section of the Judgement in which the Trial Chamber analysed and drew conclusions about the Accused’s contributions. Citing to the entire range of paragraphs is necessary in paragraphs 6 and 9, sub-grounds 1(A)(i) and 1(A)(iv), as the errors identified permeate the entire section. The 27 specific paragraphs referred to in paragraph 6 are not distinct from the range, but

¹⁰ *Contra* Motion, paras.19(i), 25(i), 32. *See e.g.* *Karadžić* Prosecution Notice, para.7; *Šešelj* Prosecution Notice, paras.10-11; *Prlić* Prosecution Notice, paras.11, 13; *Prosecutor v. Prlić et al.*, Case No.IT- 04-74-A, Milivoj Petković’s Notice of Appeal, 5 August 2014, para.48; M.Stanišić Defence Notice, paras.40-42; *Prosecutor v. Delić*, Case No.IT-04-83-A, Defence Notice of Appeal, 14 October 2008 (“*Delić* Defence Notice”), para.13; *Prosecutor v. Bošković*, Case No.IT-04-82-A, Prosecution’s Notice of Appeal, 6 August 2008, para.6.

¹¹ Motion, para.25(ii).

¹² *See above* fns.3-5.

¹³ *See above* para.5.

¹⁴ *Contra* Motion, para.32.

¹⁵ *See* Notice, paras.6, 7, 9, 12.

¹⁶ *Contra* Motion, paras.11, 15(ii), 19(iii), 23(ii).

¹⁷ *See e.g.* *Mladić* Defence Notice, para.61; *Karadžić* Prosecution Notice, para.21; *Prlić* Defence Notice, Ground 13; M.Stanišić Defence Notice, para.23; ICTY *Stanišić & Simatović* Prosecution Notice, paras.3, 5; *Prosecutor v. Popović et al.*, Case No.IT-05-88-A, Prosecution’s Notice of Appeal, 8 September 2010, fns.5-6.

¹⁸ *Prosecutor v. Bošković & Tarčulovski*, Case No.IT-04-82-A, Decision on Johan Tarčulovski’s Motion for Leave to Present Appellate Arguments in Order Different from that Presented in Notice of Appeal, to Amend the Notice of Appeal, and to File Sur-Reply, and on Prosecution Motion to Strike, 26 March 2009 (“*Tarčulovski* Decision”).

¹⁹ Motion, paras.5(b), 23(ii).

²⁰ *See Prosecutor v. Bošković and Tarčulovski*, Case No.04-82-A, 1) Reply of Tarčulovski on Motion, 2) Response to Prosecution’s Motion to Strike, 26 January 2009, Annex A.

²¹ *Tarčulovski* Decision, para.30.

examples of where the incorrect standard was articulated or applied.²² In paragraph 7, sub-ground 1(A)(ii), referring to the entire contributions section is necessary since the Prosecution is alleging a failure to adjudicate and/or lack of a reasoned opinion—making it impossible to pinpoint specific paragraphs.²³ The contribution section of the Judgement is where the adjudication and/or reasoned opinion should have been, had the Trial Chamber not so erred.

9. Similarly, the range of paragraphs referred to in paragraph 12 of the Notice, sub-ground 1(B)(ii), was necessary as it encompasses the Trial Chamber’s discussion on intent—the section which should have contained all of Stanišić’s and Simatović’s relevant conduct, had the Trial Chamber not failed to consider it all. No more precise identification of paragraphs was possible.²⁴

D. The use of alternative fact and/or law formulations is permitted

10. The Prosecution’s use of an alternative formulation for errors of fact and law is standard practice.²⁵ The *Hartmann* Decision does not stand for the proposition that alternative formulations are impermissible in a notice of appeal.²⁶ When relying on it, Stanišić changes its meaning by omitting the words “persistent and pervasive” from the quoted paragraph.²⁷

11. The Prosecution’s use of alternative formulations is neither persistent nor pervasive. Stanišić takes issue with the single occasion that an alternative formulation is used in a sub-ground that describes a specific error.²⁸ All other instances are in headings or introductory paragraphs that describe a grouping of sub-errors, each of which is then specifically labelled as an error of law or an error fact.²⁹

12. In sub-ground 1(A)(iii), the alternative formulation was necessary. The Prosecution views the Trial Chamber’s mistaken determination that the Prosecution had dropped charges of forcible displacement crimes in Sanski Most in 1995 as an error of law. However, in light

²² *Contra* Motion, para.11.

²³ *Contra* Motion, para.15(ii).

²⁴ *Contra* Motion, para.23(ii).

²⁵ See e.g. *Mladić* Prosecution Notice, para.5; *Karadžić* Prosecution Notice, paras.3, 9, 16; *Prlić* Prosecution Notice, paras.3, 7; *Prosecutor v. Prlić et al.*, Case No.IT-04-74-A, Bruno Stojić Notice of Appeal, 4 August 2014, paras.8-9; *Prosecutor v. Lukić & Lukić*, Case No.IT-98-32/1-A, Notice of Appeal on Behalf of Sredoje Lukić, 19 August 2009, p.84; *Delić* Defence Notice, para.37.

²⁶ *Contra* Motion, paras.5(c), 17(ii).

²⁷ Motion, paras.5(c), 17(ii) citing *Hartmann* Decision, para.13, which states that the “**persistent and pervasive** use of alternative formulations for alleged errors of law and errors of fact throughout the Notice of Appeal leads to imprecision and confusion” (emphasis added).

²⁸ See Motion, para.17(ii).

²⁹ See Motion, paras.20-21.

of the unusual nature of this error, which involves an incorrect understanding of the procedural record, the Prosecution has included an error of fact formulation in its Notice. Given the specificity of this error, the inclusion of an alternative error of fact has no impact on the Respondents' ability to prepare their response.

E. Grounds 1(C) and 2(C) are properly pleaded

13. Grounds 1(C) and 2(C) clearly state the error by reference to the relevant Decision on the basis of which the Trial Chamber systematically excluded and/or did not rely on evidence which was not admitted in the first trial.

14. Stanišić overlooks the interplay between the Notice of Appeal and a Motion for Additional Evidence pursuant to Rule 142. The Appeals Chamber previously determined that the excluded evidence may be admissible on appeal through a motion for additional evidence.³⁰ It is in such a motion that the Prosecution will have to identify which specific items of evidence were erroneously excluded and the impact it could have had on the verdict.³¹

II. THE PROSECUTION SHOULD BE ALLOWED TO AMEND ITS NOTICE

15. Should the Appeals Chamber find that any ground or sub-ground of the Notice is defective, the Prosecution should be given the opportunity to amend its Notice accordingly, in line with previous decisions.³² At this early stage of the appeals proceedings, an amendment of the Notice would not cause undue prejudice.

³⁰ *Prosecutor v. Stanišić & Simatović*, Case No.MICT-15-96-AR.Misc, Decision on a Prosecution Motion for Enforcement of Order for Retrial, 14 December 2018, para.10 (“It will be open to both the Prosecution and the Accused to appeal the relevant decisions of the Trial Chamber in an appeal from judgement during which they may also seek to admit additional evidence pursuant to Rule 142 of the Rules, including any evidence that they may contend was erroneously excluded by the Trial Chamber.”).

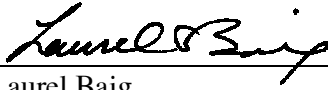
³¹ See Rule 142(C) of the Rules.

³² See e.g. *Hartmann* Decision, para.14; *Prosecutor v. Šešelj*, Case No.IT-03-67-R77.3-A, Decision on Vojislav Šešelj's Submission No.491 and on the *Amicus* Prosecutor's Motion to Strike Vojislav Šešelj's Notice of Appeal and to Close the Case, 6 July 2012, paras.22-23; *Prosecutor v. Prlić et al.*, Case No.IT-04-74-A, Decision on Prosecution Motion to Strike Grounds 12 and 14 of Valentin Ćorić's Notice of Appeal, 11 December 2014, p.3.

III. CONCLUSION

16. Stanišić's Motion should be dismissed in its entirety as the Prosecution's Notice meets all of the legal requirements for notices of appeal. In the alternative, the Prosecution should be allowed to amend its Notice in accordance with the Appeals Chamber's direction.

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Laurel Baig
Senior Appeals Counsel

Dated this 22nd day of September 2021
At The Hague, The Netherlands



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