

**UNITED
NATIONS**



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of the
Former Yugoslavia since 1991

Case No. IT-04-82-A
Date: 26 March 2009
Original: English

BEFORE THE APPEALS CHAMBER

Before: Judge Mehmet Güney, Pre-Appeal Judge
Judge Mohamed Shahabuddeen
Judge Liu Daqun
Judge Andrézia Vaz
Judge Theodor Meron

Acting Registrar: Mr. John Hocking

Decision: 26 March 2009

PROSECUTOR

v.

**LJUBE BOŠKOSKI
JOHAN TARČULOVSKI**

PUBLIC

**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**

The Office of the Prosecutor:

Mr. Paul Rogers

Counsel for Johan Tarčulovski:

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Counsel for Ljube Boškosi

Ms. Edina Rešidović
Mr. Guenaël Mettraux

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (“Appeals Chamber” and “Tribunal”, respectively) is seized of the “Motion of Johan Tarčulovski for Leave to Present Appellate Arguments in Order Different from that Presented in Notice of Appeal, Pursuant to Practice Direction 4 and to Amend the Notice of Appeal Pursuant to Practice Direction 2” (“Motion”), filed by Johan Tarčulovski (“Tarčulovski”) on 12 January 2009. The Office of the Prosecutor (“Prosecution”) responded to the Motion and filed a Motion to Strike on 22 January 2009.¹

I. PROCEDURAL BACKGROUND

2. On 10 July 2008, Trial Chamber II convicted Tarčulovski pursuant to Article 7(1) of the Statute for murder, wanton destruction, and cruel treatment, as violations of the laws and customs of war under Article 3 of the Statute,² and sentenced him to 12 years in prison.³ The Appeals Chamber is currently seized of two appeals against the Trial Judgement filed by Tarčulovski⁴ and the Prosecution.⁵

3. The Prosecution filed its Response and Motion to Strike Grounds 1 and 2 of Tarčulovski’s Appeal Brief on 22 January 2009.⁶ Tarčulovski responded to the Prosecution’s Response and Motion to Strike on 26 January 2009.⁷ The Prosecution replied to Tarčulovski’s Reply and Response to Motion to Strike on 29 January 2009.⁸ Tarčulovski filed a motion to file a sur-reply to the Prosecution’s Motion to Strike along with his sur-reply on 30 January 2009,⁹ and the Prosecution filed its response to the Motion for Sur-Reply on 4 February 2009.¹⁰

¹ Prosecution Response to Johan Tarčulovski’s Motion of 12 January 2009, and Motion to Strike, 22 January 2009 (“Prosecution Response and Motion to Strike”).

² *Prosecutor v. Ljube Boškosi and Johan Tarčulovski*, Case No. IT-04-82-T, Judgement, 10 July 2008 (“Trial Judgement”), para. 607.

³ Trial Judgement, para. 608.

⁴ Tarčulovski Notice of Appeal, 8 August 2008. Upon Tarčulovski’s second request for extension of time to file his Appellant’s Brief (Tarčulovski Motion for Extension of Time to File the Appellant’s Brief, 1 October 2008), the Appeals Chamber ordered, on 22 October 2008, that the deadline for filing his Appellant’s Brief be postponed to 12 January 2009. *See* Decision on Johan Tarčulovski’s Second Motion for Extension of Time to File Appeal Brief, 22 October 2008, p. 3. Tarčulovski filed a confidential Appeal Brief on 9 January 2009 and filed a public redacted version of it on 12 January 2009 (“Tarčulovski’s Appeal Brief”).

⁵ The Prosecution has appealed the acquittal of Ljube Boškosi. *See* Prosecution’s Notice of Appeal, 6 August 2008; Prosecution’s Appeal Brief, filed confidentially on 20 October 2008; Notice of Filing of Public Redacted Version of Prosecution’s Appeal Brief, 3 November 2008; Notice of Filing of Corrected Public Redacted Version of Prosecution’s Appeal Brief, 4 November 2008; Boškosi Defence Respondent Brief, 1 December 2008; Prosecution’s Reply Brief, filed confidentially on 16 December 2008.

⁶ Prosecution Response and Motion to Strike, paras 4-24.

⁷ 1) Reply of Tarčulovski on Motion 2) Response to Prosecution’s Motion to Strike, 26 January 2009 (“Tarčulovski Reply and Response to Motion to Strike”).

⁸ Prosecution Reply to Johan Tarčulovski’s Response of 26 January 2009, to Prosecution Motion to Strike, 29 January 2009 (“Reply to Motion to Strike”).

⁹ Motion to File Sur-Reply to Prosecution’s Motion to Strike and Sur-Reply, 30 January 2009 (“Motion to File Sur-Reply” and “Sur-Reply”, respectively).

¹⁰ Prosecution’s Response to Johan Tarčulovski’s “Motion to File Sur-Reply to Prosecution’s Motion to Strike and Sur-Reply”, 4 February 2009 (“Response to Motion for Sur-Reply”).

II. SUBMISSIONS

4. Tarčulovski requests leave, based on the Practice Direction on Formal Requirements for Appeals from Judgement (“Practice Direction”),¹¹ to reorganise the grounds of appeal listed in his Appeal Brief in an order different from that set forth in his Notice of Appeal.¹² He provides the new order for the grounds of appeal in the Appeal Brief, and the Motion cross-references each of the six new consolidated grounds of appeal to the fifteen original grounds contained in the Notice of Appeal.¹³ To the extent that the arguments presented in the Appeal Brief are framed in a different context to those in the Notice of Appeal, Tarčulovski seeks leave to amend and supplement the Notice of Appeal *nunc pro tunc*.¹⁴

5. In its Response and Motion to Strike, the Prosecution argues that Tarčulovski improperly added two new grounds of appeal in the Appeal Brief, and requests that they be stricken.¹⁵ The Prosecution asserts that Grounds 1 and 2 of the Appeal Brief are neither consistent with nor covered by Ground 2 of the Notice of Appeal, as Tarčulovski contends in his Motion.¹⁶ The Prosecution points out that, while Ground 2 of the Notice of Appeal refers to the existence of an armed conflict, Tarčulovski’s knowledge of the armed conflict, and his nexus to that conflict: (1) Ground 1 of the Appeal Brief argues that the Tribunal does not have jurisdiction over this case because it relates to a lawful operation ordered by a sovereign government acting in self-defence and because, according to the Security Council, this internal armed conflict fell outside the Tribunal’s jurisdiction;¹⁷ and (2) Ground 2 of the Appeal Brief argues that there are no laws or customs of war to govern the response of a sovereign government to an internal terrorist attack.¹⁸ Accordingly, the Prosecution submits that the arguments presented in Grounds 1 and 2 of the Appeal Brief differ substantially from those set out in the Notice of Appeal.¹⁹

6. The Prosecution moves the Chamber to strike Grounds 1 and 2 from the Appeal Brief. In support of this contention, the Prosecution states that it has been prejudiced by not having adequate and timely notice of these new grounds, and because it must now dedicate a substantial part of its resources to respond fully to the new grounds on short notice, since they “could not have been reasonably read into the [Notice of Appeal]”.²⁰ In addition, it argues that striking Grounds 1 and 2 from the Appeal Brief will not result in a risk of miscarriage of justice because they are “wholly

¹¹ IT/201, 7 March 2002, para. 4.

¹² Motion, paras 3, 4.

¹³ Motion, paras 5, 6.

¹⁴ Motion, p. 2 and para. 7.

¹⁵ Prosecution Response and Motion to Strike, paras 1, 3, 4-24, 29.

¹⁶ Prosecution Response and Motion to Strike, paras 5-10.

¹⁷ Prosecution Response and Motion to Strike, paras 5, 6.

¹⁸ Prosecution Response and Motion to Strike, paras 7, 8.

¹⁹ Prosecution Response and Motion to Strike, para. 10.

²⁰ Prosecution Response and Motion to Strike, para. 15.

misconceived, irrelevant, demonstrably wrong, and cannot be said to have any reasonable prospect of success”.²¹

7. The Prosecution claims that Ground 1 of the Appeal Brief is without merit because the Appeals Chamber has already settled the Tribunal’s geographical and temporal jurisdiction over this case and, moreover, the Trial Chamber has already made a finding on the existence of an internal armed conflict in the Former Yugoslav Republic of Macedonia (FYROM).²² The Prosecution contends that Ground 2 of the Appeal Brief should also fail since the laws and customs of war do not cease to apply where self-defence actions are taken against “terrorists”.²³

8. The Prosecution further submits that it does not oppose Tarčulovski’s request to reorganise and reorder the remaining grounds of appeal, as long as he files an Amended Notice of Appeal that clearly identifies the grounds he seeks to pursue, and presents them in the same order of appearance as in the Appeal Brief.²⁴ The Prosecution finally requests the Appeals Chamber to extend the time period for filing its Response to the Appeal Brief until 30 days after the Amended Notice of Appeal is filed.²⁵

9. In its Reply and Response to Motion to Strike, Tarčulovski claims that: (1) Grounds 1 and 2 of the Appeal Brief do not raise new issues; (2) even if Grounds 1 and 2 are new claims concerning the Tribunal’s jurisdiction, they “can and should be reviewed by the Appeals Chamber *ab initio*”; (3) the procedures to amend the Notice of Appeal were properly sought under Rule 108 of the Rules of Procedure and Evidence (“Rules”); and (4) striking Grounds 1 and 2 of the Appeal Brief would result in a miscarriage of justice.²⁶

10. Tarčulovski submits that the arguments advanced by Grounds 1 and 2 concern the jurisdiction of the Tribunal, an issue that according to him has been contested throughout the proceedings through a preliminary motion to dismiss,²⁷ an interlocutory appeal,²⁸ and in the Defence’s final submissions.²⁹ He further argues that the Notice of Appeal need not provide in detail the arguments put forth but is only required to contain a list of the grounds of appeal.³⁰ Tarčulovski asserts that though recast or rephrased, the arguments remain essentially the same in that they challenge the fact that the events in Ljuboten in the context of the Macedonian conflict fell

²¹ Prosecution Response and Motion to Strike, paras 16, 17-21.

²² Prosecution Response and Motion to Strike, paras 18-20.

²³ Prosecution Response and Motion to Strike, para. 21.

²⁴ Prosecution Response and Motion to Strike, paras 3, 25-27, 29.

²⁵ Prosecution Response and Motion to Strike, paras 3, 28-29.

²⁶ Tarčulovski Reply and Response to Motion to Strike, para. 3.

²⁷ Tarčulovski Reply and Response to Motion to Strike, paras 4, footnote 7.

²⁸ Tarčulovski Reply and Response to Motion to Strike, para. 6, footnote 11.

²⁹ Tarčulovski Reply and Response to Motion to Strike, para. 8, footnote 15.

³⁰ Tarčulovski Reply and Response to Motion to Strike, para. 10.

within the jurisdiction of the Tribunal.³¹ Additionally Tarčulovski avers that issues of jurisdiction are fundamental and can never be waived.³²

11. Relying on paragraph 2 of the Practice Direction and Rule 108 of the Rules, Tarčulovski submits that he has shown good cause to vary the grounds of appeal because his new appellate counsel view the case differently and may want to refine or clarify some issues.³³ Thus, he claims that he should not be precluded from raising any ground of appeal that would be substantially important to the appeal.³⁴ Tarčulovski adds that the Prosecution has not been prejudiced by the recasting of the arguments in Grounds 1 and 2 of the Appeal Brief,³⁵ whereas striking these grounds would result in a miscarriage of justice.³⁶ He further claims that the Prosecution “misinterpreted the ‘substantial importance to the appeal’ standard” by improperly requesting the Tribunal to pre-judge the arguments on the merits.³⁷ In addition, Tarčulovski provided an Amended Notice of Appeal in his Reply and Response to Motion to Strike, listing the reorganised grounds of appeal and the relief sought, which according to him would render moot the Prosecution’s claim.³⁸ He consequently deems the Prosecution’s request for extension of time to file its Response to the Appeal Brief moot but does not object for it to receive a limited extension of time.³⁹

12. In its Reply to the Motion to Strike, the Prosecution reiterates that Grounds 1 and 2 of the Appeal Brief should be stricken.⁴⁰ It avers that the new arguments raised therein should be dismissed on the basis of waiver⁴¹ and as frivolous.⁴² It adds that in order to determine whether there is a risk of miscarriage of justice, the Appeals Chamber must “at least make a *prima facie* assessment of the merits of the arguments raised by the person seeking amendment”.⁴³

13. The Prosecution further submits that the proposed Amended Notice of Appeal does not meet the requirements of the Practice Direction, in particular paragraphs 1 (c) (i), (ii) and (iii), where it fails to set out clearly whether the alleged errors are errors of fact leading to a miscarriage of justice, or errors of law invalidating the decision, and to identify in relation to each error which specific findings of the Trial Judgement are challenged.⁴⁴ Taking this into account, it emphasises

³¹ Tarčulovski Reply and Response to Motion to Strike, para. 10.

³² Tarčulovski Reply and Response to Motion to Strike, paras 12-13.

³³ Tarčulovski Reply and Response to Motion to Strike, para. 18.

³⁴ *Ibid.*

³⁵ Tarčulovski Reply and Response to Motion to Strike, para. 20.

³⁶ Tarčulovski Reply and Response to Motion to Strike, paras 23, 24.

³⁷ Tarčulovski Reply and Response to Motion to Strike, para. 21, citing to *Prosecutor v. Mrkšić and Veselin Šljivančanin*, 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. 35, (“*Mrkšić* Decision, 25 August 2008”).

³⁸ Tarčulovski Reply and Response to Motion to Strike, para. 25 and Annex A.

³⁹ Tarčulovski Reply and Response to Motion to Strike, para. 26.

⁴⁰ Reply to Motion to Strike, para. 1.

⁴¹ Reply to Motion to Strike, para. 1.

⁴² Reply to Motion to Strike, paras 2, 6.

⁴³ Reply to Motion to Strike, para. 4.

⁴⁴ Reply to Motion to Strike, paras 7-11.

that the Amended Notice of Appeal should identify the issues to be litigated with sufficient clarity to permit the respondent to properly prepare its brief.⁴⁵

14. In its Motion for Sur-Reply and Sur-Reply, Tarčulovski asserts that the Prosecution raised two arguments for the first time in its Reply to Motion to Strike: (1) its contention that Grounds 1 and 2 of the Appeal Brief should be dismissed on the basis of waiver; and (2) its argument that the proposed Amended Notice of Appeal fails to abide by the Practice Direction.⁴⁶ The Prosecution states in its Response to the Motion for Sur-Reply that the Motion for Sur-Reply and Sur-Reply should be denied because the two new matters Tarčulovski refers to were raised in the Prosecution's Motion to Strike.⁴⁷ Additionally, it states that, to the extent that the Prosecution raised anything new in its Reply to the Motion to Strike, it was only to point out the inadequacies of the proposed Amended Notice of Appeal, which was only filed with Tarčulovski's Reply and Response to Motion to Strike.⁴⁸

III. DISCUSSION

A. Preliminary Issue

15. With regard to the Motion for Sur-Reply, the Appeals Chamber recalls that full answers to issues raised in motions should be provided at the response stage and that no provision of the Rules nor the Practice Direction authorizes a party to file a sur-reply.⁴⁹ However, leave to file a sur-reply may be granted "where the reply raises a new issue to which the respondent has not already had the opportunity to respond".⁵⁰ In the present case, the issue of waiver was implicitly raised by the Prosecution in its Response and Motion to Strike⁵¹ and Tarčulovski had the opportunity to respond to it.⁵² Therefore, the issue of waiver does not require leave to file a sur-reply. Given that the proposed Amended Notice of Appeal was filed as an annex to Tarčulovski's Reply and Response to Motion to Strike, the Appeals Chamber considers that the Prosecution could only have raised matters related to it in its Reply to Motion to Strike. Therefore, the Appeals Chamber accepts the Sur-Reply as validly filed to the extent that it refers to the compliance of the proposed Amended Notice of Appeal with the Practice Direction.

⁴⁵ Reply, para. 8.

⁴⁶ Motion for Sur-Reply and Sur-Reply, paras 4-6.

⁴⁷ Response to Motion for Sur-Reply, para. 1.

⁴⁸ *Ibid.*

⁴⁹ *Prosecutor v. Nikola Šainović & Dragoljub Ojdanić*, Case No. IT-99-37-AR65, Decision on Provisional Release, 30 October 2002, para. 5. See also *Ferdinand Nahimana, Jean-Bosco Barayagwiza & Hassan Ngeze v. The Prosecutor*, Case No. ICTR-99-52-A, Decision on Formal Requirements Applicable to the Parties' Filings Related to the Appellant Jean-Bosco Barayagwiza's Motion for Leave to Present Additional Evidence, 23 January 2006, p. 5.

⁵⁰ *Prosecutor v. Mlado Radić*, Case No. IT-98-30/1-R.1, Decision on Prosecution Motion for Leave to File Sur-Reply to Defence Reply in Request for Review by Mlado Radić, 9 May 2006, p. 3. See also Practice Direction of the Tribunal on Procedure for the Filing of Written Submissions in Appeal Proceedings Before the International Tribunal, IT/155 Rev 3, 16 September 2005, para. 19.

B. Authorisation to Amend a Notice of Appeal

16. Rule 108 of the Rules reads as follows:

A party seeking to appeal a judgement shall, not more than thirty days from the date on which the judgement was pronounced, file a notice of appeal, setting forth the grounds. The Appellant should also identify the order, decision or ruling challenged with specific reference to the date of its filing, and/or the transcript page, and indicate the substance of the alleged errors and the relief sought. The Appeals Chamber may, on good cause being shown by motion, authorise a variation of the grounds of appeal.

17. The Appeals Chamber may authorise leave to amend a notice of appeal upon the showing of “good cause”. The concept of “good cause” covers both good reason for including the new or amended grounds of appeal sought and good reason showing why those grounds were not included (or were not correctly phrased) in the original notice of appeal.⁵³ The “good cause” requirement is assessed on a case by case basis,⁵⁴ and several factors can be taken into account.⁵⁵ The Appeals Chamber has summarized these factors as follows:

These have included the fact that the variation is so minor that it does not affect the content of the notice of appeal; the fact that the opposing party would not be prejudiced by the variation or has not objected to it; and the fact that the variation would bring the notice of appeal into conformity with the appeal brief. Where the appellant seeks a substantive amendment broadening the scope of the appeal, “good cause” might also, under some circumstances, be established. The Appeals Chamber notes that it has never established a cumulative list of requirements that must be met each time a substantive amendment is to be granted.⁵⁶

18. The Appeals Chamber recalls that the good cause requirement is to be interpreted more restrictively at later stages in the appeal proceedings when variations to the grounds of appeal may substantially affect the efficient administration of justice.⁵⁷

19. The grounds of appeal and the arguments in an Appellant’s brief must be set out and numbered in the same order as in the Appellant’s Notice of Appeal, unless otherwise varied with leave of the Appeals Chamber.⁵⁸ Any variation of the grounds of appeal must be done by way of a motion in accordance to the Rules setting out the specific Rule under which the variation is sought and the arguments in support of the request to vary the grounds of appeal as required by that Rule.⁵⁹

⁵¹ Prosecution Response and Motion to Strike, paras 18-20.

⁵² Tarčulovski Reply and Response to Motion to Strike, paras 12-13.

⁵³ *The Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Decision on Motion of Dragan Jokić for Leave to File Third Amended Notice of Appeal and Amended Appellate Brief, 26 June 2006 (“*Blagojević and Jokić* Decision of 26 June 2006”), para. 7.

⁵⁴ *The Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A, Decision Granting Leave to Dario Kordić to Amend his Grounds of Appeal, 9 May 2002, para. 5.

⁵⁵ *The Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-A, Decision on Motions Related to the Pleadings in Dragan Jokić’s Appeal, 24 November 2005, para. 7.

⁵⁶ *Blagojević and Jokić* Decision of 26 June 2006, para. 7.

⁵⁷ *Prosecutor v. Miroslav Bralo*, Case No. IT-95-17-A, Decision on Miroslav Bralo’s Motion for leave to Supplement Appeal Brief in Light of New Information Concerning Ex Parte Portion of the Trial Record, 9 January 2007, para. 11.

⁵⁸ Practice Direction, para. 4.

⁵⁹ Practice Direction, para. 2.

C. Whether Grounds 1 and 2 of the Appeal Brief are New Arguments not Included in the Notice of Appeal

20. Tarčulovski argues that Grounds 1 and 2 of the Appeal Brief are not new arguments because they are sufficiently contained within Ground 2 of his Notice of Appeal.⁶⁰

21. The Appeals Chamber notes that Ground 2 of the Notice of Appeal contends that the Trial Chamber erred when it concluded that: (1) an armed conflict existed at the time and place relevant to the charges against him;⁶¹ (2) Tarčulovski knew of the existence of an armed internal conflict;⁶² and (3) Tarčulovski's conduct was sufficiently linked with the alleged armed conflict.⁶³

22. However, Ground 1 of the Appeal Brief argues that the Tribunal has no jurisdiction over the present case because: (1) it never made a threshold determination as to whether the government of Macedonia lawfully ordered the operation to weed out terrorists living and/or hiding among villagers;⁶⁴ and (2) its jurisdiction over this matter is contrary to the determinations and actions of the Security Council.⁶⁵ These arguments are considerably distinct from those presented in Ground 2 of the Notice of Appeal. Hence, the Appeals Chamber finds that Ground 1 of the Appeal Brief is a new ground of appeal not covered by the Notice of Appeal.

23. Moreover, Ground 2 of the Appeal Brief asserts that: (1) the events in Ljuboten on 12 August 2001 did not violate previously established "Laws or Customs of War",⁶⁶ since these laws do not govern "how a sovereign State should or may respond to an internal terrorist threat";⁶⁷ and (2) as an individual carrying out a lawful self-defence operation planned by his sovereign State, Tarčulovski could not be found criminally responsible unless his actions were disproportionate, or he exceeded his lawful orders.⁶⁸ These arguments are also distinct from those presented in Ground 2 of the Notice of Appeal. Thus, the Appeals Chamber finds that Ground 2 of the Appeal Brief is a new ground of appeal not covered by the Notice of Appeal.

D. Whether Good Cause to Amend the Notice of Appeal Exists

24. Tarčulovski contends that good cause exists to amend his Notice of Appeal because two of his current counsel were appointed after it was filed, and his Defence team now believes that they have a fresh perspective on the significance of the alleged errors committed by the Trial Chamber

⁶⁰ Motion, para. 6.

⁶¹ Notice of Appeal, paras 31-43.

⁶² Notice of Appeal, paras 44-51.

⁶³ Notice of Appeal, paras 52-54.

⁶⁴ Tarčulovski's Appeal Brief, paras 39-53.

⁶⁵ Tarčulovski's Appeal Brief, paras 54-58.

⁶⁶ Tarčulovski's Appeal Brief, paras 59-92.

⁶⁷ Tarčulovski's Appeal Brief, para. 64. Sub-ground 2A analyses to what extent terrorism can be covered by international humanitarian law and the Tribunal's Statute, paras 66-88.

⁶⁸ Tarčulovski's Appeal Brief, sub-ground 2B, paras 89-92.

because the entire team has now had the opportunity to review the extensive record and transcript in the case.⁶⁹

25. The Appeals Chamber considers that, in the circumstances of this case, the change of counsel constitutes good reason for showing why those grounds were not included in the original Notice of Appeal. In addition, it takes note of the fact that the proposed variation to the Notice of Appeal would bring it into conformity with the Appeal Brief, that any potential prejudice caused to the Prosecution is cured through the Appeals Chamber's decision to grant the Prosecution's request for an extension of time to file its Respondent's Brief,⁷⁰ and that the inclusion of these grounds of appeal in an amended notice of appeal would not unduly interfere with the expeditious administration of justice as these arguments do not reflect a change to an appeal strategy by Tarčulovski subsequent to reading the Prosecution's Respondent's brief, which has not yet been filed.⁷¹ Therefore, the Appeals Chamber finds that Tarčulovski has shown good cause for amending his notice of appeal.

E. Prosecution's Motion to Strike

26. The Prosecution asserts that Grounds 1 and 2 of the Appeal Brief should be stricken because they contain new factual and legal arguments, which it did not receive timely or adequate notice of through the Notice of Appeal.⁷² The Appeals Chamber recalls that, at the request of a party, it may strike new grounds that have been presented for the first time in an appellant's brief.⁷³ In deciding on such a request, two considerations are relevant: (1) whether or to what extent the respondent has been prejudiced by not having had adequate and timely notice about these grounds of appeal; and (2) whether the adjudication of these grounds or sub-grounds of appeal in an appellant's case is of substantial importance to the appeal such that without their inclusion there is a risk of a miscarriage of justice.⁷⁴

27. The Prosecution asserts first that it was prejudiced by not having adequate and timely notice of the two new grounds because they "could not have been reasonably read into the [Notice of Appeal]" and, therefore, none of the preparatory work it has undertaken since the Notice of Appeal was filed is useful in addressing them.⁷⁵ Additionally, it submits that it was prejudiced because it now has to allocate a substantial part of its finite resources to respond to these two new grounds.⁷⁶ While the Appeals Chamber agrees that the Prosecution was prejudiced to some extent by the appearance of the two new grounds in the Appeal Brief, it finds that this prejudice has been cured

⁶⁹ Motion, para. 4.

⁷⁰ *Boškosi and Tarčulovski* Decision, 19 February 2009, p. 3.

⁷¹ *Mrkšić* Decision, para. 41.

⁷² Prosecution Response and Motion to Strike, para. 10.

⁷³ *Mrkšić* Decision, para. 9.

⁷⁴ *Mrkšić* Decision, para. 35.

⁷⁵ Prosecution Response and Motion to Strike, para. 15.

⁷⁶ *Ibid.*

by the Appeals Chamber's recent decision to grant the Prosecution's request for an extension of time to file its Respondent's Brief.⁷⁷

28. The Prosecution argues second that no risk of miscarriage of justice will arise if the new grounds are stricken at this stage because they are "wholly misconceived, irrelevant, demonstrably wrong, and cannot be said to have any reasonable prospect of success".⁷⁸ The Appeals Chamber rejects this argument because it considers the new grounds to be *prima facie* important to Tarčulovski's appeal, and declines to prejudge their prospect of success at this stage of the proceedings.

F. Whether the Amended Notice of Appeal Complies with the Practice Direction

29. Tarčulovski filed his proposed Amended Notice of Appeal as Annex "A" to his Reply and Response to Prosecution's Motion to Strike.⁷⁹ In its Reply to its Motion to Strike, the Prosecution asserted that the proposed Amended Notice of Appeal does not comply with the Practice Direction Requirements, in particular paragraph 1(c)(i), (ii), and (iii) because it: (1) does not set out clearly whether the alleged errors are errors of fact which have occasioned a miscarriage of justice, or errors of law that invalidate the decision; and (2) fails to identify in relation to each error and sub-error which finding(s) or ruling(s) are challenged in the judgement with specific reference to the page number and paragraph number of the judgement.⁸⁰

30. Paragraph 1 (c) (i), (ii) and (iii) of the Practice Direction provides that:

A party seeking to appeal from a judgement of a Trial Chamber ("Appellant") shall file, in accordance with the Statute, [...] a Notice of Appeal containing, in the following order:[...]the ground of appeal, clearly specifying a notice of appeal in respect of each ground of appeal (i) any alleged error on a question of law invalidating the decision, and/or (ii) any alleged error of fact which has occasioned a miscarriage of justice; (iii) an identification of the finding or ruling challenged in the judgement, with specific reference to the page number and paragraph number.

While Tarčulovski's proposed Amended Notice of Appeal refers to ranges of paragraphs in the Trial Judgement, which correspond to his grounds of appeal, the Appeals Chamber finds that this does not satisfy the express requirement of the Practice Direction that a notice of appeal contain an identification of the finding or ruling challenged in the judgement with specific reference to the page number and paragraph number. Accordingly, the Appeals Chamber orders Tarčulovski to file an amended Notice of Appeal that fully complies with the Practice Direction.

IV. DISPOSITION

For the foregoing reasons, the Appeals Chamber

⁷⁷ *Boškovski* Decision, p. 3.

⁷⁸ Prosecution Response and Motion to Strike, para. 16.

⁷⁹ Tarčulovski Reply and Response to Motion to Strike, para. 25.

⁸⁰ Prosecution Reply to Motion to Strike, para. 7.

GRANTS Tarčulovski's request to amend his Notice of Appeal and to present the grounds of appeal in the Appeal Brief in the order in which they appear in the amended Notice of Appeal;

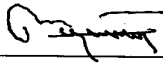
ORDERS Tarčulovski to file an amended Notice of Appeal, which fully complies with Paragraph 1 (c) (i), (ii) and (iii) of the Practice Direction, no later than seven days from the date of filing of this decision;

DENIES the Prosecution's motion to strike; and

DENIES the Prosecution's request to extend the time period for the filing of its Respondent's Brief to 30 days from the filing of the Amended Notice of Appeal.

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

Done this 26th day of March 2009,
At The Hague,
The Netherlands.



Judge Mehmet Güney
Pre-Appeal Judge

[Seal of the Tribunal]