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-01-42/1-A

Date: 30 August 2005

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Inés Mónica Weinberg de Roca, Presiding**
Judge Mohamed Shahabuddeen
Judge Florence Ndepele Mwachande Mumba
Judge Mehmet Güney
Judge Wolfgang Schomburg

Registrar: **Mr. Hans Holthuis**

Judgement of: **30 August 2005**

PROSECUTOR

v.

MIODRAG JOKIĆ

JUDGEMENT ON SENTENCING APPEAL

Counsel for the Prosecution:

Mr. Norman Farrell
Ms. Marie Ursula Kind

Counsel for the Appellant:

Mr. Žarko Nikolić
Mr. Eugene O'Sullivan

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I. INTRODUCTION

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 ("International Tribunal") is seized of an appeal from the Sentencing Judgement rendered by Trial Chamber I on 18 March 2004 in the case of *Prosecutor v. Miodrag Jokić*, Case No. IT-01-42/1-S ("Sentencing Judgement"). The Prosecution has not appealed the Sentencing Judgement.

2. The events giving rise to this appeal took place in Croatia, where forces of the Yugoslav People's Army ("JNA") under the command of, among others, Miodrag Jokić ("Appellant") shelled the Old Town of Dubrovnik from the early hours of 6 December 1991 until late that day.[1] The Trial Chamber accepted the Prosecution's position that the attack was not ordered by the Appellant,[2] and that he had knowledge of the unlawful shelling, and failed to take the necessary steps to prevent, mitigate or stop the shelling, and to take disciplinary measures against those under his command who were directly responsible.[3] As a result of the shelling, two civilians were killed and three civilians were wounded, and numerous buildings were destroyed, including institutions dedicated to religion, charity, education, the arts and sciences, and historic monuments.[4]

3. The Second Amended Indictment,[5] confirmed at the Plea Hearing of 27 August 2003,[6] served as the basis for the guilty plea and for the Sentencing Judgement. In the Plea Agreement, the Prosecution stated that it would recommend a sentence of ten years' imprisonment and that the Appellant was entitled to argue for a sentence of less than ten years.[7]

4. At the Plea Hearing, the Trial Chamber entered a finding of guilt under Articles 7(1) and 7(3) of the Statute of the International Tribunal ("Statute") for six counts of violations of the laws or customs of war pursuant to Article 3 of the Statute, contained in the Second Amended Indictment, which are identical to the counts in the Plea Agreement, including Count 1 (Murder), Count 2 (Cruel treatment), Count 3 (Unlawful attack on civilians), Count 4 (Devastation not justified by

[1] *Prosecutor v. Miodrag Jokić*, IT-01-42-PT, Plea Agreement between Miodrag Jokić and the Office of the Prosecutor, Confidential, *Ex Parte, Under Seal*, 27 August 2003 ("Plea Agreement"), para. 14.
[2] Sentencing Judgement, para. 26.
[3] *Ibid.*, para. 28.
[4] *Ibid.*, para. 27.
[5] *Prosecutor v. Miodrag Jokić*, IT-01-42, Second Amended Indictment, 26 August 2003, confirmed on 27 August 2003 ("Second Amended Indictment").
[6] At the Plea Hearing the Prosecution applied orally to amend the original indictment (confirmed on 27 February 2001 and unsealed on 2 October 2001) on the condition that the Appellant would plead guilty to six counts in the proposed Second Amended Indictment. *See Prosecutor v. Miodrag Jokić*, IT-01-42-PT, Plea Hearing, 27 August 2003 ("Plea Hearing") T. 141-145.
[7] Plea Agreement, paras 7-8; *see* Sentencing Judgement, para. 11.

military necessity), Count 5 (Unlawful attack on civilian objects), and Count 6 (Destruction or wilful damage done to institutions dedicated to religion, charity, and education, the arts and sciences, historic monuments and works of art and science).[8] The Sentencing Hearing was held on 4 December 2003.[9] The Trial Chamber sentenced the Appellant to seven years of imprisonment.[10]

5. The Appellant filed his Notice of Appeal of the Sentencing Judgement on 16 April 2004, based on seven grounds of appeal.[11] He filed his Appellant's Brief on 30 June 2004,[12] in which he abandoned the fourth ground of appeal.[13] The Prosecution filed its Respondent's Brief on 9 August 2004.[14] A Brief in Reply was filed on 23 August 2004.[15] The Appellant filed several motions seeking the admission of additional evidence,[16] which the Appeals Chamber denied.[17] The hearing on appeal took place on 26 April 2005.[18]

[8] Plea Hearing, T. 155-156.
[9] *Prosecutor v. Miodrag Jokić*, IT-01-42-PT, Sentencing Hearing, 4 December 2003 ("Sentencing Hearing").
[10] Sentencing Judgement, para. 116.
[11] *Prosecutor v. Miodrag Jokić*, Case No. IT-01-42/1-A, Miodrag Jokić's Notice of Appeal, 16 April 2004 ("Notice of Appeal").
[12] *Prosecutor v. Miodrag Jokić*, Case No. IT-01-42/1-A, Appellant's Brief Pursuant to Rule 111, Confidential, 30 June 2004. A corrigendum thereto was filed on 3 August 2004: *Prosecutor v. Miodrag Jokić*, Case No. IT-01-42/1-A, Corrigendum to Appellant's Brief Pursuant to Rule 111 filed on 30 June 2004, Confidential. A public redacted version of the Appellant's Brief Pursuant to Rule 111 was filed on 7 March 2005 ("Appellant's Brief").
[13] Appellant's Brief, para. 4.
[14] *Prosecutor v. Miodrag Jokić*, Case No. IT-01-42/1-A, Prosecution Respondent Brief, Confidential, 9 August 2004. A public redacted version was filed on 4 March 2005 ("Respondent's Brief").
[15] *Prosecutor v. Miodrag Jokić*, Case No. IT-01-42/1-A, Appellant's Brief in Reply, Confidential, 23 August 2004. A public redacted version was filed on 7 March 2005 ("Brief in Reply").
[16] *Prosecutor v. Miodrag Jokić,* Case No.: IT-01-42/1-A, "Motion to Present Additional Evidence Pursuant to Rule 115" dated 27 May 2004 but filed confidentially in part on 1 June 2004 ("First Motion"); "Motion to Present the Expert Opinion of Dr. Stanko Pihler as Additional Evidence Pursuant to Rule 115", 21 June 2004, seeking to admit the Curriculum Vitae and Expert Opinion of Dr. Stanko Pihler as an Annex to the First Motion; "Second Motion to Present Additional Evidence Pursuant to Rule 115", 21 June 2004, and "Third Motion to Present Additional Evidence Pursuant to Rule 115", Confidential, 16 August 2004.
[17] *Prosecutor v. Miodrag Jokić*, Case No. IT-01-42/1-A, Decision on Appellant's Motions for Admission of Additional Evidence Pursuant to Rule 115, 31 August 2004 ("Decision on Appellant's Additional Evidence Motions").
[18] *Prosecutor v. Miodrag Jokić*, Case No. IT-01-42/1-A, Appeal Hearing, 26 April 2005 ("Appeal Hearing").

II. STANDARD OF REVIEW

6. The relevant provisions on sentencing are Articles 23 and 24 of the Statute and Rules 100 to 106 of the Rules of Procedure and Evidence ("Rules"). Both Article 24 of the Statute and Rule 101 of the Rules contain general guidelines for a Trial Chamber that amount to an obligation to take into account the following factors in sentencing: the gravity of the offence or totality of the culpable conduct, the individual circumstances of the convicted person, the general practice regarding prison sentences in the courts of the former Yugoslavia, and aggravating and mitigating circumstances.[19]

7. Appeals against sentence, as appeals from a trial judgement, are appeals *stricto sensu*; they are of a "corrective nature" and are not trials *de novo*.[20] Pursuant to Article 25 of the Statute, the role of the Appeals Chamber is limited to correcting errors of law invalidating a decision and errors of fact which have occasioned a miscarriage of justice.[21] These criteria have been frequently referred to and are well established in the jurisprudence of the International Tribunal[22] and the International Criminal Tribunal for Rwanda ("ICTR").[23]

8. Trial Chambers are vested with a broad discretion in determining an appropriate sentence, due to their obligation to individualise the penalties to fit the circumstances of the accused and the gravity of the crime.[24] As a general rule, the Appeals Chamber will not revise a sentence unless the Trial Chamber has committed a "discernible error" in exercising its discretion or has failed to follow the applicable law.[25] It is for the Appellant to demonstrate how the Trial Chamber ventured outside its discretionary framework in imposing his sentence.[26]

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[19] *Čelebići* Appeal Judgement, paras 429, 716. In addition, Trial Chambers are obliged to take into account the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 10(3) of the Statute and in Rule 101(B)(iv).
[20] *Kupreškić et al.* Appeal Judgement, para. 408.
[21] *Mucić et al.* Judgement on Sentence Appeal, para. 11. *See also Furundžija* Appeal Judgement, para. 40; *Čelebići* Appeal Judgement, para. 203; *Dragan Nikolić* Judgement on Sentencing Appeal, para. 8.
[22] *Tadić* Appeal Judgement, para. 64; *Furundžija* Appeal Judgement, para. 37; *Čelebići* Appeal Judgement, paras 434-435; *Kupreškić et al.* Appeal Judgement, para. 29; *Kunarac et al.* Appeal Judgement, paras 35-48; *Vasiljević* Appeal Judgement, paras 4-12; *Kvočka et al.* Appeal Judgement, para.14.
[23] *Akayesu* Appeal Judgement, para. 178; *Kayishema and Ruzindana* Appeal Judgement, para. 320; *Musema* Appeal Judgement, para. 15.
[24] *Čelebići* Appeal Judgement, para. 717.
[25] *Tadić* Judgement in Sentencing Appeals, para. 22; *Aleksovski* Appeal Judgement, para. 187; *Furundžija* Appeal Judgement, para. 239; *Čelebići* Appeal Judgement, para. 725; *Jelisić* Appeal Judgement, para. 99; *Kupreškić et al.* Appeal Judgement, para. 408; *Krstić* Appeal Judgement, para. 242; *Blaškić* Appeal Judgement, para. 680.
[26] *Čelebići* Appeal Judgement, para. 725.

III. FIRST GROUND OF APPEAL: THE SCOPE OF THE SECOND AMENDED INDICTMENT AND AGREED FACTS

9. The Appellant submits that the Trial Chamber erred in ruling that he is liable under Article 7(1) of the Statute for aiding and abetting for events prior to 6 December 1991.[27] In doing so, according to the Appellant, the Trial Chamber went beyond what was pleaded in the Second Amended Indictment and agreed upon in the Plea Agreement, which expressly limited his responsibility as an aider and abettor to his conduct on and the events of 6 December 1991 only.[28] As a remedy, the Appellant seeks a reduction of the sentence imposed by the Trial Chamber.[29] The Appellant asserts that the Trial Chamber erred "in extending the period of responsibility of the Appellant as an aider and abettor to alleged events and conduct in October and November 1991", which, in his opinion, was a decisive factor in the Trial Chamber's decision to impose a seven year sentence.[30] Moreover, the Appellant alleges that the Trial Chamber erred when stating that it recounted the events based on the parties' submissions regarding the context of the case and submits that the written and oral submissions by the parties cannot "amend, modify or in any manner change" the terms of the Plea Agreement and the Second Amended Indictment.[31]

10. The Prosecution agrees that the Plea Agreement and the Second Amended Indictment explicitly limit the responsibility of the Appellant as an aider and abettor under Article 7(1) of the Statute to the events of 6 December 1991.[32] The Prosecution further acknowledges that the Trial Chamber seems to hold the Appellant responsible for conduct prior to this date,[33] and agrees with the Appellant that in doing so it went beyond the scope of the Second Amended Indictment and the Plea Agreement.[34] The Prosecution submits, and the Appellant agrees,[35] that this error "goes to the heart of the degree of personal guilt possessed by the Appellant";[36] however, it maintains that any adjustment of the sentence should be limited.[37] During the Appeal Hearing, the Prosecution submitted that the alleged error did not "seriously impact on the sentence imposed".[38]

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[27] Appellant's Brief, para. 31; AT. 318.
[28] Appellant's Brief, para. 31.
[29] *Ibid.*, para. 41 referring to paragraphs 20, 57 and 58 of the Sentencing Judgement.
[30] *Ibid. See also* AT. 318.
[31] *Ibid.*, para. 40.
[32] Respondent's Brief, para. 4.3.
[33] *Ibid.*, paras 4.3, 4.7.
[34] *Ibid.*, paras 4.8, 4.10.
[35] Brief in Reply, para. 6; AT. 318- 319.
[36] Respondent's Brief, para. 4.18.
[37] *Ibid.*, para. 4.19.
[38] AT. 358.

11. Furthermore, during the Appeal Hearing, the Prosecution asserted that "the first ground of appeal actually goes to conviction not to sentence."[39] The Prosecution argued that "[t]he Trial Chamber only found the [A]ppellant guilty for the acts on December 6th under [Article] 7(3), not under [Article] 7(1) [of the Statute]."[40] Therefore, in the view of the Prosecution, "if the removal of [the] liability for [the events before 6 December 1991] under Article 7(1) [of the Statute] is correct, as the Prosecution has conceded, the result will be […] that the only thing [that] remains or is maintained is a finding of guilt under Article 7(3) [of the Statute] for the acts of the 6th."[41] Further, the Prosecution asserted that the events prior to 6 December 1991 referred to in the Plea Agreement and the Second Amended Indictment "are relevant and can be relied upon when considering the mental state under [Article 7(3) or Article 7(1) of the Statute] of Admiral Jokić on the morning of the 6th."[42] The Prosecution argued that "[p]revious information would alert a superior to the fact that crimes might be committed based on the prior conduct of the subordinates or the history of maltreatment, and as a result of the prior shelling, in this case, Admiral Jokić was aware of the potential for damage."[43]

12. The Appeals Chamber observes that the Second Amended Indictment, under the section titled "General Allegations", refers to the fact that from 23 October 1991 through 6 December 1991, hundreds of shells fired by the JNA forces struck the Old Town area of Dubrovnik, where a number of buildings were marked with the symbols mandated by the Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict.[44] The Plea Agreement is even more detailed in this respect stating that "[f]rom 8 October 1991 through 31 December 1991, Miodrag Jokić, acting individually or in concert with others, conducted a military campaign, which was launched on 1 October 1991 and directed at the territory of the Municipality of [Dubrovnik]. From 8 October through 31 December 1991 […], JNA forces under the command of Miodrag Jokić fired hundreds of shells which impacted in the Old Town area of Dubrovnik."[45] However, the Second Amended Indictment clearly states that "[a]ll acts and omissions, for which Miodrag JOKIC is liable […] occurred on or about 6 December 1991 on the territory of Croatia."[46] Although in principle "or about" could mean around 6 December 1991, when enumerating the alleged counts, the Second

[39] AT. 344.
[40] *Ibid.*
[41] *Ibid. See also* AT. 345.
[42] AT. 348.
[43] *Ibid.*
[44] Second Amended Indictment, para. 8.
[45] Plea Agreement, paras 11-12. The Appeals Chamber notes that reference to these passages within the Plea Agreement is made upon consultation with the parties.
[46] Second Amended Indictment, para. 5.

Amended Indictment refers solely to the day of 6 December 1991.[47] Moreover, the Plea Agreement states that the Appellant would admit his guilt for the counts charged against him with respect "solely to the events of 6 December 1991".[48]

13. The Appeals Chamber notes that during the Plea Hearing, the Trial Chamber was cognisant of the fact that the new indictment was limited to the events on 6 December 1991.[49] Before granting leave to amend the indictment, it summarised the contents of the Second Amended Indictment for the sake of clarity; to that effect the Presiding Judge stated that: "[j]ust to summarise the new indictment, if leave is granted, would be that there are six charges remaining, the first three being murder, cruel treatment, and attacks on civilians, all being the result of the shelling of the old town of Dubrovnik on the 6th of December, 1991".[50] The Appeals Chamber notes that the Trial Chamber stated in its Sentencing Judgement that, "[h]aving accepted Miodrag Jokić's guilty plea on the basis of the Plea Agreement, [it] limits itself to the submissions on the facts made by the parties."[51] Thus the Sentencing Judgement limits the discussion of the Appellant's responsibility to the events of 6 December 1991.[52]

14. The Appeals Chamber notes that the finding of guilt entered by the Trial Chamber against the Appellant during the Plea Hearing is limited to Counts 1 through 6 of the Second Amended Indictment, which were unambiguously limited to the Appellant's acts and omissions that occurred on 6 December 1991. This is the context within which paragraph 58 of the Sentencing Judgement, which reads as follows, must be understood:

> Part of Miodrag Jokić's behaviour, specifically certain acts and omissions before the shelling by JNA forces on 6 December 1991, in the specific circumstances of this case, is correctly qualified as aiding and abetting, since it had a substantial effect on the commission of the crimes. Other culpable omissions, in particular the lack of prompt and proper response to the crimes that were being, or had been, committed and the failure to punish the perpetrators, are properly qualified, in the specific circumstances of this case, under "superior responsibility" pursuant to Article 7(3) of the Statute. Thus, at the Plea Hearing, the Trial Chamber entered a finding of guilt under both heads of responsibility.[53]

15. In the preceding paragraph of the Sentencing Judgement the Trial Chamber refers to the Prosecution's proposition that the Appellant's lack of proper disciplinary action to punish perpetrators for similar attacks under his authority on 23 and 24 October, and again on 9 November

[47] For Counts one to three, *see* Second Amended Indictment, paras 11, 13; and for Counts four to six, *see* Second Amended Indictment, paras 18, 19, 21.
[48] Plea Agreement, para. 3.
[49] Plea Hearing, T. 138, Judge Orie: "The reduction of the indictment mainly is that the charges will be limited to the shelling of the old city of Dubrovnik on the 6th of December, 1991, and that the accused will be charged with six counts".
[50] *Ibid.*, T. 144.
[51] Sentencing Judgement, para. 20.
[52] *Ibid.*, para. 57.
[53] *Ibid.*, para. 58.

1991, had a direct impact on the command environment, and therefore on the commission of the crimes, on 6 December 1991.[54] But this cannot be read to imply that the Trial Chamber meant to treat that earlier conduct as a basis for the sentence in its own right; the remainder of the Sentencing Judgement made it clear that the Appellant was only being sentenced on the basis of his conduct on 6 December. Rather, it is evident to the Appeals Chamber that the Trial Chamber cited the Appellant's earlier conduct to provide context for the 6 December crimes. That context was relevant to the question whether the Appellant's awareness from the early hours of the morning of 6 December 1991 of the unlawful shelling of the Old Town of Dubrovnik was sufficient to establish the *mens rea* requirement to support a conviction for aiding and abetting.

16. The Appeals Chamber will not discuss whether the qualification as "aiding and abetting" is correct, as this has been agreed upon by the parties and accepted by the Trial Chamber, and the interests of justice do not require an intervention.[55] The references to acts and omissions of the Appellant before and after 6 December 1991 were made in order to portray the context of the Appellant's role in the crimes committed on that day.

17. This is in keeping with the proceedings at the Sentencing Hearing, during which counsel for the Prosecution referred to the previous events as having "aided and abetted what happened on the 6th of December"[56] and expressly clarified "that that is not part of the charge here".[57] Defence counsel did not object to prosecuting counsel's reference to the earlier events as having "aided and abetted what happened on the 6th of December"; on the contrary, defence counsel expressly indicated his approval of the "context" as portrayed by prosecuting counsel.[58]

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[54] *Ibid.*, para. 57 referring to *Prosecutor v. Miodrag Jokić*, Case No. IT-01-42/1-S, Prosecution's Brief on the Sentencing of Miodrag Jokić, 14 November 2003 ("Prosecution Sentencing Brief"), paras 38-40, which read as follows: "38. The Accused Jokić was aware that despite prohibitions against damaging the Old Town, on 23 and 24 October 1991, JNA mortar rounds fell within the Old Town of Dubrovnik. The Museum Rupe was struck, the Old Town grain silo and incidents of injury to civilians occurred. No disciplinary action for those breaches was taken against those responsible.
39. The Accused was also aware that on 9 November, a co-ordinated JNA land, sea and air attack was launched against Croatian objectives above the city. From 10 through 13 November, a variety of JNA ordnance fell on the Old Town, including at least fifty mortar rounds. No disciplinary action for those breaches of orders not to shell the Old Town was taken.
40. The Prosecution alleges and the Accused Jokić admits that the units responsible for the unlawful attacks against the Old Town of Dubrovnik on 6 December 1991 were directly subordinated to him and to the co-accused, Pavle Strugar and Vladimir Kovačević. These attacks resulted in death and injuries to civilians and damage and destruction to civilian objects throughout the Old Town and were a direct and foreseeable consequence of acts by JNA units operating in a command environment which was characterised by a lack of discipline." *See also* Sentencing Hearing, T. 200.
[55] This does not affect the discretionary power vested to the Appeals Chamber in general to correct an error of law if the interests of justice so require, *cf. infra* para. 26.
[56] Sentencing Judgement, para. 20 referring to Sentencing Hearing, T. 200.
[57] Sentencing Hearing, T. 198.
[58] *Ibid.*, T. 206.

18. The Trial Chamber noted in turn that, at "the Sentencing Hearing, the Defence clearly accepted that the Prosecution had 'set out for us the context' of the case".[59] The Trial Chamber described the previous events as being "correctly qualified as aiding and abetting"; it did so in the same sense in which both prosecuting and defence counsel understood the expression "aiding and abetting" at the Sentencing Hearing, namely, as pertinent solely to the "context" in which the acts of 6 December 1991 took place. For his part, the Appellant has not satisfactorily explained why two paragraphs of the Plea Agreement were devoted to the earlier events unless they were relevant to the context and not part of the crimes for which he was being charged.

19. The Appeals Chamber is satisfied that the Trial Chamber did not err in making a *mere* reference — *and not a finding on the crimes charged* — to the events prior to 6 December 1991 in its Sentencing Judgement.

20. Moreover, even if the Trial Chamber had erred in referring to the earlier events, the Appellant has not illustrated how this error invalidated the Sentencing Judgement. The entry of convictions is not under review here. The Appellant has not demonstrated that the sentence, which is under review, was affected by the Trial Chamber's alleged consideration of conduct prior to 6 December 1991. Whether the Trial Chamber properly considered that conduct as mere context for the crimes the Appellant committed on 6 December, or instead improperly considered it as an aspect of the crime itself, does not appear to materially affect the ultimate fact of the Appellant's responsibility for the shelling of Dubrovnik, nor does it materially affect the degree of that responsibility or the magnitude of the crime. Thus, even if the Trial Chamber had erred, the error would not merit alteration of the Sentencing Judgement by the Appeals Chamber.

21. For the foregoing reasons, this part of the Appellant's first ground of appeal is dismissed.

22. The Appeals Chamber notes that the Prosecution suggests that, as "the Appellant was sentenced for his role on 6 December 1991 under both Article 7(1) (aiding and abetting) and 7(3) (superior responsibility) [of the Statute] in relation to identical conduct, [the Appeals Chamber] may consider applying the rationale in [the *Blaškić* case] to re-characterise his conduct and convict the Appellant on the most appropriate basis of liability."[60] The Appellant agrees with the Prosecution's proposition.[61] During the Appeal Hearing, the Defence further submitted that "from

[59] Sentencing Judgement, para. 20.
[60] Respondent's Brief, para. 1.7; *see also* para. 4.14.
[61] Brief in Reply, para. 6.

the Appellant's perspective, he has always considered his failure as a commander under Article 7(3) [of the Statute] to properly reflect his liability on the 6th of December 1991." [62]

23. The relevant paragraphs of the *Blaškić* Appeal Judgement read as follows:

> The Appeals Chamber considers that the provisions of Article 7(1) and Article 7(3) of the Statute connote distinct categories of criminal responsibility. However, the Appeals Chamber considers that, in relation to a particular count, it is not appropriate to convict under both Article 7(1) and Article 7(3) of the Statute. Where both Article 7(1) and Article 7(3) responsibility are alleged under the same count, and where the legal requirements pertaining to both of these heads of responsibility are met, a Trial Chamber should enter a conviction on the basis of Article 7(1) only, and consider the accused's superior position as an aggravating factor in sentencing.[63]
>
> The Appeals Chamber therefore considers that the concurrent conviction pursuant to Article 7(1) and Article 7(3) of the Statute in relation to the same counts based on the same facts […] constitutes a legal error invalidating the Trial Judgement in this regard.[64]

24. The same rationale is applicable in the present case.[65] The convictions for individual and superior responsibility under Counts 1 through 6 are based on the same facts. The jurisprudence of the Appeals Chambers of both the International Tribunal and ICTR shows that concurrent convictions for individual and superior responsibility in relation to the same counts based on the same facts constitutes a legal error.[66]

25. The Appeals Chamber acknowledges that, in paragraph 58 of the Sentencing Judgement, the Trial Chamber distinguished between "part of Miodrag Jokić's behavior", which is aiding and abetting, and on the other hand "other culpable omissions," which were characterized under Article 7(3) liability. This language might be read to suggest compliance with the *Blaškić* principle, which does not bar simultaneous convictions under Articles 7(1) and 7(3) of the Statute if they are based on different conduct. However, the Trial Chamber's findings of fact do not support the notion that the Appellant engaged in two distinct sets of actions and omissions that merit conviction under different modes of liability. As previously noted, the Trial Chamber cannot, consistent with the scope of the Second Amended Indictment, have intended to enter a conviction for aiding and abetting based on conduct *prior* to 6 December 1991. The convictions under both modes of liability must therefore have stemmed from the Appellant's actions and omissions on that particular day; in this respect, the Trial Chamber did not distinguish among those actions and omissions, identifying which supported each conviction. Accordingly, the Appeals Chamber finds that the convictions were based on the same facts, and thus the *Blaškić* prohibition applies.

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[62] AT. 319.
[63] *Blaškić* Appeal Judgement, para. 91 (footnote omitted).
[64] *Ibid.*, para. 92.
[65] It must be noted that the *Blaškić* Appeal Judgement was rendered on 29 July 2004, several months after the Sentencing Judgement was issued.
[66] *See Blaškić* Appeal Judgement, paras 91, 92; *Kordić and Čerkez* Appeal Judgement, paras 33, 34; *Kajelijeli* Appeal Judgement, para. 81.

26. The Appeals Chamber is aware that this issue of concurrent convictions has not been appealed by either party and that the Appellant appealed only his sentence. There is, however, an insoluble nexus between a conviction and a sentence. Also, in the case of an error of law the Appeals Chamber has the discretionary power to correct this error *proprio motu* if the interests of justice so require. As the Appeals Chamber held in the *Mucić et al* case, "[a]s part of the [International] Tribunal, [the Appeals Chamber] also has an inherent power, deriving from its judicial function, to control its proceedings in such a way as to ensure that justice is done".[67] Thus, the Appeals Chamber has the discretionary power to correct an error of law in relation to the issue of concurrent convictions for individual and superior responsibility. The underlying rationale is that an appropriate sentence can in general only be based on a correct qualification of the criminal conduct. As regards the sentence, the Appeals Chamber bears in mind that such a re-qualification of the conviction, when it occurs *proprio motu* in a sentencing appeal proceeding, can never be to the detriment of the accused. The Appeals Chamber also notes that it was invited by the parties to address the issue of concurrent convictions.[68]

27. Based on settled jurisprudence and in the light of the discussion above, only one conviction under each count can be entered against the Appellant pursuant to Article 7(1) of the Statute. Thus, the Appeals Chamber vacates the Appellant's convictions for Counts 1 through 6 insofar as they are based on a finding of the Appellant's superior responsibility under Article 7(3) of the Statute.

28. However, the Trial Chamber was required to take the Appellant's superior position into account as an aggravating factor at sentencing, as it was agreed upon by the parties and accepted by the Trial Chamber that the Appellant held a leadership position.[69]

29. The Trial Chamber expressly considered the Appellant's leadership position in its discussion of aggravating circumstances and held:

> […] when determining the sentence, the Trial Chamber considers in aggravation the position of Miodrag Jokić and the influence of this position on the overall situation.[70]

Thus, the Trial Chamber fully recognized, as an aggravating factor, that the Appellant held a position of authority and the power of a high-ranking officer over others committing the crimes charged under Counts 1 through 6 as is reflected in the sentence imposed.[71]

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[67] *Mucić et al.* Judgment on Sentence Appeal, para. 16 (citations omitted).
[68] *See supra*, para. 22.
[69] Sentencing Judgement, paras 59-62, 68.
[70] *Ibid.*, para. 62; *see also* para. 68.
[71] *Cf. Kajelijeli* Appeal Judgement, paras 316-319.

30. The Appeals Chamber notes that the Trial Chamber's consideration of the Appellant's abuse of his position of authority as an aggravating circumstance may have been inappropriate in light of the fact that it had convicted the defendant under Article 7(3) of the Statute, which essentially incorporates the Appellant's authority as an element. The parties have not objected to the Trial Chamber's consideration of this factor. The Appeals Chamber need not consider *proprio motu* whether the Trial Chamber's approach was in error, for it concludes that, now that it has vacated the finding that the defendant was responsible under Article 7(3) of the Statute, the Trial Chamber's approach is in fact the appropriate one. Moreover, although the Trial Chamber listed the position of authority as an aggravating factor, it did not simultaneously suggest, in its discussion of the gravity of the crimes, that the crimes in question should be considered especially grave because the Appellant was convicted under the head of command responsibility and not just as an aider and abettor. Thus, in practice, the Trial Chamber appears to have only considered the effect of the Appellant's position of authority on the sentence once, rather than impermissibly double-counting it.

31. On the basis of the foregoing, the Appeals Chamber concludes that its vacating of the Trial Chamber's convictions of the Appellant as a superior pursuant to Article 7(3) of the Statute under Counts 1 through 6 has no impact on the Appellant's sentence.

IV. SECOND GROUND OF APPEAL: THE TRIAL CHAMBER'S RECOURSE TO PROVISIONS OF THE SFRY CRIMINAL CODE

32. The Appellant asserts that the Trial Chamber erred in law in having recourse to provisions of the SFRY Criminal Code,[72] which would not have been applicable or relevant to the range of penalties the courts in the former Yugoslavia would have taken into account in the Appellant's case.[73] He claims that the conduct to which he pleaded guilty — superior responsibility under Article 7(3) of the Statute and aiding and abetting under Article 7(1) of the Statute — would not have been considered criminal under Articles 142 and 148 of the SFRY Criminal Code, relied upon by the Trial Chamber as a guide for determination of his sentence.[74] He asserts that "Article 142(1) punishes the criminal conduct of those who 'order' any of the enumerated acts contained in that provision" and "Articles 148(1) and 148(2) provide that a person who orders, in the course of war or armed conflict the use of combat means, or combat measures forbidden by the Rules of International Law or uses them by him/herself, shall be punished by at least five years of prison."[75] The Appellant claims that under these provisions, liability is limited to those who are the direct perpetrators of the criminalised conduct.[76] During the Appeal Hearing, the Defence submitted that the Trial Chamber also erred in referring to Article 151 of the SFRY Criminal Code,[77] and that even if the Trial Chamber had not erred in consulting Articles 142, 148 and 151 of the SFRY Criminal Code, it erred in not consulting Article 24 of the SFRY Criminal Code since, under this provision, a person aiding in the commission of an act can be given a more lenient sentence.[78]

33. The Prosecution responds that, while Articles 142 and 148 of the SFRY Criminal Code refer to persons ordering and committing the crimes in question, aiding and abetting such crimes would nevertheless be punishable under those provisions if applied together with Article 24 of the SFRY Criminal Code, which is the provision enshrining the criminal liability of accessories.[79] It contends that, even though accomplice liability under the SFRY Criminal Code in principle attracts a more lenient sentence, Articles 142 and 148 of the SFRY Criminal Code do not seem to indicate that they are inapplicable to aiding and abetting, nor that a sentence of five years' imprisonment would have

[72] Criminal Code of the Socialist Federal Republic of Yugoslavia, adopted by the SFRJ Assembly at the session of the Federal Council on 28 September 1976; declared by a decree of the President of the Republic on 28 September 1976; published in the Official Gazette of the SFRJ No.44 of 8 October 1976; a correction was made in the Official Gazette, SFRJ No. 36 of 15 July 1977; took effect on 1 July 1977 ("SFRY Criminal Code").
[73] Appellant's Brief, paras 43, 47.
[74] *Ibid.*, paras 46-48.
[75] *Ibid.,* para. 48.
[76] *Ibid. See also* AT. 325.
[77] AT. 325-327. The Appeals Chamber notes that in the Appellant's Brief, the Appellant argues that Article 151 of the SFRY Criminal Code would have been applicable to the circumstances of his case. *See* Appellant's Brief, para. 49.
[78] AT. 328.
[79] Respondent's Brief, para. 4.25.

been inappropriate in the case of the Appellant under SFRY law.[80] The Prosecutor concludes that "no unambiguous error" can be found in the Trial Chamber's articulation of the law of SFRY.[81] During the Appeal Hearing, the Prosecution argued that the laws of the former Yugoslavia were meant as general guidelines and that there was no need "to find exactly replicated provisions with the exact same modes of liability",[82] nor to determine whether the Appellant's conduct would have been penalized in the former Yugoslavia.[83] It concluded that "at the end of the day, the question is whether or not there is something comparable that will give the Court some guidance."[84]

34. The Appellant replies that, since under Articles 142 and 148 of the SFRY Criminal Code, "an individual can only be criminally liable for his 'acts' but not for his 'omissions'"[85] and considering that he incurred criminal liability by omission, he could not have been considered as a perpetrator or an aider and abettor under Articles 142, 148 and 24 of the SFRY Criminal Code.[86]

35. Notwithstanding the fact that the Appellant was not responsible for ordering the shelling of the Old Town of Dubrovnik[87] and that the Second Amended Indictment does not allege that he directly committed any of the crimes charged, the Appeals Chamber considers that Articles 142, 148 and 151 of the SFRY Criminal Code — which encompass war crimes, means and modes to wage combat operations, and the protection of cultural property — prohibit criminal conduct against legal values which are also protected in the offences to which the Appellant pleaded guilty and for which he was convicted.[88] Regarding the modes of liability encompassed in Article 142 of the SFRY Criminal Code, the relevant part provides that "[w]hoever in violation of rules of international law effective at the time of war, armed conflict or occupation, orders that civilian population be subject to killings […] or who commits one of the foregoing acts, shall be punished by imprisonment for not less than five years or by the death penalty."[89] Article 148 of the SFRY Criminal Code prescribes imprisonment for not less than one year for "[w]hoever in time of war or armed conflict orders the use of means or practices of warfare prohibited by the rules of

[80] *Ibid.*, para. 4.26.
[81] *Ibid.*, para. 4.27.
[82] AT. 359.
[83] The Prosecution suggests that "[w]ith respect to the arguments related to whether or not the law itself of the former Yugoslavia would criminalise this conduct […] the Court should be hesitant to go in that specific direction." AT. 360.
[84] AT. 361.
[85] Brief in Reply, para. 10. *See also* the Defence arguments to the effect that: "Article 24, which refers to aiding and abetting of the Yugoslav Criminal Code does not provide [that] aiding in the commission of a crime can be committed by a failure to act or by non-commission. Therefore, it's not possible to be an aider and abettor according to Articles 142, 148 and 151 if this aiding takes the form of non-commission or omission or failure to act." AT. 326.
[86] Brief in Reply, paras 11-12.
[87] Sentencing Judgement, para. 26.
[88] Plea Hearing, T. 155-156.
[89] Article 142 SFRY Criminal Code.

international law, or whoever makes use of such means and practices".[90] The Sentencing Judgement also makes reference to Article 151 of the SFRY Criminal Code, which prescribes a penalty of imprisonment for not less than one year for "[w]hoever in time of war or armed conflict destroys cultural or historical monuments, buildings and establishments devoted to [...] science, art, education or humanitarian purposes in violation of the rules of international law".[91]

36. The Appeals Chamber is of the view that Articles 142, 148 and 151 of the SFRY Criminal Code, read together with Article 24 of the SFRY Criminal Code, which prescribes that "[a]nybody who intentionally aids another in the commission of a criminal act shall be punished as if he himself had committed [the crime]";[92] Article 30 of the SFRY Criminal Code, which provides that "[a] criminal act is committed by omission if the offender abstained from performing an act which he was obligated to perform;[93] and paragraph 21 of the Regulations Concerning the Application of the International Law of War to the Armed Forces of SFRY, which refers to the principle of command responsibility and the accomplice liability of a commander in circumstances where subordinates carry out criminal acts,[94] provide guidance on the general practice regarding prison sentences in the courts of the former Yugoslavia concerning the acts and omissions to which the Appellant pleaded guilty and for which he has been convicted.

37. The Appeals Chamber observes that the Trial Chamber did not consider Article 24 or Article 30 of the SFRY Criminal Code, nor did it resort to paragraph 21 of the Regulations Concerning the Application of International Law of War to the Armed Forces of SFRY in its discussion on the general practice regarding prison sentences in the courts of the former

[90] Article 148(1) SFRY Criminal Code.
[91] Article 151 SFRY Criminal Code. *See* Sentencing Judgement, para. 111.
[92] Article 24 SFRY Criminal Code reads in its entirety: "*Aiding* (1) Anybody who intentionally aids another in the commission of a criminal act shall be punished as if he himself had committed it, but his punishment may also be reduced. (2) The following, in particular, shall be considered as aiding: the giving of instructions or counselling about how to commit a criminal act, the supply of tools and resources for the crime, the removal of obstacles to the commission of a crime, as well as the promise, prior to the commission of the act, to conceal the existence of the criminal act, to hide the offender, the means to commit the crime, its traces, or goods gained through the commission of a criminal act."
[93] Article 30 (2) SFRY Criminal Code.
[94] Paragraph 21 of the Regulations Concerning the Application of the International Law of War to the Armed Forces of SFRY, Federal Secretariat for National Defence (1988), Part I, under the section titled "II. Prevention of Violations of the International Law of War and Criminal Responsibility for War Crimes", reads: "*Responsibility for the acts of subordinates.* The commander is personally responsible for violations of the law of war if he knew or could have known that his subordinate units or individuals are preparing to violate the law, and he, does not take measures to prevent violations of the law of war. The commander who knows that the violations of the law of war took place and did not charge those responsible for the violations is personally responsible. In case he is not authorised to charge them to the authorized military commander, he would also be personally responsible. A commander is responsible as a participant or an instigator if, by not taking measures against subordinates who violate the law of war, he allows his subordinate units and individuals to continue to commit the acts." Translation of paragraph 21 of the Regulations Concerning the Application of the International Law of War to the Armed Forces of SFRY, Federal Secretariat for National Defence (1988) in Appendix II of: *Bassiouni, M. Cherif*, with the Collaboration of Peter Manikas, The Law of the International Criminal Tribunal for the Former Yugoslavia (Irvington-on-Hudson, New York, Transnational Publishers Inc., 1996).

Yugoslavia,[95] despite the fact that the Prosecution had referred to this provision in its submissions.[96] However, the Appeals Chamber considers that Trial Chambers are not obliged to consider each and every applicable provision of the laws of the former Yugoslavia. Neither the fact that the Trial Chamber did not cite Articles 24 and 30 of the SFRY Criminal Code and did not expressly refer to paragraph 21 of the Regulations Concerning the Application of the International Law of War to the Armed Forces of SFRY in its discussion, nor the Trial Chamber's references to Articles 142, 148 and 151 of the SFRY Criminal Code do constitute an error of law.

38. Article 24(1) of the Statute provides that, in determining a sentence, "Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia". As the International Tribunal has consistently held that "recourse" need not be of a binding nature: although a Trial Chamber should "take into account"[97] the general practice regarding prison sentences in the courts of the former Yugoslavia, this "does not oblige the Trial Chambers to conform to that practice; it only obliges the Trial Chambers to take account of that practice".[98]

39. For the foregoing reasons, the Appellant's second ground of appeal is dismissed.

[95] Sentencing Judgement, section IV.D.
[96] *Ibid.*, para. 106.
[97] Rule 101(B) of the Rules.
[98] *Serushago* Sentencing Appeal Judgement, para. 30; *Dragan Nikolić* Judgement on Sentencing Appeal, para. 69. *See also Tadić* Judgement in Sentencing Appeals, para. 21.

V. THIRD GROUND OF APPEAL: THE TRIAL CHAMBER'S RELIANCE ON MITIGATING FACTORS AGREED UPON BY THE PARTIES

40. The Appellant alleges that the Trial Chamber erred in law in deciding that, in the case of plea agreements, it would primarily rely on mitigating factors agreed upon by the parties since mitigating factors should be established by a defendant on the balance of probabilities and not by agreement between the parties.[99] He argues that "[b]y focusing on factors which the Trial Chamber considered agreed to by the parties, the evaluation of the mitigating factors presented by the Appellant was erroneous and insufficient weight was given to the totality of these factors".[100] The Appellant asserts that not all of the mitigating factors were agreed upon by the parties and that he submitted additional mitigating factors.[101] He requests the Appeals Chamber to reduce the sentence pronounced by the Trial Chamber accordingly.[102]

41. The Prosecution contends that the Appellant is insufficiently specific in identifying the nature and consequences of the errors he alleges, and in particular that he has failed to demonstrate that the Trial Chamber refused to consider mitigating factors to which the parties had not agreed. Rather, the Prosecution maintains, the Trial Chamber considered as having been validly established all the mitigating factors pleaded by the Appellant, regardless of whether the Prosecution had agreed to them.[103]

42. The Appellant submits that footnote 100 in paragraph 69 of the Sentencing Judgement contains an error of law and fact.[104] The Appeals Chamber understands the Appellant's submission to be that the alleged error of law invalidated the verdict, since it resulted in insufficient weight been given by the Trial Chamber to the three mitigating factors he pleaded in addition to those factors identified by the Prosecution, namely: (1) his age; (2) the five events regarding his conduct prior to, during and after, the commission of the offence; and (3) his exceptional family circumstances. This is supported by the Brief in Reply, in which the Appellant asserts that "[t]he central issue of the third ground of appeal is that the Trial Chamber misdirected itself as a matter of law on the question of the standard for establishing mitigating factors and, *as a result of this error*, the Trial Chamber did not attach sufficient weight to the totality of the mitigating circumstances."[105]

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[99] Appellant's Brief, para. 51.
[100] *Ibid.*, para. 57.
[101] *Ibid.*, para. 56; AT. 320.
[102] Appellant's Brief, para. 58.
[103] Respondent's Brief, paras 4.38, 4.42, 4.51; AT. 338.
[104] Appellant's Brief, para. 52.
[105] Brief in Reply, para. 17 (emphasis added).

On the other hand, the Appellant also submits that "[t]he error of the Trial Chamber consisted [of] failing to attach […] particular weight to the totality of the mitigating factors advanced and established by the Appellant".[106]

43. The Appeals Chamber will first assess whether the Trial Chamber erred in law with regard to the standard for the establishment of mitigating factors, then whether the mitigating factors identified solely by the Appellant were considered by the Trial Chamber, and finally whether these mitigating factors were improperly given less weight than the mitigating factors agreed upon by the parties.

A. Whether the Trial Chamber erroneously departed from the standard set out by the Appeals Chamber in the *Čelebići* case

44. The Appellant argues that the Trial Chamber, after having correctly stated the law set out by the Appeals Chamber in the *Čelebići* case – which places upon the defendant the onus of establishing matters in mitigation of sentence on the balance of probabilities –[107] erred in finding at footnote 100 of the Sentencing Judgement that "[i]n cases of plea agreements, however, [it] will primarily rely on the mitigating factors agreed to by the parties."[108] According to the Appellant, the Trial Chamber wrongly departed from the standard set out by the Appeals Chamber in the *Čelebići* case.[109]

45. The Prosecution considers that one interpretation of the Trial Chamber's statement at footnote 100 of the Sentencing Judgment is that the Trial Chamber did not require the Appellant to actually prove on the balance of probabilities those mitigating factors which were not disputed by the Prosecution.[110] The Prosecution submits that the Trial Chamber did not err in its approach[111] and that, in any case "the standard it applied worked in fact to the benefit of the [Appellant]".[112]

46. The challenged statement in footnote 100 of the Sentencing Judgement reads as follows:

> As a defendant bears the onus of establishing matters in mitigation of sentence […] he must establish [them] on the balance of probabilities – that more probably than not [they] existed at the relevant time", *Čelebići* Appeal Judgement, para. 590. *In cases of plea agreements, however, the*

[106] Appellant's Brief, para. 57; AT 321.
[107] Appellant's Brief, para. 55; Brief in Reply, para. 17.
[108] Sentencing Judgement, footnote 100.
[109] Appellant's Brief, paras 53-54.
[110] Respondent's Brief, para. 4.48.
[111] *Ibid.*, paras 4.49-4.50 referring by analogy to the wording of Rule 62*bis* of the Rules providing that the factual basis of a guilty plea can be established on the lack of any disagreement between the parties about the facts of the case, and Rule 65*ter* (E) (i) of the Rules requiring the Prosecution to submit matters which are not in dispute at the pre-trial stage.
[112] *Ibid.*, para. 4.50.

Trial Chamber will primarily rely on the mitigating factors agreed to by the parties, whether in the Plea Agreement or at the Sentencing Hearing.[113]

47. The Appeals Chamber recalls that Trial Chambers are "required as a matter of law to take account of mitigating circumstances".[114] The Appeals Chamber is not satisfied that the Trial Chamber wrongly departed from the "balance of probabilities" standard set out in the *Čelebići* Appeal Judgement. Having recalled the standard in question, the Trial Chamber stated that, in cases of plea agreements, it would primarily rely on the mitigating factors agreed to by the parties. In other words, the Trial Chamber logically relieved the Appellant from discharging the burden of establishing mitigating circumstances on the balance of probabilities with respect to those mitigating circumstances agreed upon by the parties. Further, the discussion below will show that the Trial Chamber considered mitigating factors that the Appellant alone had identified.

B. Whether the Trial Chamber considered the mitigating circumstances identified by the Appellant only

48. The Appellant submits that three mitigating factors were identified solely by him in addition to those identified by the Prosecution, namely, (1) his age; (2) five events regarding his conduct prior to, during and after the commission of the offence; and (3) exceptional family circumstances.[115] The Appeals Chamber will examine each of these factors in turn.

1. The Appellant's age

49. The Appeals Chamber finds that, contrary to the Appellant's submissions, the Trial Chamber did take into account his age as a mitigating factor. The age of the Appellant as well as his family situation were considered by the Trial Chamber in its discussion concerning his "Personal Circumstances" in section IV. C 5 (b) of the Sentencing Judgement.[116] The Trial Chamber considered that the age of the Appellant, as well as the fact that he was married with two children, were factors which by themselves did not amount to a mitigating circumstance but which, taken together with the fact that he had been described as a "very human and professional officer" and the fact that he conducted himself well in detention and complied fully with the terms and conditions of his provisional release, did amount to personal circumstances of a kind which might be accorded some, although very limited, weight in mitigation.[117]

[113] Sentencing Judgement, footnote 100 (emphasis added).
[114] *Serushago* Sentencing Appeal Judgement, para. 22. *See also Musema* Appeal Judgement, para. 395.
[115] Appellant's Brief, para. 56; Brief in Reply, para. 18; AT. 320.
[116] Sentencing Judgement, para.101.
[117] *Ibid*., para. 102.

2. The Appellant's conduct prior to, during and after the commission of the offence

50. The Appellant submits that "five important factors were argued on [his] behalf […]: (i) on 5 December 1991, the Appellant and the Croatian Minister for Maritime Affairs and Foreign Affairs reached a verbal agreement on an immediate ceasefire and on mechanisms to improve the lives of the citizens of Dubrovnik, (ii) on 6 December 1991, the Appellant sent a radiogram to the Croatian Minister expressing [his] apology for the shelling of the old town of Dubrovnik during the afternoon when the shelling occurred, (iii) he met with the Croatian Minister the day after the shelling of the [O]ld [T]own of Dubrovnik and concluded a comprehensive ceasefire agreement, (iv) the conduct of the Appellant in relation to the negotiated ceasefire agreement were benevolent acts which were an attempt by the Appellant to change and improve the course of events, and (v) beginning in 1993, the Appellant participated directly with the leadership of the New Democracy party of Serbia on strategy of future reforms, reorganisation and strategy of the Yugoslav Armed Forces with the Partnership for Peace."[118]

51. The Prosecution contends that it did agree that the Appellant's conduct at the time of the commission of the crime was a relevant mitigating factor.[119] The Appeals Chamber notes that the Sentencing Judgement addressed the Appellant's role in implementing a comprehensive ceasefire after the attack of 6 December 1991[120] and acknowledged that *both* parties agreed that this role was instrumental.[121] Even though the Appellant does not dispute that the Prosecution agreed with the mitigating factors pleaded by him,[122] his argument appears to be that because his conduct prior to, during and after the commission of the crimes had been *originally* pleaded by the Appellant only, it was not given sufficient weight. However, the Trial Chamber noted the Appellant's submissions in this respect and stated that the Prosecution accepted that the Appellant was an active member of the New Democracy Party and that he contributed significantly to promoting peace.[123] The Trial Chamber also noted the Prosecution's submissions concerning the Appellant's regret expressed on 6 December 1991, the day of the attack.[124]

52. Furthermore, the Trial Chamber took into consideration, as an expression of his sincere remorse, the radiogram sent by the Appellant as an apology for the shelling,[125] the ceasefire

[118] Appellant's Brief, para. 56(b).
[119] Respondent's Brief, para. 4.54.
[120] Sentencing Judgement, para. 88.
[121] *Ibid*., para. 90.
[122] Brief in Reply, para. 16.
[123] Sentencing Judgement, para. 88 referring to Sentencing Hearing, T. 290.
[124] *Ibid*., para. 83 referring to Prosecution Sentencing Brief, paras 52-53.
[125] Sentencing Judgement, para. 89. This matter was referred to at paragraph 56(b)(ii) of the Appellant's Brief. The Appeals Chamber notes that this mitigating factor was acknowledged by the Prosecution, as recognized by the Appellant during the Sentencing Hearing (Sentencing Hearing T. 289). *See also* Sentencing Judgement, para. 88.

agreement and its implementation,[126] as well as his participation in political activities aimed at promoting a peaceful solution to conflicts in the region after the war.[127] One factor not considered by the Trial Chamber as a mitigating circumstance in the Sentencing Judgement was the verbal agreement reached on 5 December 1991 on a ceasefire and on mechanisms to improve the lives of the citizens of Dubrovnik.[128] The Appeals Chamber finds that it was within the discretion of the Trial Chamber to consider that the verbal agreement, whose existence does not appear to have been disputed amongst the parties, did not constitute a mitigating circumstance.

53. The Appellant emphasises that the signing of the ceasefire agreement on 7 December 1991 was "a benevolent act, which demonstrated his attempt to change and improve the course of events and to contribute to peace."[129] The Appeals Chamber notes that the Trial Chamber did refer to the Appellant's submission that "the conduct of Miodrag Jokić during the negotiations on 5 to 7 December 1991 with Minister Davorin Rudolf should be considered as 'benevolent acts, which were Miodrag Jokić's attempts to change and improve the course of events'".[130] This reference to the Defence Sentencing Brief is *prima facie* evidence that the Trial Chamber was cognisant of the circumstance and took it into account.[131] Moreover, the Appeals Chamber considers that it is clear from the Sentencing Judgement that the ceasefire on 7 December 1991 and its implementation were taken into account by the Trial Chamber.[132]

54. The Appellant further submits that post-conflict conduct is a "separate and distinct mitigating circumstance" that should not be "commingled with remorse".[133] In his view, the negotiated ceasefire and his political activities in the New Democratic Party should be characterised as steps taken by the Appellant "to improve the situation and alleviate suffering", which is a mitigating circumstance "separate and distinct from remorse".[134] He adds that to consider these factors "as remorse is an abuse of discretion which creates an injustice to the Appellant."[135] The Appeals Chamber finds that this argument, advanced by the Appellant for the first time in his Brief in Reply, amounts to a new allegation. Nonetheless, the Appeals Chamber decides to exercise its discretionary power to briefly address the Appellant's new argument. The Trial Chamber took the

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[126] Sentencing Judgement, paras 85, 90. This matter was referred to at paragraph 56(b)(iii) of the Appellant's Brief. The Appeals Chamber notes that the Appellant's participation in the ceasefire agreement and its implementation were facts accepted by the Prosecution (Prosecution Sentencing Brief, para. 52).
[127] Sentencing Judgement, para. 91; this matter was referred to at para 56(b)(v) of the Appellant's Brief.
[128] Appellant's Brief, para 56(b)(i). The Trial Chamber did however refer to this verbal agreement in section II of the Sentencing Judgement titled "Facts", *see* Sentencing Judgement, para. 25.
[129] Brief in Reply, para. 18; *see also* Appellant's Brief, para. 56.b.(iv).
[130] Sentencing Judgement, para. 85, citing *Prosecutor v. Miodrag Jokić*, Case No. IT-01-42/1-S, Miodrag Jokić's Sentencing Brief ("Defence Sentencing Brief"), 14 November 2003, para. 60.
[131] *Kupreškić et al.* Appeal Judgement, para. 430.
[132] Sentencing Judgement, para. 90.
[133] Brief in Reply, para. 19.
[134] *Ibid.*

Appellant's post-conflict conduct into account as a factor in mitigation[136] and considered it in its final determination, when it found that the Appellant's remorse was a relevant mitigating circumstance "also shown by the conduct concomitant and posterior to the committed crimes."[137] The Appeals Chamber finds that it was within the discretion of the Trial Chamber to consider the Appellant's post-conflict conduct as an expression of his sincere remorse, instead of assessing his post-conflict conduct as a *distinct* mitigating circumstance. The Trial Chamber did not err in this respect.

3. Family circumstances

55. The Trial Chamber referred to the Appellant's family circumstances in its discussion on the Appellant's personal circumstances.[138] Specific arguments concerning the exceptional nature of his family circumstances have been raised by the Appellant under his fifth ground of appeal and will be considered in the discussion of that ground.[139]

C. Whether the Trial Chamber gave insufficient weight to the mitigating factors presented only by the Appellant

56. The Appellant does not dispute that the Prosecution did agree to the mitigating factors that he identified.[140] However, he argues generally that, as a result of the alleged legal error concerning the departure from the standard set out in the *Čelebići* case, the Trial Chamber failed to attach sufficient weight to those factors.[141]

57. The Appeals Chamber emphasizes that, upon finding that mitigating circumstances have been established, a decision as to the weight to be accorded thereto lies within the discretion of the Trial Chamber.[142] Proof of mitigating circumstances "does not automatically entitle [an] [a]ppellant to a 'credit' in the determination of the sentence; it simply requires the Trial Chamber to consider

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[135] *Ibid.*
[136] Sentencing Judgement, paras 90-92.
[137] *Ibid.*, para. 103.
[138] *Ibid*., paras 97, 101.
[139] The Appeals Chamber notes that the Appellant did not address the issue of his "family circumstances" with respect to the present ground of appeal during the Appeal Hearing, *see* AT. 320-321.
[140] Brief in Reply, para. 16.
[141] Appellant's Brief, para. 57: "The error of the Trial Chamber consisted in failing to attach[…] particular weight to the totality of the mitigating factors advanced and established by the Appellant." *See also* Brief in Reply, para. 17: "As a consequence, those mitigating factors which were pleaded by the Appellant only (those factors in addition to the ones both parties had identified) were not given due consideration or weight by the Trial Chamber because of the legal error committed by the Trial Chamber." *See also* the following statement by the Defence at the Appeal Hearing: "We say that this error consisted in failing to attach sufficient weight to the totality of the mitigating factors advanced and established by the Appellant." (AT. 321).
[142] *Čelebići* Appeal Judgement., para. 777; *see also Kambanda* Appeal Judgement, para. 124; *Musema* Appeal Judgement, para. 396.

such mitigating circumstances in its final determination".[143] The Appeals Chamber finds that the Appellant has failed to show that the Trial Chamber abused its discretion when weighing the mitigating circumstances presented by him.

58. As to the Appellant's argument that the Trial Chamber did not give "due weight to the fact that he participated directly with the leadership of the New Democracy party of Serbia on strategy of future reforms, reorganisation and strategy of the Yugoslav Armed Forces with the Partnership of Peace"[144] the Appeals Chamber notes that the Sentencing Judgement makes reference to the Defence's submissions in this respect during the Sentencing Hearing. The Sentencing Judgement states that "the Prosecutor accepts that Miodrag Jokić was an active member of the New Democracy party and President for the Board for Defence and Security" and that "the Prosecution recognizes that, in this capacity, Miodrag Jokić contributed significantly to the initiative for having the Federal Republic of Yugoslavia join the Partnership for Peace, and worked on proposals for the reform of the military and the police."[145] Moreover, the Trial Chamber expressly referred to this information in the context of its discussion.[146]

59. For the foregoing reasons, the Appellant's third ground of appeal is dismissed.

[143] *Niyitegeka* Appeal Judgement, para. 267.
[144] Brief in Reply, para. 18.
[145] Sentencing Judgement, para. 88 referring to Sentencing Hearing, T. 290.
[146] *Ibid*., para. 91.

VI. FIFTH GROUND OF APPEAL: THE TRIAL CHAMBER'S ASSESSMENT OF THE APPELLANT'S HEALTH AND FAMILY SITUATION

60. The Appellant submits that the Trial Chamber erred in law and fact and abused its discretion in not taking into account as a factor in mitigation his "extraordinary" health and family situation, which, in his view, amount to "exceptional circumstances".[147] According to the Appellant, the relevant evidence was submitted to the Trial Chamber in Confidential Annex E of the Defence Sentencing Brief;[148] and (1) was uncontested by the Prosecution; (2) had been previously pleaded and accepted by the Trial Chamber when granting his request for provisional release; and (3) had been described by the Trial Chamber itself "as constituting 'extraordinary health and family considerations amounting to exceptional circumstances'".[149] The Appellant raises several arguments in support of this ground of appeal, which the Appeals Chamber will examine in turn. During the Appeal Hearing, the Prosecution argued that "the Trial Chamber was fully aware of the specific circumstances in this case and took them into account."[150]

61. The Appeals Chamber turns first to the Appellant's assertion that the Trial Chamber incorrectly held that he shared the same family circumstances as other accused.[151] The Prosecution responds that the Trial Chamber was not specifically addressing the particular family circumstances of the Appellant,[152] and was correct in giving such factors only limited importance in mitigation.[153]

62. The Appeals Chamber notes the Trial Chamber's observation that various personal circumstances have been taken into account as mitigating factors by the jurisprudence of the International Tribunal,[154] but that limited weight had been given to these circumstances by some Chambers.[155] In support of this observation, the Trial Chamber noted the finding in the *Banović* Sentencing Judgement that "many accused share these personal factors".[156] Hence, the Trial Chamber only provided a reason as to why, in general, limited weight has been attached in

[147] Appellant's Brief, paras 59, 62; AT. 321.
[148] *See* Defence Sentencing Brief, para. 62 referring to Confidential Annex E in footnote 77.
[149] Appellant's Brief, para. 62 referring to *Prosecutor v. Miodrag Jokić*, Case No.: IT-01-42-PT, Order on Miodrag Jokić's Motion for Provisional Release, 29 August 2003 ("29 August 2003 Order"), p. 3; Order on Miodrag Jokić's Request for Continued Provisional Release, 4 December 2003 ("4 December 2003 Order"), p. 2; AT. 321.
[150] Appeals Hearing, T. 340 referring to Sentencing Judgement, paras 69, 97, 98 and 101.
[151] Appellant's Brief, para. 62.
[152] Respondent's Brief, para. 4.84.
[153] *Ibid.*, para. 4.85.
[154] Sentencing Judgement, para. 100 referring to the advanced age of an accused, good behaviour whilst at the United Nations Detention Unit, full compliance with the terms and conditions imposed upon him during provisional release, and his family situation.
[155] *Ibid.*
[156] *Ibid.* referring to *Banović* Sentencing Judgement, para. 75.

mitigation to factors such as, *inter alia*, the family situation of an accused. The Trial Chamber did not, however, compare the Appellant's personal circumstances to those of other accused.

63. The Appeals Chamber turns next to the Appellant's allegation that it was erroneous and unreasonable for the Trial Chamber to disregard the evidence before it or to find that his family circumstances were anything other than exceptional.[157] The Prosecution responds that the Sentencing Judgment shows that the Appellant's family circumstances, as well as his age, were considered by the Trial Chamber when assessing the mitigating factors.[158] It points out that the Sentencing Judgement refers in footnote 146 to a section of the Defence Sentencing Brief which sets out the fact that his daughter lived with him and his wife.[159] The Prosecution claims that since the Appellant made no explicit reference to this mitigating factor at the Sentencing Hearing, "it must be assumed that it is incorporated in [the] [Defence's] concluding submission that the Trial Chamber consider [the] Appellant's 'personal and family circumstance'".[160] The Prosecution submits that "it is open to conclude that the Trial Chamber dealt with this issue in the same manner."[161] Further, the Prosecution brings to the Appeals Chamber's attention the fact that the Sentencing Judgement refers by way of a footnote to a portion of Mr. Marjan Pogačnik's testimony related to the Appellant's family.[162] The Prosecution further argues that the fact that the Trial Chamber did not make any explicit reference in the Sentencing Judgement to the family circumstances of the Appellant should not lead to the conclusion that it did not consider them.[163] In its view, it is clear that the Trial Chamber was cognisant of the Appellant's special family circumstances as it considered them in its orders on provisional release.[164]

64. The Appeals Chamber observes that in section IV. C. 5 of the Sentencing Judgement titled "Personal Circumstances", under heading (a) titled "Arguments of the Parties", the Trial Chamber referred to the Appellant's family situation, including his marriage and his two daughters, citing paragraph 62 of the Defence Sentencing Brief, which in turn refers to its Confidential Annex E.[165] Moreover, in its discussion of the Appellant's personal circumstances, the Trial Chamber referred to the fact that the Appellant is married and has two children.[166] In addition, the Appeals Chamber notes that, within this context, the Trial Chamber referred to a portion of the Sentencing Hearing during which one witness stated the following: "Mr. Jokić is married. He has two daughters. The

[157] AT. 321-323. *See also* Brief in Reply, para. 22.
[158] Respondent's Brief, para. 4.72 referring to Sentencing Judgement, paras 97-103.
[159] *Ibid.*, para. 4.76 referring to Defence Sentencing Brief, para. 62 which refers in a footnote to Confidential Annex E.
[160] *Ibid.*, para. 4.78 referring to Sentencing Hearing T. 295.
[161] *Ibid.*
[162] *Ibid.*, paras 4.79-4.80.
[163] *Ibid.*, para. 4.83.
[164] *Ibid.*, paras 4.81-4.83.
[165] Sentencing Judgement, para. 97.

names are Sanja and Tanja. All I can say that -- is that he always behaved in an exemplary manner as a father. He took care of his family. He brought them up very well. But I would say that he was always worried about the health of his youngest daughter above all, his younger -- youngest daughter was called Tanja."[167]

65. The Trial Chamber expressly referred to the Appellant's written submissions and cited the paragraph of the Defence Sentencing Brief which contains evidence presented by the Appellant to show that his personal circumstances were of an exceptional nature and which refers in a footnote to Confidential Annex E.[168] This reference in the Sentencing Judgement to the written submissions is *prima facie* evidence that the Trial Chamber was cognisant of the Appellant's specific personal and family situation and took it into account.[169] The Appeals Chamber finds that the Trial Chamber was under no obligation to discuss the Appellant's personal circumstances in more detail than it did, in particular in light of the fact that some of the evidence proffered by the Appellant concerning his family circumstances is of a confidential nature.

66. The Appeals Chamber turns now to the Appellant's argument that the Sentencing Judgement "erroneously describes the Appellant's family circumstances and failed to properly consider his true family circumstances as a mitigating factor",[170] which he supports by reference to the orders on his provisional release, in which the Trial Chamber considered that his extraordinary health and family considerations amounted to exceptional circumstances.[171]

67. The Appeals Chamber finds that the Trial Chamber's considerations when granting the Appellant's provisional release are not necessarily relevant to its assessment of the circumstances in mitigation of the Appellant's sentence. Pursuant to Rule 65(B) of the Rules an accused may be provisionally released if the Trial Chamber is satisfied that he or she will appear for trial and, if released, will not pose a danger to any victim, witness or other person. When evaluating an accused's conduct in order to mete out an appropriate sentence, it is open to a Trial Chamber to weigh the mitigating circumstances against other factors, such as, the gravity of the crime, the particular circumstances of the case and the form and degree of the participation of the accused in the crime.[172] The Appeals Chamber considers that the Appellant's argument under this part of his fifth ground of appeal is misconceived.

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[166] *Ibid.*, para. 101.
[167] Sentencing Hearing, T. 255 (open session), referred to in Sentencing Judgement, para. 101, footnote 161.
[168] Sentencing Judgement, para. 97, footnote 146 citing Defence Sentencing Brief, para. 62.
[169] *Kupreškić et al.* Appeal Judgement, para. 430.
[170] Brief in Reply, para. 22.
[171] 29 August 2003 Order, p. 3; and 4 December 2003 Order, p. 2.
[172] *Kupreškić et al.* Trial Judgement, para. 852.

68. Furthermore, the Appellant has shown neither that the Trial Chamber abused its discretion in weighing mitigating circumstances, nor that it "failed to follow [the] applicable law and correctly interpret and evaluate the facts".[173] Rather, the Appeals Chamber finds that the Trial Chamber considered all the evidence before it concerning the Appellant's personal circumstances, and that it was within its discretion to afford this factor "some, although very limited, weight in mitigation."[174]

69. For the foregoing reasons, the Appellant's fifth ground of appeal is dismissed.

[173] Appellant's Brief, para. 62.
[174] *See* Sentencing Judgement, paras 101, 102.

VII. SIXTH GROUND OF APPEAL: THE TRIAL CHAMBER'S ASSESSMENT OF THE GOOD CHARACTER AND PROFESSIONALISM OF THE APPELLANT

70. The Appellant alleges that the Trial Chamber erred in law and in fact and abused its discretion by failing to consider the totality of the evidence presented by the parties in relation to his good character and professionalism.[175] He identifies the following evidence which he claims was not considered by the Trial Chamber in this respect: (1) a part of the testimony of Marjan Pogačnik,[176] (2) the testimonies of two investigators from the Office of the Prosecutor,[177] and (3) the testimony of Miroslav Stefanović, one of the founders of a democratic party in Serbia, which the Appellant joined in 1993.[178] The Appellant further submits that: "[his] voluntary surrender […], his conduct while in provisional release, and his admission of guilt demonstrate the character and personal integrity of the Appellant as a man and as a soldier and his respect for the authority and orders of the [International] Tribunal."[179] The Prosecution responds that the Appellant's voluntary surrender and his compliance with the conditions of his provisional release were indeed considered by the Trial Chamber when assessing the Appellant's personal circumstances.[180] The Prosecution adds that the Trial Chamber was "fully" cognisant of the testimonies of the witnesses referred to by the Appellant and properly assessed this evidence in mitigation.[181]

A. The Witness' Testimonies

71. As to the evidence of Marjan Pogačnik, the Appellant acknowledges that the Trial Chamber accepted the testimony of this witness to the effect that he was "an exemplary father and a very human and professional officer"[182] but he submits that it failed to take into account other parts of the testimony, in which the witness testified that the Appellant favoured a peaceful resolution even before the conflict broke out in 1990, that the Appellant was the only one together with the witness to vote in favour of a reformed Yugoslavia, and that their vote supported the lifting of the economic blockade against Slovenia; in sum, that the Appellant was opposed to war and in favour of a peaceful resolution.[183] The Prosecution contends that the Trial Chamber was aware of the relevance

[175] Appellant's Brief, para. 64; AT. 323.
[176] Appellant's Brief, paras 66-67; AT. 323.
[177] Appellant's Brief, para. 68.
[178] *Ibid.*, para. 69.
[179] *Ibid.*, para. 70.
[180] Respondent's Brief, para. 4.108 referring to Sentencing Judgement, paras 97-102.
[181] *Ibid.*, para. 4.111.
[182] Sentencing Judgement, paras 98, 101.
[183] Appellant's Brief, para. 66.

of Marjan Pogačnik's testimony to the Appellant's good character and professionalism and "incorporated it within its recognition of the human and professional nature of the Appellant".[184]

72. The Appeals Chamber disagrees with the Appellant's contention that the Trial Chamber ignored certain aspects of Marjan Pogačnik's testimony. The Trial Chamber in fact quoted that testimony verbatim in its Sentencing Judgement, saying that the Appellant "was always for full equality of all nations and ethnic groups. That was his main point, what he really believed in. He never expressed any nationalistic views."[185]

73. The Appeals Chamber finds that the Trial Chamber did not commit an error in not expressly referring to further portions of the testimony in question. Trial Chambers are not required to "articulate every step" of their reasoning in reaching particular findings,[186] and "failure to list in [a judgement] each and every circumstance placed before them and considered, does not necessarily mean that [they] either ignored or failed to evaluate the factor in question."[187] A Trial Chamber is in no way obliged to refer to every phrase pronounced by a witness during his testimony but may, where it deems appropriate, stress the main parts of the testimony relied upon in support of a finding. That the Sentencing Judgement refers only to some parts of Marjan Pogačnik's testimony does not support the contention that the other parts of his testimony were rejected or not taken into account by the Trial Chamber. To the contrary, reference to a certain portion of the witness's testimony is *prima facie* evidence that the Trial Chamber was cognisant of the whole testimony and took it into account.

74. Furthermore, the Appellant submits that in relation to the circumstances surrounding his appointment as a commander of the Ninth Naval Sector, in October 1991, the same witness gave evidence that the Dubrovnik operation was in full swing,[188] and that the Appellant had far-reaching responsibilities in relation to the withdrawal of the naval sectors of the JNA from Croatia.[189] The Prosecution responds that the Appellant failed to show how the fact that the Appellant was appointed as commander after the sudden death of the former commander is relevant to his professionalism or the mitigation of his sentence.[190] The Appellant indeed has failed to demonstrate how these facts are relevant as evidence of his good character.

[184] Respondent's Brief, para. 4.101.
[185] Sentencing Judgement, para. 98.
[186] *Čelebići* Appeal Judgement, para. 481.
[187] *Kupreškić et al.* Appeal Judgement, para. 458.
[188] Appellant's Brief, para. 67.
[189] *Ibid.*, paras 67, 71.
[190] Respondent's Brief, para. 4.102.

75. The Appeals Chamber turns now to the testimonies of two investigators from the Office of the Prosecutor, Witness M and Witness W.[191] The Appellant submits that Witness M gave evidence that the Appellant fully recognized his criminal culpability and described him as truthful, relaxed and obviously candid in providing information to the Prosecution, and Witness W gave evidence that the Appellant did not try to cover his or his former colleagues' responsibility, that he stated the truth to the best of his ability, and that he felt remorse and disappointment in himself as a military professional and human being.[192] The Prosecution argues that this evidence goes more precisely to the issue of the Appellant's expression of remorse and his cooperation with the Prosecution, which were considered by the Trial Chamber.[193]

76. The Appellant argues that Witness W's testimony during the Sentencing Hearing and the reference thereto by the Appellant's counsel were not considered by the Trial Chamber.[194] The Appeals Chamber notes, however, that the Sentencing Judgement refers to these portions of the transcripts of the Sentencing Hearing.[195] The Appeals Chamber acknowledges that the Trial Chamber referred to these passages of the transcript within the context of the Appellant's cooperation with the Prosecution and not in relation to the Appellant's good character and professionalism. However, the Appeals Chamber finds that the Trial Chamber did not err by addressing this issue in its discussion on the Appellant's cooperation as a mitigating circumstance. In this regard, the Appeals Chamber notes that counsel for the Appellant had requested to address the court on the issue of substantial cooperation in private session[196] in light of the fact that the "Prosecution's witnesses and the statements they provided [were] all confidential",[197] and it was within the context of discussing the Appellant's substantial cooperation that his counsel recalled the evidence provided by witnesses M and W concerning the Appellant's character and demeanour.[198]

77. The Appeals Chamber observes that the testimony of Witness M was not referred to by the Trial Chamber in its Sentencing Judgement. The Appellant asserts that in Witness M's testimony "[t]he Appellant is described as not trying to cover his own responsibility or the responsibility of others."[199] The Appeals Chamber recalls Witness M's statement to the effect that "[t]here were

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[191] Appellant's Brief, para. 68. In light of the fact that the testimonies of the two investigators from the Office of the Prosecutor were given in closed session, the present Judgement will use pseudonyms to refer to these witnesses.
[192] *Ibid*.
[193] Respondent's Brief, paras 4.103-4.104.
[194] Appellant's Brief, para. 68, footnote 57, referring to Sentencing Hearing T. 225-235 (closed session) and T. 294 (private session).
[195] Sentencing Judgement, para. 95, footnote 143. The four pages cited in the Appellant's Brief but not cited in the Sentencing Judgement (Sentencing Hearing, T. 225-228, closed session) concern only introductory remarks by the witness.
[196] Sentencing Hearing, T. 293 (private session).
[197] *Ibid.*
[198] *Ibid*., T. 294 (private session).
[199] Appellant's Brief, para. 68, footnote 56, referring to Sentencing Hearing, T. 217-218 (closed session).

almost no occasions where -- where he was being caught out as being evasive or trying to cover his own responsibility or the responsibility of others."[200] The Appeals Chamber considers that the fact that the Trial Chamber did not explicitly rely in mitigation on this part of the witness's testimony does not constitute an error.

78. With respect to the Appellant's argument that the Trial Chamber failed to consider the uncontested testimony of Miroslav Stefanović, one of the founding members of the New Democracy party in Serbia, in relation to the Appellant's character,[201] the Prosecution responds that this testimony was considered and specifically referred to in the Sentencing Judgement within the context of the assessment of the Appellant's remorse as a mitigating factor.[202]

79. The Appeals Chamber observes that the Sentencing Judgement notes that the Appellant's submissions regarding the fact that he became the President of the Defence and Safety Commission of the New Democracy party of Serbia were supported by the testimony of Miroslav Stefanović,[203] and considers the Appellant's participation in the New Democracy party as indicative of his remorse.[204] The Appeals Chamber finds that it was within the Trial Chamber's discretion to assess the testimony of Mr. Stefanović as evidence of the Appellant's remorse; the Trial Chamber was not bound to consider this factor when assessing the Appellant's good character as well. Furthermore, the Trial Chamber did not have to include every portion of the testimony heard in the Sentencing Judgement and had no obligation to refer to the exact position the Appellant held in the party, nor to his activities on its behalf.[205]

80. The Appeals Chamber considers that when read as a whole, the Sentencing Judgement reflects that the Trial Chamber considered evidence indicative of the Appellant's character and professionalism, individually and together with other mitigating factors. This part of the Appellant's sixth ground of appeal is dismissed.

B. Facts Indicative of the Appellant's Good Character

81. The Appellant further submits that the Trial Chamber failed to consider his attitude of respect and deference towards the International Tribunal as being indicative of his good character, as demonstrated by: (1) his voluntary surrender and the fact that he was the first JNA officer to "voluntarily surrender without the framework of the law on cooperation between the [International]

[200] Sentencing Hearing, T. 218 (closed session).
[201] Appellant's Brief, para. 69.
[202] Respondent's Brief, para. 4.106 referring to Sentencing Judgement, paras 87- 88.
[203] Sentencing Judgement, para. 87.
[204] *Ibid.*, para. 91.
[205] Appellant's Brief, para. 69.

Tribunal and the FRY";[206] (2) the fact that he always complied fully with the terms and conditions of his provisional release; (3) the fact that he admitted his guilt;[207] and (4) the fact that he apologized to the Croatian Minister for Maritime Affairs and Foreign Affairs on the day of the shelling and concluded a ceasefire the day after.[208] The Appellant further submits that "the factors identified in his sixth ground of appeal are examples of good character and professionalism which cannot simply be subsumed by other mitigating factors."[209] The Prosecution responds that the Appellant's voluntary surrender and his compliance with the terms and conditions imposed upon him during his provisional release were taken into account by the Trial Chamber in its assessment of his personal circumstances.[210] Furthermore, the Prosecution contends that the Appellant's voluntary surrender can only be given little weight as it does not reduce the perpetrator's level of culpability.[211] Finally, the Prosecution argues that it does not matter under which "heading" the Trial Chamber considers the mitigating factors as long as all the evidence presented is taken into account.[212]

82. The Appeals Chamber observes that all the evidence in question was duly considered by the Trial Chamber when discussing the issue of mitigating circumstances. The Trial Chamber was fully cognisant of this evidence; this is apparent from the Sentencing Judgement which specifically refers to the Appellant's voluntary surrender,[213] his conduct while on provisional release,[214] his admission of guilt,[215] as well as the facts that he apologized to the Croatian Minister for Maritime Affairs and Foreign Affairs on the day of the shelling on 6 December 1991 and that these two men concluded a ceasefire the day after.[216] The Appeals Chamber finds that it was within the Trial Chamber's discretion to consider these factors as indications of the Appellant's remorse and his substantial cooperation with the International Tribunal; the Trial Chamber was not bound to consider these factors when assessing the Appellant's good character as well. With respect to the Appellant's argument that his voluntary surrender took place outside the framework of the law on cooperation between the former FRY and the International Tribunal,[217] the Appeals Chamber considers that the fact that the Trial Chamber did not mention this point specifically does not mean the point was not considered, and does not amount to an error.

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[206] *Ibid.*, para. 70; *see also* Brief in Reply, para. 26; AT. 324.
[207] *Ibid.*, para. 70.
[208] *Ibid.*, para. 71.
[209] Brief in Reply, para. 25.
[210] Respondent's Brief, para. 4.108.
[211] *Ibid.*, para. 4.109.
[212] AT. 343.
[213] Sentencing Judgement, para. 73, section IV.C.1 titled: "Voluntary Surrender of the Accused".
[214] *Ibid.*, para. 101, section IV.C.5 titled: "Personal Circumstances".
[215] *Ibid.*, paras 74-78 in relation to the guilty plea, section IV.C.2 titled: "Guilty Plea and Acceptance of Responsibility".
[216] *Ibid.*, paras 86, 89, section IV.C.3 titled "Remorse".
[217] Appellant's Brief, para. 70.

83. In light of the foregoing, the Appellant's sixth ground of appeal is dismissed.

VIII. SEVENTH GROUND OF APPEAL: REQUEST THAT THE APPEALS CHAMBER CONSIDERS AS A MITIGATING FACTOR THE APPELLANT'S SUBSTANTIAL COOPERATION WITH THE PROSECUTION AFTER THE SENTENCING JUDGEMENT WAS RENDERED

84. Relying upon the *Kupreškić* Appeal Judgement,[218] the Appellant requests the Appeals Chamber to consider, "in the interests of justice",[219] "[his] substantial cooperation […] after the date of the Sentencing Judgement as a factor in mitigation",[220] namely his testimony as a Prosecution witness in the *Strugar* case. He argues that his testimony in the *Strugar* case was crucial and in some instances the only evidence the Prosecution relied upon,[221] and submits that this testimony amounted to substantial cooperation with the Prosecution, for which he is entitled to have the Appeals Chamber reduce his sentence.[222] He further argues that the Trial Chamber could not have known that his testimony would be so crucial to the Prosecution in the *Strugar* trial when it considered the issue of substantial cooperation for sentencing purposes.[223] He submits that "the legal criteria for evaluating the cooperation of the Appellant is to determine the quality and the quantity of his testimony in the Strugar trial,"[224] and that the Appeals Chamber is in a position to assess the extent of his post-conviction cooperation.[225] The Appellant does not allege under his seventh ground of appeal that "the Trial Chamber erred in any way."[226]

85. The Prosecution acknowledges that the Appellant's cooperation after the Sentencing Judgement was substantial, truthful and far-reaching and it does not dispute the fact that the Appeals Chamber might consider substantial cooperation to be a mitigating factor when it occurs after the conviction.[227] However, the Prosecution argues that the Appellant erroneously relied on the *Kupreškić* Appeal Judgement, as the two cases are not comparable.[228] It submits that, in the *Kupreškić* case, a convicted person had decided to cooperate with the Prosecution after the trial but before the completion of the appeal proceedings and his cooperation had not been indicated to or

[218] Appellant's Brief, paras 74-77.
[219] *Ibid.*, para. 77.
[220] *Ibid.*, para. 73.
[221] *Ibid.*, paras 76-77.
[222] *Ibid.*, para. 77.
[223] *Ibid*.
[224] *Ibid.*
[225] AT. 337.
[226] Appellant's Brief, para. 77.
[227] Respondent's Brief, para. 4.113.
[228] *Ibid.*, para. 4.117.

envisaged by the Trial Chamber,[229] whereas in the present case, the scope of the Appellant's anticipated testimony was known to the Prosecution and presented before the Trial Chamber.[230] The Prosecution argues that the Trial Chamber gave full consideration in the Sentencing Judgement to the Plea Agreement in which the Appellant agreed to also cooperate with the Prosecution in future trials.[231] Further, the Prosecution submits that when Witnesses M and W testified in the sentencing proceedings, they knew "the nature and scope of the testimony the Appellant could provide".[232] In the Prosecution's view, through the testimonies at the Sentencing Hearing, the Trial Chamber gained full knowledge of the "anticipated value" of the Appellant's testimony.[233] Therefore, the Prosecution submits that "the scope of the Plea Agreement, the representations made during the [S]entencing [H]earing and the text of the Sentencing Judgement itself all suggest that the Appellant's future testimony was considered as part of the mitigating circumstances which were fully evaluated by the Trial Chamber and for which the Appellant has already been given credit for in sentencing."[234]

86. The Appellant replies that the circumstances of this case require the Appeals Chamber to reduce the sentence imposed by the Trial Chamber because of the degree of cooperation he provided after the Sentencing Judgement was rendered.[235] He contends that the nature and scope of his actual testimony in the *Strugar* trial was not known to the Prosecution and the Trial Chamber.[236]

87. The Appeals Chamber considers that, in the context of this ground of appeal, the *Kupreškić* case is not comparable as the only circumstance considered in mitigation of Vladimir Šantić's sentence was his voluntary surrender;[237] thus, the Appeals Chamber found that "in appropriate cases, co-operation between conviction and appeal could be a factor" while emphasizing that "[t]his will of course depend on the circumstances of each case and the degree of co-operation rendered."[238]

88. The Appeals Chamber acknowledges the obligation that Rule 101(B)(ii) of the Rules imposes upon Chambers to take account of the substantial cooperation with the Prosecution before or after conviction, in the determination of sentence. However, pursuant to its previous finding in the *Kupreškić* case, the Appeals Chamber finds that the circumstances in the present case do not

[229] *Ibid*.
[230] *Ibid.*, para. 4.118.
[231] *Ibid.*, para. 4.122 referring to Plea Agreement, para. 16 and Sentencing Judgement, para. 95.
[232] Respondent's Brief, para. 4.124.
[233] *Ibid*., para. 4.125.
[234] *Ibid*., para. 4.126; AT. 363.
[235] Brief in Reply, para. 29.
[236] *Ibid.*, para. 30.
[237] *Kupreškić et al.* Trial Judgement, para. 863.
[238] *Kupreškić et al.* Appeal Judgement, para. 463.

demand its intervention in the interests of justice.[239] The Appeals Chamber recalls its Decision on Appellant's Additional Evidence Motions, where it dismissed the Appellant's motions, *inter alia,* on the ground that "although the evidence relating to the Appellant's cooperation with the Prosecutor provided in Annexes B, C, and D to the First Motion, Annexes A and B to the Second Motion, and Annex A to the Third Motion were not available at the time of the [Sentencing] Judgement and could not have been discovered through the exercise of due diligence, this evidence merely serves to provide further proof of cooperation and/or the execution of the terms of the Plea Agreement, an issue already taken into account by the Trial Chamber in sentencing and thus this evidence [is] not such that it could have affected the verdict".[240]

89. The Trial Chamber in the present case considered the Appellant's cooperation with the Prosecution as a factor in mitigation of his sentence,[241] and qualified this cooperation as being of "exceptional importance."[242] The Trial Chamber also took note of the Plea Agreement in this respect;[243] it cited in particular paragraphs 15 to 18, and expressly observed that the Appellant had agreed to cooperate with the Prosecution "whenever requested".[244] During the Sentencing Hearing, the Trial Chamber learned of the – according to the Prosecution – significant evidence that the Appellant could provide in future trials and especially in the *Strugar* case.[245] The Trial Chamber noted in the Sentencing Judgement that "the parties have made specific submissions to the Trial Chamber"[246] and referred to the portions of the Sentencing Hearing that confirmed the possible value of the Appellant's testimony for other cases, as well as his willingness to testify in future cases.[247] The Appeals Chamber thus concludes that the Trial Chamber was fully aware of the cooperation that the Appellant had provided and could provide in future cases, as realised later on in the *Strugar* case, and took this fact into account.

90. For the foregoing reasons, the Appellant's seventh ground of appeal is dismissed.

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[239] *Ibid.*
[240] Decision on Appellant's Additional Evidence Motions, p. 4.
[241] Sentencing Judgement, paras. 93-96.
[242] *Ibid.*, para. 114.
[243] *Ibid.*, para. 95.
[244] *Ibid.*
[245] Sentencing Hearing, T. 229-230 (closed session); *see* Appellant's Brief, para. 76.
[246] Sentencing Judgement, para. 95.
[247] *Ibid*., referring in footnote 143, *inter alia*, to Sentencing Hearing, T. 229-235 (closed session).

IX. DISPOSITION

For the foregoing reasons, **THE APPEALS CHAMBER**, unanimously

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 oral arguments they presented at the hearing of 26 April 2005;

SITTING in open session;

VACATES, *proprio motu*, the Appellant's conviction under Counts 1 through 6 insofar as they are based on a finding of the Appellant's superior responsibility under Article 7(3) of the Statute;

DISMISSES all the grounds of appeal filed by the Appellant;

AFFIRMS the sentence of seven years of imprisonment as imposed by the Trial Chamber; and

ORDERS in accordance with Rule 103(C) and Rule 107 of the Rules, that the Appellant is to remain in the custody of the International Tribunal pending the finalisation of arrangements for his transfer to the State in which his sentence will be served.

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

Judge Inés Mónica Weinberg de Roca Presiding	Judge Mohamed Shahabuddeen	Judge Florence Ndepele Mwachande Mumba
Judge Mehmet Güney	Judge Wolfgang Schomburg	

Dated this thirtieth day of August 2005
at The Hague, The Netherlands.

[Seal of the International Tribunal]

X. GLOSSARY OF TERMS

A. List of Cited Court Decisions

1. ICTY

ALEKSOVSKI
Prosecutor v. Zlatko Aleksovski, Case No. IT-95-14/1-A, Judgement, 24 March 2000 ("*Aleksovski* Appeal Judgement")

BANOVIĆ
Prosecutor v. Predrag Banović, Case No. IT-02-65/1-S, Sentencing Judgement, 28 October 2003 ("*Banović* Sentencing Judgement")

BLAŠKIĆ
Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-A, Judgement, 29 July 2004 ("*Blaškić* Appeal Judgement")

"ČELEBIĆI" (A)
Prosecutor v. Zejnil Delalić, Zdravko Mucić, a.k.a. "Pavo", Hazim Delić and Esad Landžo, a.k.a. "Zenga", Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeal Judgement")

"ČELEBIĆI" (B)
Prosecutor v. Zdravko Mucić, Hazim Delić and Esad Landžo, Case No. IT-96-21-A, Judgement on Sentence Appeal, 8 April 2003 ("*Mucić et al.* Judgement on Sentence Appeal")

FURUNDŽIJA
Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-A, Judgement, 21 July 2000 ("*Furundžija* Appeal Judgement")

JELISIĆ
Prosecutor v. Goran Jelisić, Case No. IT-95-10-A, Judgement, 5 July 2001 ("*Jelisić* Appeal Judgement")

KORDIĆ AND ČERKEZ
Prosecutor v. Dario Kordić and Mario Čerkez, Case No. IT-95-14/2-A, Judgement, 17 December 2004 ("*Kordić and Čerkez* Appeal Judgement")

KRSTIĆ
Prosecutor v. Radislav Krstić, Case No. IT-98-33-A, Judgement, 19 April 2004 ("*Krstić* Appeal Judgement")

KUNARAC, KOVAČ AND VUKOVIĆ
Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković, Case No. IT-96-23 & IT-96-23/1-A, Judgement, 12 June 2002 ("*Kunarac et al.* Appeal Judgement")

Z. KUPREŠKIĆ, M. KUPREŠKIĆ, V. KUPREŠKIĆ, JOSIPOVIĆ, (PAPIĆ) AND SANTIĆ
Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Dragan Papić and Vladimir Santić, a.k.a. "Vlado", Case No. IT-95-16-T, Judgement, 14 January 2000 ("*Kupreškić et al.* Trial Judgement")

Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović and Vladimir Santić, Case No. IT-95-16-A, Appeal Judgement, 23 October 2001 ("*Kupreškić et al.* Appeal Judgement")

KVOČKA, KOS, RADIĆ, ŽIGIĆ AND PRCAĆ
Prosecutor v. Miroslav Kvočka, Milojica Kos, Mlado Radić, Zoran Žigić and Dragoljub Prcać, Case No. IT-98-30/1-A, Appeal Judgement, 28 February 2005 ("*Kvočka et al.* Appeal Judgement")

D. NIKOLIĆ
Prosecutor v. Dragan Nikolić, Case No. IT-94-02-A, Judgement on Sentencing Appeal, 4 February 2005 ("*Dragan Nikolić* Judgement on Sentencing Appeal")

D. TADIĆ
Prosecutor v. Duško Tadić, Case No. IT-94-1-A, Judgement, 15 July 1999 ("*Tadić* Appeal Judgement")

Prosecutor v. Duško Tadić, Case No. IT-94-1-A and IT-94-1-A*bis*, Judgement in Sentencing Appeals, 26 January 2000 ("*Tadić* Judgement in Sentencing Appeals")

VASILJEVIĆ
Prosecutor v. Mitar Vasiljević, Case No. IT-98-32-A, Judgement, 25 February 2004 ("*Vasiljević* Appeal Judgement")

2. ICTR

AKAYESU
Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-A, Judgement, 1 June 2001 ("*Akayesu* Appeal Judgement")

KAMBANDA
Jean Kambanda v. The Prosecutor, Case No. ICTR 97-23-A, Judgement, 19 October 2000 ("*Kambanda* Appeal Judgement")

KAJELIJELI
Juvénal Kajelijeli v. The Prosecutor, Case No. ICTR-98-44A-A, Judgement, 23 May 2005 ("*Kajelijeli* Appeal Judgement")

KAYISHEMA AND RUZINDANA
Prosecutor v. Clément Kayishema and Obed Ruzindana, Case No. ICTR-95-1-A, Judgement (Reasons), 1 June 2001 ("*Kayishema and Ruzindana* Appeal Judgement ")

MUSEMA
Alfred Musema v. The Prosecutor, Case No. ICTR-96-13-A, Judgement, 16 November 2001 ("*Musema* Appeal Judgement")

NIYITEGEKA
Eliézer Niyitegeka v. The Prosecutor, Case No. ICTR-96-14-A, Appeal Judgement, 9 July 2004 ("*Niyitegeka* Appeal Judgement")

SERUSHAGO
Omar Serushago v. The Prosecutor, Case No. ICTR-98-39-A, Reasons for Judgement [Appeal against Sentence], 6 April 2000 ("*Serushago* Sentencing Appeal Judgement").

B. List of Abbreviations, Acronyms and Short References

According to Rule 2(B), of the Rules of Procedure and Evidence, the masculine shall include the feminine and the singular the plural, and vice-versa.

Appeal Hearing	*Prosecutor v. Miodrag Jokić*, Case No. IT-01-42/1-A, Appeal Hearing, 26 April 2005
Appellant	Miodrag Jokić
Appellant's Brief	*Prosecutor v. Miodrag Jokić*, Case No. IT-01-42/1-A, public redacted version of the Appellant's Brief Pursuant to Rule 111 filed on 7 March 2005
AT.	Transcript page from hearings on appeal in the present case. All transcript page numbers referred to are from the unofficial, uncorrected version of the transcript, unless not specified otherwise. Minor differences may therefore exist between the pagination therein and that of the final transcripts released to the public. The Appeals Chamber accepts no responsibility for the corrections of or mistakes in these transcripts. In case of doubt the video-tape of a hearing is to be revisited.
Brief in Reply	*Prosecutor v. Miodrag Jokić*, Case No. IT-01-42/1-A, Appellant's Brief in Reply, public redacted version filed on 7 March 2005
Decision on Appellant's Additional Evidence Motions	*Prosecutor v. Miodrag Jokić*, Case No. IT-01-42/1-A, Decision on Appellant's Motions for Admission of Additional Evidence Pursuant to Rule 115, 31 August 2004
Defence	Counsel for the Appellant
Defence Sentencing Brief	*Prosecutor v. Miodrag Jokić,* Case No. IT-01-42/1-S, Miodrag Jokić's Sentencing Brief, 14 November 2003
FRY	*Former:* Federal Republic of Yugoslavia
ICTR	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994
inter alia	among other things
International Tribunal	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
JNA	Yugoslav Peoples' Army (Army of the Socialist Federal Republic of Yugoslavia)

Notice of Appeal	*Prosecutor v. Miodrag Jokić*, Case No. IT-01-42/1-A, Miodrag Jokić's Notice of Appeal, 16 April 2004
para.	Paragraph
paras	Paragraphs
Plea Agreement	*Prosecutor v. Miodrag Jokić*, IT-01-42-PT, Plea Agreement between Miodrag Jokić and the Office of the Prosecutor, Confidential, *Ex Parte, Under Seal*, 27 August 2003
Plea Hearing	*Prosecutor v. Miodrag Jokić,* IT-01-42-PT, Plea Hearing, 27 August 2003
Prosecution	Office of the Prosecutor
Prosecution Sentencing Brief	*Prosecutor v. Miodrag Jokić,* Case No. IT-01-42/1-S, Prosecution's Brief on the Sentencing of Miodrag Jokić, 14 November 2003
Respondent's Brief	*Prosecutor v. Miodrag Jokić*, Case No. IT-01-42/1-A, Prosecution Respondent Brief, public redacted version filed on 4 March 2005
Rules	Rules of Procedure and Evidence of the International Tribunal
Second Amended Indictment	Second Amended Indictment, 26 August 2003, confirmed on 27 August 2003 in this case
Sentencing Hearing	*Prosecutor v. Miodrag Jokić*, IT-01-42-PT, Sentencing Hearing, 4 December 2003
Sentencing Judgement	*Prosecutor v. Miodrag Jokić*, IT-01-42/1-S, Sentencing Judgement, 18 March 2004
SFRY (or SFRJ)	*Former*: Socialist Federal Republic of Yugoslavia
SFRY Criminal Code	Criminal Code of the Socialist Federal Republic of Yugoslavia adopted on 28 of September 1976 and entered into force on 1 July 1977
Statute	Statute of the International Tribunal for the Former Yugoslavia established by Security Council Resolution 827 (1993)
T.	Transcript page from hearings before the Trial Chamber in the present case. All transcript page numbers referred to are from the unofficial, uncorrected version of the transcript, unless not specified otherwise. Minor differences may therefore exist between the pagination therein and that of the final transcripts released to the public. The Appeals Chamber accepts no responsibility for the corrections of or mistakes in these transcripts. In case of doubt the video-tape of a hearing is to be revisited.