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**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-05-88-
R77.1-A
Date: 25 June 2009
Original: English

IN THE APPEALS CHAMBER

Before: Judge Andréia Vaz, Presiding
Judge Mehmet Güney
Judge Fausto Pocar
Judge Liu Daqun
Judge Theodor Meron

Registrar: Mr. John Hocking

Judgement of: 25 June 2009

CONTEMPT PROCEEDINGS AGAINST DRAGAN JOKIĆ

PUBLIC REDACTED VERSION

JUDGEMENT ON ALLEGATIONS OF CONTEMPT

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I. INTRODUCTION

A. Background

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (“Appeals Chamber” and “Tribunal” respectively) is seized of an appeal¹ from the Judgement on Allegations of Contempt² (“Trial Judgement”), rendered by Trial Chamber II (“Trial Chamber”), on 27 March 2009, in the contempt proceedings against Dragan Jokić (“Jokić”).

2. Jokić, who is currently serving a nine-year prison sentence for his conviction entered by this Tribunal on 17 January 2005 in the case of *Prosecutor v. Blagojević and Jokić*,³ was issued with a subpoena on 29 August 2007 to appear before the Trial Chamber to give oral testimony in the *Prosecutor v. Popović et al.* case.⁴ [Redacted] the Trial Chamber ordered that Jokić’s testimony be given in closed session and that he could be represented by a Defence Counsel should the need arise.⁵

3. On 31 October 2007, when Jokić appeared to testify, he submitted that he was unable to do so [redacted].⁶ [Redacted].⁷ The Trial Chamber instructed Jokić to provide a confidential and *ex parte* filing [redacted]⁸ which he did the same day.⁹ On 1 November 2007, the Trial Chamber decided that nothing in the filing justified a refusal to testify and no further investigations were warranted.¹⁰ As a result of Jokić’s continued refusal to testify, the Trial Chamber issued the “Order

¹ Notice of Appeal Filed by Dragan Jokić Against the Trial Judgement, filed confidentially in French on 14 April 2009 (“Notice of Appeal”) English translation filed on 21 April 2009; *Mémoire de l’appelant déposé par Dragan Jokić*, 29 April 2009 (“Appeal Brief”) (confidential).

² *Contempt Proceedings Against Dragan Jokić*, Case No. IT-05-88-R77.1, Judgement on Allegations of Contempt (Public Redacted Version), 27 March 2009.

³ *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, Judgement, 17 January 2005, paras 860–861; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-A, Judgement, 9 May 2007, p. 137.

⁴ *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Decision on Prosecution Motion for Subpoena of Dragan Jokić and Decision on Protective Measures, 29 August 2007 (“Decision on Subpoena”) (confidential); *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Confidential and *Ex Parte* Order, 29 August 2007; *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Confidential and *Ex Parte* Order, 26 October 2007.

⁵ Decision on Subpoena, pp. 1, 4 (confidential).

⁶ *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, T. 17245–17247, 17254, 17268 (31 October 2007) (closed session).

⁷ *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, T. 17245 (31 October 2007) (closed session).

⁸ *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, T. 17263–17264 (31 October 2007) (closed session).

⁹ *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Submission by Dragan Jokić Presenting Grounds to Justify His Refusal to Respond to the Summons to Appear Before the Court, filed confidentially and *ex parte* in the original French on 31 October 2007.

¹⁰ *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, T. 17274 (1 November 2007) (closed session).

in Lieu of Indictment on Contempt Concerning Dragan Jokić”, in which it determined that it had reason to believe that Jokić might be in contempt of the Tribunal and decided, pursuant to Rule 77(D)(ii) of the Rules of Procedure and Evidence (“Rules”), to prosecute the matter itself.¹¹

4. The hearing of the contempt case against Jokić took place on 19 November 2007, 10 December 2007 and 15 December 2008.¹² Jokić pleaded not guilty.¹³ He adduced seven exhibits and led evidence from two witnesses, including the psychologist Ana Najman (“Defence Expert”) who submitted a report (“Defence Expert Report”).¹⁴

5. On 28 February 2008, the Trial Chamber issued an order instructing the Registrar to appoint a psychiatric expert to examine Jokić and to report to the Trial Chamber on the mental condition of Jokić prior to and after his service with the subpoena.¹⁵ The subsequent confidential report of the independent psychiatric expert appointed by the Registry, Dr. Eric Vermetten (“Chamber Expert”), was filed by the Registry on 16 June 2008 (“First Chamber Expert Report”).¹⁶

6. On 20 June 2008, the Trial Chamber issued an additional order in which it instructed the Registrar to require further assessment by the Chamber Expert to determine Jokić’s fitness to stand trial, and his state of mind when he refused to testify in the *Popović et al.* case.¹⁷ The subsequent confidential report was filed by the Registry on 20 August 2008 (“Second Chamber Expert Report”).¹⁸

7. On 30 October 2008, the Trial Chamber issued an order instructing Jokić to file a closing brief within 14 days.¹⁹ Jokić filed his closing brief on 13 November 2008.²⁰ On 18 November 2008,

¹¹ *Contempt Proceedings Against Dragan Jokić*, Case No. IT-05-88-R77.1, Order in Lieu of Indictment on Contempt Concerning Dragan Jokić, 1 November 2007. See also *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, T. 17279–17281 (1 November 2007).

¹² *Contempt Proceedings Against Dragan Jokić*, Case No. IT-05-88-R77.1, Scheduling Order, 9 November 2007; *Contempt Proceedings Against Dragan Jokić*, Case No. IT-05-88-R77.1, T. 1–7 (19 November 2007), T. 8–69 (10 December 2007) (partly in closed session), T. 70–141 (15 December 2008) (partly in closed session).

¹³ *Contempt Proceedings Against Dragan Jokić*, Case No. IT-05-88-R77.1, T. 2 (19 November 2007).

¹⁴ *Contempt Proceedings Against Dragan Jokić*, Case No. IT-05-88-R77.1, T. 8–68 (10 December 2007) (partly in closed session); Exhibit 001, “Letter” (confidential); Exhibit 002, “Statement” (confidential); Exhibit 003, “Medical Report” (confidential); Exhibit 004, “Medical Chart” (confidential); Exhibit 005, “Request” (confidential); Exhibit 006, “Letter” (confidential); Exhibit 007B, “Defence Expert Report” (confidential); Exhibit 007C, “Chart” (confidential).

¹⁵ *Contempt Proceedings Against Dragan Jokić*, Case No. IT-05-88-R77.1, Confidential Order to Instruct the Registrar to Appoint a Psychiatric Expert, 28 February 2008 (“Order to Appoint Psychiatric Expert”).

¹⁶ *Contempt Proceedings Against Dragan Jokić*, Case No. IT-05-88-R77.1, Confidential Registry Submission Pursuant to Rule 33(B) Regarding the Psychiatric Expert Report, 16 June 2008.

¹⁷ *Contempt Proceedings Against Dragan Jokić*, Case No. IT-05-88-R77.1, Confidential Order to Instruct the Registrar to Require Further Assessment by the Psychiatric Expert of the Mental Condition of Jokić, 20 June 2008 (“Order for Further Psychiatric Assessment of Jokić”).

¹⁸ *Contempt Proceedings Against Dragan Jokić*, Case No. IT-05-88-R77.1, Confidential Registry Submission Pursuant to Rule 33(B) Regarding the Second Psychiatric Expert Report, 20 August 2008.

¹⁹ *Contempt Proceedings Against Dragan Jokić*, Case No. IT-05-88-R77.1, Confidential Scheduling Order, 30 October 2008 (“Scheduling Order of 30 October 2008”), p. 2.

²⁰ *Contempt Proceedings Against Dragan Jokić*, Case No. IT-05-88-R77.1, Defence Closing Brief, filed confidentially in the original French on 13 November 2008 (“Closing Brief”). English translation filed on 19 November 2008.

pursuant to Jokić's motion,²¹ the Trial Chamber amended its order, and held that in the circumstances of the case, it was in the interests of justice to allow Jokić to cross-examine the Chamber Expert on the First and Second Chamber Expert Reports.²² It also held that Jokić was entitled to file a supplement to his closing brief.²³ Jokić cross-examined the Chamber Expert on 15 December 2008,²⁴ and filed the supplement to his closing brief on 12 January 2009.²⁵

8. Jokić was convicted of contempt on 27 March 2009 and sentenced to four months' imprisonment to run consecutively to any other sentence of imprisonment imposed on him.²⁶ Jokić filed a Notice of Appeal on 14 April 2009 and his Appeal Brief on 29 April 2009.

B. Jokić's Appeal

9. Jokić requests the Appeals Chamber to reverse the Trial Judgement and acquit him, or in the alternative to pronounce a lower sentence.²⁷ In support of this request, he sets out eight grounds of appeal. He submits that the Trial Chamber erred in law: (1) by ordering the Chamber Expert to respond to a legal question;²⁸ (2) by ruling that Rule 94 *bis* of the Rules is not applicable to the Chamber Expert and his reports;²⁹ (3) by ordering the *in camera* hearing of the cross-examination of the Chamber Expert, without informing Jokić thereof;³⁰ (4) regarding the substantive norms governing the offence and the principle of presumption of innocence;³¹ and (5) by failing to provide reasons for its decision regarding the essential elements of the offence.³² Further, he submits that the Trial Chamber erred in fact: (6) in finding that Jokić made a conscious decision not to testify;³³

²¹ *Contempt Proceedings Against Dragan Jokić*, Case No. IT-05-88-R77.1, Motion to Amend the Scheduling Order Rendered on 30 October 2008 and to Disclose Expert Reports, filed confidentially in the original French on 3 November 2008 ("Motion to Amend Scheduling Order of 30 October 2008"). English translation filed on 7 November 2008.

²² *Contempt Proceedings Against Dragan Jokić*, Case No. IT-05-88-R77.1, Confidential Decision on Jokić Motion to Amend the Scheduling Order Rendered on 30 October 2008, 18 November 2008 ("Decision to Amend Scheduling Order of 30 October 2008").

²³ Decision to Amend Scheduling Order of 30 October 2008.

²⁴ *Contempt Proceedings Against Dragan Jokić*, Case No. IT-05-88-R77.1, Scheduling Order, 24 November 2008; T. 77- 140 (15 December 2008) (partly private session).

²⁵ *Contempt Proceedings Against Dragan Jokić*, Case No. IT-05-88-R77.1, Further Defence Closing Brief, filed confidentially in the original French on 12 January 2009 ("Further Closing Brief"). English translation filed on 19 January 2009.

²⁶ Trial Judgement, para. 43.

²⁷ Notice of Appeal, p. 4 (confidential).

²⁸ Notice of Appeal, paras 6-7 (confidential).

²⁹ Notice of Appeal, paras 8-9 (confidential).

³⁰ Notice of Appeal, paras 10-11 (confidential).

³¹ Notice of Appeal, para. 12 (confidential).

³² Notice of Appeal, para. 13 (confidential).

³³ Notice of Appeal, para. 14 (confidential).

(7) in finding that Jokić knowingly and wilfully interfered with the administration of justice;³⁴ and
 (8) in its assessment of the weight to be given to the mitigating circumstances.³⁵

10. No response was filed in this appeal.

II. STANDARD OF REVIEW ON APPEAL

11. On appeal, the Parties must limit their arguments to legal errors that invalidate the judgement of the Trial Chamber and to factual errors that result in a miscarriage of justice within the scope of Article 25 of the Statute of the Tribunal (“Statute”). The settled standard of review for appeals against judgements also applies to appeals against convictions for contempt.³⁶

12. The Appeals Chamber reviews the Trial Chamber’s findings of law to determine whether or not they are correct.³⁷ A party alleging an error of law must identify the alleged error, present arguments in support of its claim and explain how the error invalidates the judgement.³⁸ An allegation of an error of law which has no chance of changing the outcome of a judgement may be rejected on that ground.³⁹ Where the Appeals Chamber finds an error of law in the Trial Judgement arising from the application of the wrong legal standard by the Trial Chamber, the Appeals Chamber will articulate the correct legal standard and review the relevant factual findings of the Trial Chamber accordingly.⁴⁰

13. When considering alleged errors of fact, the Appeals Chamber will apply a standard of reasonableness. Only an error of fact which has occasioned a miscarriage of justice will cause the Appeals Chamber to overturn a decision by the Trial Chamber.⁴¹ In reviewing the findings of the Trial Chamber, the Appeals Chamber will only substitute the Trial Chamber’s finding with its own

³⁴ Notice of Appeal, para. 15 (confidential).

³⁵ Notice of Appeal, para. 16 (confidential).

³⁶ *Prosecutor v. Josip Jović*, Case No. IT-95-14 & 14/2-R77-A, Judgement, 15 March 2007 (“*Jović* Appeal Judgement”), para. 11; *Prosecutor v. Ivica Marijačić and Markica Rebić*, Case No. IT-95-14-R77.2-A, Judgement, 27 September 2006 (“*Marijačić and Rebić* Appeal Judgement”), para. 15. See also, *inter alia*, *Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, Case No. IT-95-13/1-A, Judgement, 5 May 2009 (“*Mrkšić and Šljivančanin* Appeal Judgement”), para. 10; *Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Judgement, 17 March 2009 (“*Krajišnik* Appeal Judgement”), para. 11; *Prosecutor v. Milan Martić*, Case No. IT-95-11-A, Judgement, 8 October 2008 (“*Martić* Appeal Judgement”), para. 8.

³⁷ *Jović* Appeal Judgement, para. 12; *Marijačić and Rebić* Appeal Judgement, para. 16. See also, *inter alia*, *Mrkšić and Šljivančanin* Appeal Judgement, para. 12; *Krajišnik* Appeal Judgement, para. 13; *Martić* Appeal Judgement, para. 10.

³⁸ *Jović* Appeal Judgement, para. 12; *Marijačić and Rebić* Appeal Judgement, para. 15. See also, *inter alia*, *Mrkšić and Šljivančanin* Appeal Judgement, para. 11; *Krajišnik* Appeal Judgement, para. 12; *Martić* Appeal Judgement, para. 9.

³⁹ *Jović* Appeal Judgement, para. 12; *Marijačić and Rebić* Appeal Judgement, para. 17. See also, *inter alia*, *Mrkšić and Šljivančanin* Appeal Judgement, para. 11; *Krajišnik* Appeal Judgement, para. 12; *Martić* Appeal Judgement, para. 9.

⁴⁰ *Inter alia*, *Mrkšić and Šljivančanin* Appeal Judgement, para. 12; *Krajišnik* Appeal Judgement, para. 13; *Martić* Appeal Judgement, para. 10.

⁴¹ *Inter alia*, *Mrkšić and Šljivančanin* Appeal Judgement, para. 13; *Krajišnik* Appeal Judgement, para. 14; *Martić* Appeal Judgement, para. 11.

when no reasonable trier of fact could have reached the original decision.⁴² In determining whether or not a Trial Chamber's finding was one that no reasonable trier of fact could have reached, the Appeals Chamber "will not lightly disturb findings of fact by a Trial Chamber".⁴³

14. On appeal, a party may not merely repeat arguments that did not succeed at trial, unless the party can demonstrate that the Trial Chamber's rejection of them constituted such an error as to warrant the intervention of the Appeals Chamber.⁴⁴ Arguments of a party which do not have the potential to cause the impugned judgement to be reversed or revised may be immediately dismissed by the Appeals Chamber and need not be considered on the merits.⁴⁵

15. In order for the Appeals Chamber to assess a party's arguments on appeal, the appealing party is expected to provide precise references to relevant transcript pages or paragraphs in the Trial Judgement to which the challenges are being made.⁴⁶ Further, "the Appeals Chamber cannot be expected to consider a party's submissions in detail if they are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies".⁴⁷

16. It should be recalled that the Appeals Chamber has inherent discretion in selecting which submissions merit a detailed reasoned opinion in writing and may dismiss arguments which are evidently unfounded without providing detailed reasoning.⁴⁸

III. FIRST GROUND OF APPEAL: WHETHER THE TRIAL CHAMBER ERRED IN ITS INSTRUCTIONS TO THE EXPERT

17. In his first ground of appeal, Jokić submits that the Trial Chamber committed an error of law in ordering the Chamber Expert to answer a legal question, which is exclusively for the Trial Chamber to determine.⁴⁹ The Trial Chamber ordered the Registrar to instruct the Chamber Expert to conduct an assessment of Jokić to determine "his state of mind when he refused to testify in *Prosecutor v. Popović et al.*".⁵⁰ Jokić submits that in asking the Chamber Expert to answer this

⁴² Jović Appeal Judgement, para. 13; Marijačić and Rebić Appeal Judgement, para. 16. See also, *inter alia*, Mrkšić and Šljivančanin Appeal Judgement, para. 13; Krajišnik Appeal Judgement, para. 14.

⁴³ Jović Appeal Judgement, para. 13; Marijačić and Rebić Appeal Judgement, para. 16. See also, *inter alia*, Mrkšić and Šljivančanin Appeal Judgement, para. 14; Martić Appeal Judgement, para. 11.

⁴⁴ Jović Appeal Judgement, para. 14; Marijačić and Rebić Appeal Judgement, para. 17. See also, *inter alia*, Mrkšić and Šljivančanin Appeal Judgement, para. 16; Krajišnik Appeal Judgement, para. 24.

⁴⁵ Jović Appeal Judgement, para. 14; Marijačić and Rebić Appeal Judgement, para. 17. See also, *inter alia*, Mrkšić and Šljivančanin Appeal Judgement, para. 16; Krajišnik Appeal Judgement, para. 20; Martić Appeal Judgement, para. 17.

⁴⁶ Jović Appeal Judgement, para. 15. See also, *inter alia*, Mrkšić and Šljivančanin Appeal Judgement, para. 17; Practice Direction on Appeals Requirements, para. 4(b).

⁴⁷ Mrkšić and Šljivančanin Appeal Judgement, para. 17. See also, *inter alia*, Marijačić and Rebić Appeal Judgement, para. 18.

⁴⁸ Jović Appeal Judgement, para. 15. See also, *inter alia*, Mrkšić and Šljivančanin Appeal Judgement, para. 18.

⁴⁹ Notice of Appeal, para. 6 (confidential); Appeal Brief, para. 4 (confidential).

⁵⁰ Order for Further Psychiatric Assessment of Jokić, p. 2 (confidential).

question, the Trial Chamber was in effect asking the Chamber Expert to determine whether Jokić had the requisite *mens rea* at the time that he allegedly committed the *actus reus* of the crime (when he refused to testify).⁵¹ As a result, he submits that the Chamber Expert's response should be struck from the record.⁵²

18. The Appeals Chamber recalls that the evidence of an expert witness is meant to provide specialised knowledge – be it a skill or knowledge acquired through training – that may assist the fact finder to understand the evidence presented.⁵³ Furthermore, Rule 74 *bis* of the Rules explicitly provides that a Trial Chamber may order a medical, psychiatric and psychological examination of an accused. While normally ordered in the context of sentencing,⁵⁴ the Appeals Chamber notes that on a number of occasions Trial Chambers have requested expert witnesses to provide psychological assessments of an accused and to report on his state of mind at the time of the commission of the crimes.⁵⁵ The Trial Chamber must determine itself whether an accused had the state of mind required by the applicable law (*mens rea*); however, a medical analysis of an accused's mental state at the time of the crime is a distinct piece of evidence which may be relied upon in support of the Trial Chamber's conclusion. In this respect, the Appeals Chamber notes the distinction drawn in the *Delalić et al.* Appeal Judgement between asking an expert to draw a conclusion of fact on behalf of the Trial Chamber versus providing medical information upon which the Trial Chamber may rely.⁵⁶

19. In the present case, the Appeals Chamber considers that the Trial Chamber's request that the Chamber Expert give his opinion on Jokić's state of mind at the time that he refused to testify was a medical question rather than a request for the Chamber Expert to make a finding of fact on one of

⁵¹ Appeal Brief, paras 6, 8 (confidential).

⁵² Notice of Appeal, para. 7 (confidential); Appeal Brief, para. 9 (confidential).

⁵³ *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*, Case No. ICTR-99-52-A, Judgement, 28 November 2007, para. 198; *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR73.2, Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness, 30 January 2008, para. 27.

⁵⁴ See *Prosecutor v. Darko Mrđa*, Case No. IT-02-59-S, Decision on the Defence Motion for Medical Examination and Variation of Scheduling Order, 15 September 2003 ("*Mrđa* Decision on Defence Motion for Medical Examination"), p. 2; *Prosecution v. Stevan Todorović*, Case No. IT-95-9/1, Order on Defence Motion for Medical Examination and Variation of Scheduling Order, 27 February 2001; *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-T, Order for Psychological and Medical-Psychiatric Exam of the Accused Radić, 19 April 2000 ("*Radić* Order for Psychological and Medical-Psychiatric Exam"), p. 2; *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-T, Decision on Defence Motion to Obtain the Assignment of Experts for the Accused Miroslav Kvočka [*sic*], 12 May 2000 ("*Kvočka* Decision on Defence Motion for Assignment of Experts"), p. 2; *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-T, Decision on Defence Request for Assignment of Experts for the Accused Dragoljub Prcać, 19 May 2000 ("*Prcać* Decision on Assignment of Experts"), p. 2; *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-T, Decision on Defence Request for Assignment of Medical and Psychiatric Experts for the Accused Zoran Zigić, 22 June 2000 ("*Zigić* Decision on Assignment of Medical and Psychiatric Experts"), p. 2.

⁵⁵ *Mrđa* Decision on Defence Motion for Medical Examination, p. 6; *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-T, Order for the Medical Examination of the Accused Milorad Krnojelac, 29 January 2001 ("*Krnojelac* Order for Medical Examination"), p. 2; *Kvočka* Decision on Defence Motion for Assignment of Experts, p. 3; *Prcać* Decision on Assignment of Experts, p. 2; *Zigić* Decision on Assignment of Medical and Psychiatric Experts, p. 2; *Radić* Order for Psychological and Medical-Psychiatric Exam, p. 3.

⁵⁶ *Prosecutor v. Delalić, Zdravko Mucić (aka "Pavo"), Hazim Delić and Esad Landžo (aka "Zenga")*, Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Delalić et al.* Appeal Judgement"), fn. 994.

the elements of the crime. Had the Trial Chamber asked the Chamber Expert for his opinion on whether Jokić intended to refuse to testify it would have been abdicating its responsibility; however, it did not. [Redacted].⁵⁷ The Trial Chamber stated that it reached its conclusion “[a]fter a careful reading of the Chamber and Defence Expert Reports as well as hearing Jokić and observing his demeanour”.⁵⁸ Therefore, the Appeals Chamber considers that the Trial Chamber did not allow the Chamber Expert to make its findings for it, but rather reached its own conclusion after considering all the evidence, including, *inter alia*, the opinion of the Chamber Expert. Accordingly the Appeals Chamber finds no error in the Trial Chamber’s instruction to the Chamber Expert.

IV. SECOND GROUND OF APPEAL: WHETHER RULE 94 *BIS* OF THE RULES APPLIES TO THE CHAMBER EXPERT’S REPORTS

20. Jokić submits that the Trial Chamber erred in law in ruling that Rule 94 *bis* of the Rules did not apply to the admission of the two expert reports submitted by the Chamber Expert on the basis that they were filed pursuant to the Trial Chamber’s order and in accordance with Rule 74 *bis* of the Rules.⁵⁹ He points to the fact that Rule 77(E) of the Rules provides that Parts Four to Eight of the Rules, which includes Rule 94 *bis*, shall apply *mutatis mutandis* to proceedings under Rule 77.⁶⁰ Jokić argues that as a result of this error, the Trial Chamber denied him the right to make use of the avenues for challenging evidence provided for in Rule 94 *bis*(B) of the Rules.⁶¹ Although he acknowledges that he was subsequently provided with the reports and given the opportunity to cross-examine the Chamber Expert on them, he argues that the Trial Chamber still did not respect the requirements of Rule 94 *bis* of the Rules.⁶² Therefore Jokić requests that the Chamber Expert’s two reports and his testimony be struck from the record.⁶³

21. Pursuant to the orders of the Trial Chamber, the Registrar appointed a psychiatric expert to examine Jokić and, first, report on the mental condition of Jokić prior to and after his service with the subpoena⁶⁴ and, second, determine Jokić’s fitness to stand trial and his state of mind when he refused to testify in the *Popović et al.* case.⁶⁵ Following the filing of the Chamber Expert’s Reports, the Trial Chamber issued a scheduling order stating that the “circumstances in this case have reached a point where the Trial Chamber can set a date for the final phase of the proceedings” and

⁵⁷ Trial Judgement, para. 34.

⁵⁸ Trial Judgement, para. 35.

⁵⁹ Notice of Appeal, para. 8 (confidential); Appeal Brief, para. 10 (confidential).

⁶⁰ Appeal Brief, para. 15 (confidential).

⁶¹ Appeal Brief, para. 12 (confidential).

⁶² Appeal Brief, para. 13 (confidential).

⁶³ Notice of Appeal, para. 9 (confidential); Appeal Brief, para. 17 (confidential).

⁶⁴ Order to Appoint a Psychiatric Expert, p. 2 (confidential).

⁶⁵ Order for Further Psychiatric Assessment of Jokić, p. 2 (confidential).

instructed Jokić to file his closing brief within 14 days.⁶⁶ In response, Jokić requested that the Chamber Expert's Reports be disclosed to him pursuant to Rule 94 *bis* of the Rules such that he would have the opportunity to challenge them pursuant to one of the avenues set out in that rule.⁶⁷ The Trial Chamber held that Rule 94 *bis* of the Rules was not applicable to the Chamber Expert's reports on the basis that they had been ordered pursuant to Rule 74 *bis* of the Rules.⁶⁸ However, it conceded that in the circumstances of the case, it was in the interests of justice to allow Jokić to cross-examine the Chamber Expert on the reports and accordingly ordered the Chamber Expert to appear for cross-examination.⁶⁹ It further allowed Jokić to file a supplement to his closing brief following the testimony of the Chamber Expert.⁷⁰ Jokić raised the issue again in his closing brief,⁷¹ but it was dismissed on the basis that it had already been addressed in the Decision on Motion to Amend Scheduling Order of 30 October 2008.⁷²

22. The Appeals Chamber considers that the Trial Chamber erred in finding that Rule 94 *bis* of the Rules was inapplicable in the particular circumstances of the case on the basis that the Chamber Expert's reports were filed pursuant to Rule 74 *bis* of the Rules. The Appeals Chamber recalls that Article 21(4) of the Statute provides that:

In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

[...]

(e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; [...]

Rule 94 *bis* of the Rules expresses this right to challenge evidence more specifically with regard to expert witnesses and their reports and sets out the procedure to be followed. In the present case, the Chamber Expert was asked to report on Jokić's state of mind when he refused to testify in the *Popović et al.* case, which goes to a central issue in the case against him, and the Trial Chamber then relied on this evidence in convicting him.⁷³ Thus while the reports were ordered pursuant to Rule 74 *bis* of the Rules rather than Rule 94 *bis* of the Rules, they should be properly understood as expert evidence in the case within the meaning of Rule 94 *bis* of the Rules and subject to cross-examination by Jokić. The Appeals Chamber notes that in a number of other cases where the Trial Chamber has ordered psychological reports pursuant to Rule 74 *bis* of the Rules, the parties have

⁶⁶ Scheduling Order of 30 October 2008, pp. 1-2 (confidential).

⁶⁷ Motion to Amend Scheduling Order of 30 October 2008, paras 18, 20 (confidential).

⁶⁸ Decision to Amend Scheduling Order of 30 October 2008, p. 1 (confidential).

⁶⁹ *Ibid.*, pp. 1-2 (confidential).

⁷⁰ *Ibid.*, p. 2 (confidential).

⁷¹ Further Closing Brief, para. 25 (confidential).

⁷² Trial Judgement, para. 21.

been given the opportunity to examine the expert.⁷⁴ It further notes that while Rule 94 *bis* is not directly applicable to the case as the Trial Chamber is not “a party” within the meaning of Rule 94 *bis*(A), the guarantees for the preservation of the procedural rights of the Accused provided under this Rule were applicable. Hence, in the circumstances of this case, the fact that the Trial Chamber ordered the reports pursuant to Rule 74 *bis* of the Rules does not place them beyond the scope of Rule 94 *bis* of the Rules.

23. Although the Trial Chamber erred in finding that Rule 94 *bis* of the Rules did not apply to the Chamber Expert and his reports in the circumstances of the case, it did subsequently order that the Chamber Expert’s reports be disclosed to Jokić and that the Chamber Expert appear to be cross-examined. It further allowed Jokić to file a supplemental closing brief.⁷⁵ Therefore, the Appeals Chamber finds that any prejudice that Jokić might have suffered as a result of the Trial Chamber’s error was remedied. Accordingly, the Appeals Chamber considers that Jokić has failed to show how the Trial Chamber’s error invalidates the Judgement.

V. THIRD GROUND OF APPEAL: WHETHER THE TRIAL CHAMBER ERRED IN ORDERING AN *IN CAMERA* HEARING

24. Jokić argues that the Trial Chamber erred in law by ordering the *in camera* hearing of 15 December 2008 for the cross-examination of the Chamber Expert without informing Jokić or the public.⁷⁶ He submits that the subsequent order of the Trial Chamber to make it public did not remedy the violation of his right to a public trial guaranteed in Article 21(2) of the Statute.⁷⁷ Jokić therefore requests that the transcript of the hearing be struck from the record.⁷⁸

25. At the 15 December 2008 hearing, Jokić raised the issue of the hearing being held in closed session and the hearing not having been announced in the Tribunal’s schedule.⁷⁹ The Trial Chamber recognised that the hearing was not properly announced in the court schedule but noted that the

⁷³ Trial Judgement, paras 29, 34-35.

⁷⁴ See *Krnjelac* Order for Medical Examination, in which a psychological expert was appointed pursuant to Rule 74 *bis* of the Rules and was examined (T. 7969-8025 (28 and 29 June 2001)); *Radić* Order for Psychological and Medical-Psychiatric Exam, in which two psychological experts were appointed pursuant to Rule 74 *bis* of the and both were examined (Ana Najman: T. 8703-8741 (6 March 2001) and Dr. Bernard van den Bussche: T. 9325-9353 (14 March 2001)).

⁷⁵ Decision to Amend Scheduling Order of 30 October 2008, pp. 1-2 (confidential).

⁷⁶ Notice of Appeal, para. 10 (confidential); Appeal Brief, para. 18 (confidential).

⁷⁷ Appeal Brief, para. 19 (confidential).

⁷⁸ Notice of Appeal, para. 11 (confidential); Appeal Brief, para. 20 (confidential).

⁷⁹ T. 70-74 (15 December 2008).

session was public and would remain open until the Defence requested to go into closed session.⁸⁰ Jokić raised the issue again in his closing brief,⁸¹ but the Trial Chamber dismissed it on the basis that it had already been addressed.⁸²

26. The Appeals Chamber notes that the 15 December 2008 hearing was held in open session up until the point at which Jokić requested that the hearing be moved into closed session in order to deal with the content of the Chamber Expert's Reports which were filed confidentially.⁸³ With regard to the case not having been properly listed on the Tribunal's schedule, the Appeals Chamber considers that the Trial Chamber did commit a discernable procedural error in deciding not to adjourn the hearing considering the lack of notice to the Accused and the public, and without verifying whether any public was actually present at the hearing. However the Appeals Chamber considers that the Trial Chamber error did not produce a miscarriage of justice or prejudice for Jokić.

VI. FOURTH GROUND OF APPEAL: WHETHER THE TRIAL CHAMBER ERRED REGARDING THE ELEMENTS OF CONTEMPT IN RULE 77(A)(I)

27. Jokić submits that the Trial Chamber erred in law in paragraphs 10 to 12 of the Trial Judgement in setting out the elements of the offence of contempt.⁸⁴ In support of this, he argues that the Trial Chamber failed to clearly distinguish the *mens rea* and *actus reus* of the offence.⁸⁵ He posits that the *actus reus* of contempt is to interfere with the course of justice by refusing to answer the questions of the Chamber.⁸⁶ Correspondingly, he argues that the *mens rea* requires that the accused acted with specific intent to interfere with the Tribunal's administration of justice and refused to answer questions without a valid excuse.⁸⁷ In this regard, he submits that the Trial Chamber's reliance on the *Kosta Bulatović* case was misleading as the Trial Chamber failed to refer to pertinent parts of that judgement, thus obscuring the fact that that case should be distinguished on the facts.⁸⁸ He argues that given that the Trial Chamber erred in setting out the

⁸⁰ T. 73-75 (15 December 2008).

⁸¹ Closing Brief, para. 26 (confidential).

⁸² Trial Judgement, para. 21.

⁸³ T. 70-97 (15 December 2008) (closed session).

⁸⁴ Notice of Appeal, para. 12 (confidential); Appeal Brief, paras 21-22, 35 (confidential).

⁸⁵ Appeal Brief, para. 23 (confidential).

⁸⁶ Appeal Brief, para. 26 (confidential).

⁸⁷ Appeal Brief, paras 27-28 (confidential).

⁸⁸ Appeal Brief, paras 29-33 (confidential).

elements of the crimes, it could not have established Jokić's guilt beyond reasonable doubt and he should therefore be acquitted.⁸⁹

28. The Appeals Chamber recalls that Rule 77(A)(i) of the Rules states:

The Tribunal in the exercise of its inherent power may hold in contempt those who knowingly and wilfully interfere with its administration of justice, including any person who

(i) being a witness before a Chamber, contumaciously refuses or fails to answer a question; [...]

The Trial Chamber found that Rule 77(A)(i) of the Rules imposes criminal liability “where a witness knowingly and wilfully interferes with the Chamber’s administration of justice by persistently refusing or failing to answer a question without reasonable excuse while being a witness before the Chamber.”⁹⁰ Its ensuing discussion covered two main points: “Whether the Accused persistently refused or failed to answer a question without reasonable excuse while being a witness before the Chamber”⁹¹ and “[w]hether by refusing to testify the Accused knowingly and wilfully interfered with the Tribunal’s administration of justice”.⁹² While the Trial Chamber did not explicitly state what it considered to be the *actus reus* and *mens rea* of the offence, the Appeals Chamber understands from this structure that the Trial Chamber considered the *actus reus* to be persistently refusing or failing to answer a question without reasonable excuse while being a witness before the Chamber and the *mens rea* to be knowingly and wilfully interfering with the Tribunal’s administration of justice by refusing to testify. Accordingly, the Appeals Chamber turns to consider whether the Trial Chamber erred in so defining the *actus reus* and *mens rea* of contempt under Rule 77(A)(i).

29. In defining the *actus reus* as “persistently refusing or failing to answer a question without reasonable excuse while being a witness before the Chamber” the Trial Chamber went beyond the language found in the Rule by adding the phrase “without reasonable excuse” and replacing the word “contumaciously” with “persistently”. The Appeals Chamber notes that the additional language of “without reasonable excuse” appears to have been taken from Judge Kwon’s dissenting opinion in the *Matter of Witness K12* in the *Slobodan Milošević* case, in which he made reference to “obstinate refusal to answer without reasonable excuse”,⁹³ but neither appears in the language of the

⁸⁹ Notice of Appeal, para. 12 (confidential); Appeal Brief, paras 34, 36 (confidential).

⁹⁰ Trial Judgement, para. 12.

⁹¹ Trial Judgement, p. 7, paras 22-31.

⁹² Trial Judgement, p. 11, paras 32-36.

⁹³ *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T-R77, Trial Chamber Finding in the Matter of Witness K12, Dissenting Opinion of Judge Kwon, 21 November 2002 (“Judge Kwon’s Dissenting Opinion in the Matter of Witness K12”), para. 2.

Rule nor elsewhere in the jurisprudence on the interpretation of this Rule.⁹⁴ However the Appeals considers that, in any event, such an addition cannot be considered as going to the detriment of the Accused for the reason that it is an addition *pro reo*, *i.e.* it narrows the scope of the crime under this Rule.

30. The Appeals Chamber now turns to the Trial Chamber's replacement of the word "contumaciously" with "persistently". This follows the reasoning in the contempt proceedings against Kosta Bulatović in the *Slobodan Milošević* case in which the Trial Chamber referred to the accused "deliberately refus[ing] to comply with an order of the Trial Chamber to answer questions and persist[ing] in that refusal when fully advised of the position and given a further opportunity to respond."⁹⁵ Although discussion in the jurisprudence of the meaning of "contumacious" has tended to be undertaken in the context of the *mens rea*,⁹⁶ if "contumacious" is defined as "persistent", it is in fact more relevant to the *actus reus* than the *mens rea* in the sense of it being a repeated or continuous refusal. This interpretation is the most consistent with the French version of Rule 77(A)(i) which does not contain the word "contumacious" or any direct equivalent but rather states:

Dans l'exercice de son pouvoir inhérent, le Tribunal peut déclarer coupable d'outrage les personnes qui entravent délibérément et sciemment le cours de la justice, y compris notamment toute personne qui: i) étant témoin devant une Chambre refuse de répondre à une question malgré la demande qui lui en est faite par la Chambre [...]

In light of the phrase "malgré la demande qui lui en est faite par la Chambre" (despite the Chamber's request), the crime under Rule 77(A) of the Rules must be considered committed not

⁹⁴ See *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T-R77, T. 18-34 (18 November 2002); *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T-R77, Trial Chamber Finding in the Matter of Witness K12, 21 November 2002 ("Trial Chamber in the Matter of Witness K12"); *Prosecutor v. Slobodan Milošević, Contempt Proceedings against Kosta Bulatović*, Case No. IT-02-54-R77.4, Decision on Contempt of the Tribunal, 13 May 2005 ("*Bulatović* Trial Decision on Contempt"); *Prosecutor v. Slobodan Milošević, Contempt Proceedings against Kosta Bulatović*, Case No. IT-02-54-R77.4, Separate Opinion of Judge Bonomy on Contempt of the Tribunal ("Separate Opinion of Judge Bonomy in *Bulatović* Trial Decision on Contempt"); *Prosecutor v. Slobodan Milošević, Contempt Proceedings against Kosta Bulatović*, Case No. IT-02-54-A-R77.4, Decision on Interlocutory Appeal on Kosta Bulatović Contempt Proceedings, 29 August 2005 ("*Bulatović* Appeal Decision on Contempt").

⁹⁵ *Bulatović* Trial Decision on Contempt, para. 16.

⁹⁶ In the Trial Chamber in the Matter of Witness K12, the Trial Chamber interpreted "contumaciously" to mean "perverse"; T. 33 (18 November 2002) (closed session)); However, Judge Kwon dissented on this interpretation, arguing that "Rule 77 may be interpreted in such a way that the terms 'knowingly', 'wilfully' and 'contumaciously' all have legal significance, but that, taken together, they should be interpreted as meaning an obstinate refusal to answer without reasonable excuse." (Judge Kwon's Dissenting Opinion in the Matter of Witness K12, para. 2). In the contempt proceedings against Kosta Bulatović also in the *Slobodan Milošević* case, the Trial Chamber referred to "the test of 'knowingly and wilfully' interfering with the Tribunal's administration of justice by 'contumaciously' refusing to answer questions" and concluded that this test was met when the accused "deliberately refused to comply with an order of the Trial Chamber to answer questions and persisted in that refusal when fully advised of the position and given a further opportunity to respond." (*Bulatović* Trial Decision on Contempt, para. 16). Meanwhile Judge Bonomy's separate opinion appended to that decision stated that the plain meaning of "contumacious" as "stubbornly or wilfully disobedient to authority" should be preferred over defining it as "perverse" (Separate Opinion of Judge Bonomy in *Bulatović* Trial Decision on Contempt, para. 1).

when the witness merely refuses to answer a question put by one of the parties, but rather when it is a refusal maintained in the face of the Chamber's request to answer the question of a party or a question put by the Chamber itself. Accordingly, the Appeals Chamber finds no error in the Trial Chamber's reference to "persistently refusing or failing to answer a question" in defining the *actus reus*.

31. Turning to the *mens rea* of contempt under Rule 77(A)(i) of the Rules, the Appeals Chamber notes that there has been considerable discussion in the jurisprudence as to the meaning of the word "contumacious" and whether it adds an extra element to the *mens rea* of the offence beyond the *chapeau* element of Rule 77(A) of "knowingly and wilfully interfer[ing] with [the] administration of justice". As discussed above, the Appeals Chamber considers that "contumaciously" falls within the *actus reus* of the offence and therefore does not create an additional element of the *mens rea*. Accordingly, the Appeals Chamber finds that the Trial Chamber was correct in holding that the *mens rea* of contempt under Rule 77(A)(i) is knowingly and wilfully interfering with the Tribunal's administration of justice by refusing to testify.

32. For the foregoing reasons, the Appeals Chamber dismisses Jokić's arguments with regard to the definition of the elements of the offence of contempt.

VII. FIFTH GROUND OF APPEAL: WHETHER THE TRIAL CHAMBER FAILED TO PROVIDE A REASONED OPINION

33. In his fifth ground of appeal, Jokić argues that the Trial Chamber erred by failing to provide reasons for its decision regarding essential elements of the offence as required by Article 23(2) of the Statute.⁹⁷ In this respect, he submits that in paragraph 28 of the Trial Judgement, the Trial Chamber set out the criteria for determining the competency of a witness to testify without valid or verifiable reasoning.⁹⁸ Furthermore, he argues that in paragraph 35 of the Trial Judgement, the Trial Chamber gave no reasons for not accepting the conclusions of the Defence Expert as to why Jokić chose not to testify.⁹⁹ As a result, Jokić argues that these findings of the Trial Chamber should be considered null.¹⁰⁰

⁹⁷ Notice of Appeal, para. 13 (confidential); Appeal Brief, paras 37-38 (confidential).

⁹⁸ Appeal Brief, para. 39 (confidential).

⁹⁹ Appeal Brief, para. 40 (confidential).

¹⁰⁰ Appeal Brief, para. 41 (confidential).

34. The Appeals Chamber recalls that as a general rule, a Trial Chamber is not required to articulate every step of its reasoning for each particular finding it makes¹⁰¹ nor is it required to set out in detail why it accepted or rejected a particular testimony.¹⁰² Further, it is necessary for any appellant claiming an error of law on the basis of the lack of a reasoned opinion to identify the specific issues, factual findings or arguments, which he submits the Trial Chamber omitted to address and to explain why this omission invalidated the decision.¹⁰³ The Appeals Chamber notes as a preliminary matter with respect to both paragraphs subject to challenge under this ground that Jokić does not identify any specific issues or sources to which the Trial Chamber should have referred in its consideration of the different issues.¹⁰⁴

35. In its discussion in paragraph 28 of the Trial Judgement, the Trial Chamber noted that the Rules do not provide a standard to be relied upon for determining a witness' "competency to testify" and therefore considered the "plain meaning" of the phrase,¹⁰⁵ finding that it "requires that the proposed witness has a basic capacity to understand the questions put to him and give rational and truthful answers to those questions."¹⁰⁶ This approach is broadly similar to that set out in Rule 90(B) of the Rules, dealing with the testimony of children, which focuses on the ability of a child witness "to report the facts of which the child has knowledge and understands the duty to tell the truth". Further, although the Trial Chamber did not refer to any jurisprudence on the issue, the Appeals Chamber notes that there is no established standard for a witness' fitness to testify in the jurisprudence of the Tribunal upon which the Trial Chamber could have relied beyond the *Strugar* case.¹⁰⁷ In that case, the Trial Chamber rejected, in the context of a determination of the accused's fitness to stand trial, the Defence's submission that the accused was not fit to testify because he was "unable to 'fully' testify".¹⁰⁸ In that case, the Trial Chamber's analysis of the accused's capacity to testify centred on his ability to answer questions put to him.¹⁰⁹ The Appeals Chamber considers that the Trial Chamber's analysis in paragraph 28 of the Trial Judgement was in line with the *Strugar*

¹⁰¹ See *Krajišnik* Appeal Judgement, para. 141; *Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-A, Judgement, 16 November 2001 ("*Musema* Appeal Judgement"), para. 18.

¹⁰² See *Krajišnik* Appeal Judgement, para. 141; *Musema* Appeal Judgement, para. 20.

¹⁰³ *Krajišnik* Appeal Judgement, para. 142; *Prosecutor v. Miroslav Kvočka, Mlado Radić, Zoran Žigić, Dragoljub Prcać*, Case No. IT-98-30/1-A, Judgement, 28 February 2005 ("*Kvočka et al.* Appeal Judgement"), para. 25.

¹⁰⁴ Appeal Brief, paras 39-40 (confidential).

¹⁰⁵ Trial Judgement, para. 28.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Decision re Defence Motion to Terminate Proceedings, 26 May 2004.

¹⁰⁸ *Ibid.*, para. 49.

¹⁰⁹ *Ibid.* Similarly, in *Prosecutor v. Vladimir Kovačević*, Case No. IT-01-42/2-I, Public Version of the Decision on Accused's Fitness to Enter a Plea and Stand Trial, 12 April 2006, in the context of determining the Accused's fitness to stand trial the Trial Chamber considered the Accused's ability to testify and considered the following questions: "Is the Accused able to understand that he may choose to give testimony himself, *i.e.* to answer questions put to him by Defence Counsel on, *i.e.*, his involvement or participation in the crimes for which he is charged, and that questions may also be put to him by the Prosecution and by the Judges, and that his answers can be taken into account when the Judges

decision. Additionally, the conclusion of the Trial Chamber in the instant case, that the question comes down to whether the witness' evidence will have probative value, is clearly in line with Rule 89(C) of the Rules which sets the standard for the admission of evidence before the Tribunal. Accordingly, the Appeals Chamber dismisses Jokić's argument that the Trial Chamber failed to provide a reasoned opinion such that the decision should be invalidated.

36. With regard to Jokić's submission concerning paragraph 35 of the Trial Judgement, the Appeals Chamber notes that the Trial Chamber stated that it had carefully read both the Chamber and Defence Experts' Reports and considered Jokić's testimony and his demeanour.¹¹⁰ In addition to this, the Trial Chamber considered the Defence Expert's testimony, compared it to the Chamber Expert's testimony and appears to have accepted portions of it.¹¹¹ While the Trial Chamber gave no specific reason for preferring the Chamber Expert's evidence to that of the Defence Expert, the Appeals Chamber considers that the Trial Chamber clearly took the Defence Expert's evidence into account in reaching its decision and finds that Jokić fails to identify any specific points the Trial Chamber omitted to address and explain why this omission invalidated the decision. Accordingly the Appeals Chamber dismisses Jokić's fifth ground of appeal in its entirety.

VIII. SIXTH AND SEVENTH GROUNDS OF APPEAL: WHETHER THE TRIAL CHAMBER COMMITTED ERRORS OF FACT

37. In his sixth and seventh grounds of appeal, Jokić respectively submits that the Trial Chamber erred in fact in finding that he made a conscious decision not to testify¹¹² and by holding that he knowingly and wilfully interfered with administration of justice.¹¹³ In support of these grounds, he recalls the testimony of the Defence Expert [redacted].¹¹⁴ He further recalls the testimonies [redacted] and the Chamber Expert, which he argues corroborate the Defence Expert's testimony [redacted].¹¹⁵ In particular, he submits that the Trial Chamber confuses the testimonies of the expert witnesses in paragraph 34 of the Trial Judgement and cites portions of the hearing which are not pertinent to the analysis in footnotes 98 and 99.¹¹⁶

determine whether he is guilty; but also that he is entitled not to testify, in which case the Judges will decide the case without the information he might have given?" (para. 5).

¹¹⁰ Trial Judgement, para. 35.

¹¹¹ See Trial Judgement, paras 29, 34.

¹¹² Notice of Appeal, para. 14 (confidential); Appeal Brief, para. 42 (confidential).

¹¹³ Notice of Appeal, para. 15 (confidential); Appeal Brief, para. 42 (confidential).

¹¹⁴ Appeal Brief, para. 43 (confidential).

¹¹⁵ Appeal Brief, paras 45-46 (confidential).

¹¹⁶ Appeal Brief, para. 47 (confidential).

38. The Appeals Chamber notes that in large part Jokić's submissions merely restate the evidence of the witnesses without demonstrating how the Trial Chamber erred in its findings.¹¹⁷ The Appeals Chamber further finds that the discussion of the Trial Chamber in paragraph 34 correctly reflects the findings both of the Defence Expert [redacted]¹¹⁸ and of the Chamber Expert [redacted].¹¹⁹ With regard to footnotes 98 and 99, the Appeals Chamber notes that while the Trial Chamber appears to have referred to the actual page count rather than the official page numbering of the transcripts, the evidence referred to in the transcripts does in fact support the Trial Chamber's findings.¹²⁰ Accordingly, the Appeals Chamber finds that Jokić has failed to show that the Trial Chamber's factual findings inaccurately reflect the evidence adduced at trial or were so unreasonable as to occasion a miscarriage of justice.

IX. EIGHTH GROUND OF APPEAL: WHETHER THE TRIAL CHAMBER ERRED IN SENTENCING

39. Under his eighth ground of appeal, Jokić argues that the Trial Chamber erred in fact in its assessment of the weight to be attached to the mitigating circumstances.¹²¹ He argues that while the Trial Chamber took into account the mitigating circumstances including his personal situation, [redacted] as well as the fact that he had not previously obstructed the course of justice, the Trial Chamber did not accord sufficient weight to these circumstances and therefore imposed a very severe sentence upon him.¹²² He further recalls that he is already serving a nine year sentence imposed on him by this Tribunal.¹²³

40. The Appeals Chamber recalls that Trial Chambers are vested with 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.¹²⁴ This discretion includes determining the weight given to aggravating or mitigating circumstances.¹²⁵ In general, the Appeals Chamber will not revise a sentence unless the Appellant demonstrates that the Trial Chamber has committed

¹¹⁷ See Appeal Brief, paras 43-46 (confidential).

¹¹⁸ Cf Exhibit 007B, "Defence Expert Report", pp. 14, 16 (confidential); T. 64 (10 December 2007)(closed session).

¹¹⁹ Cf Second Chamber Expert Report, pp. 3-5 (confidential); T. 121-122, 130-135 (15 December 2008)(closed session).

¹²⁰ Footnote 98 refers to T. 64-65 (15 December 2008)(private session). This appears to be the 64th and 65th pages of the transcript of that date which are officially numbered T. 133-134 (15 December 2008)(closed session). Similarly, footnote 99 refers to T. 51-52, 61-65 (15 December 2008)(private session) but this appears to be 51st to 52nd and 61st to 65th pages of the transcript of 15 December 2008 which are officially numbered T. 121-122, 130-134 (15 December 2008)(closed session).

¹²¹ Notice of Appeal, para. 16 (confidential); Appeal Brief, para. 48 (confidential).

¹²² Appeal Brief, paras 49-52 (confidential).

¹²³ Appeal Brief, para. 53 (confidential).

¹²⁴ *Mrkšić and Šljivančanin* Appeal Judgement, para. 352; *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Judgement, 17 July 2008, para. 336; *Prosecutor v. Envir Hadžihasanović and Amir Kubura*, Case No. IT-01-47-A, Judgement, 22 April 2008 ("*Hadžihasanović and Kubura* Appeal Judgement"), para. 302.

¹²⁵ *Mrkšić and Šljivančanin* Appeal Judgement, para. 352; *Hadžihasanović and Kubura* Appeal Judgement, para. 302.

a “discernible error” in exercising its discretion or has failed to follow the applicable law.¹²⁶ It is for the Appellant to demonstrate how the Trial Chamber ventured outside its discretionary framework in imposing the sentence.¹²⁷

41. The Appeals Chamber notes that Jokić concedes that the Trial Chamber accepted the mitigating circumstances set out above¹²⁸ and it considers that Jokić has failed to demonstrate that the Trial Chamber committed a discernible error with regard to the weight attached to these factors. Rather, Jokić merely suggests that the factors should have been given more weight than they were, without identifying a specific error in the exercise of the Trial Chamber’s discretion. Further, while the Trial Chamber did not specifically list the fact that Jokić is already serving a sentence of nine years’ imprisonment as a mitigating factor, the Appeals Chamber recalls that the Trial Chamber noted his submissions in this regard.¹²⁹ Accordingly the Appeals Chamber finds that Jokić has failed to demonstrate that the Trial Chamber committed a discernible error in exercising its discretion.

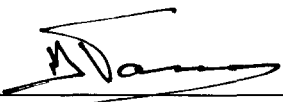
X. DISPOSITION

For the foregoing reasons, the Appeals Chamber

DISMISSES the Appeal and **AFFIRMS** Dragan Jokić’s sentence of 4 months’ imprisonment to run consecutively to any other sentence of imprisonment imposed on Jokić.

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

Dated this 25th day of June 2009
At The Hague
The Netherlands



Judge Andrézia Vaz
Presiding

[Seal of the Tribunal]

¹²⁶ *Marijačić and Rebić* Appeal Judgement, para. 52; *Delalić et al.* Appeal Judgement, para. 725.

¹²⁷ *Marijačić and Rebić* Appeal Judgement, para. 52; *Delalić et al.* Appeal Judgement, para. 725.

¹²⁸ Trial Judgement, para. 40.

¹²⁹ Trial Judgement, para. 39.